



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2404

Appeal MA07-172

Durham Regional Police Services Board



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NATURE OF THE APPEAL:

The Durham 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 information relating to a fatal motor vehicle accident in which a named individual (the deceased) was killed. The requester is a lawyer representing the deceased's estate and his family. The requester sought access to complete copies of a named investigating police officer's (investigating police officer) field notes, including any witness statements taken at the scene of the accident.

The Police located several pages of records including a contact list, the investigating police officer's notes, three witness statements and the notes of two other police officers. The Police notified four affected parties. Three of the affected parties did not respond while one of the affected parties consented to the release of portions of his witness statement. Despite this affected party's consent, the Police issued a decision denying access to all of the responsive records in their entirety pursuant to section 38(b), read with section 14(1) (personal privacy), of the *Act*. In support of its section 38(b)/14(1) exemption claim, the Police cited the application of the presumption in section 14(3)(b) (investigation into violation of law).

The requester (now the appellant) appealed the Police's decision.

During the mediation stage of the appeal process, the appellant confirmed that he is not claiming the application of section 54(a) (personal representative) of the *Act*, as the records are not required for the administration of the deceased's estate.

However, also during mediation, the appellant raised the application of section 14(4)(c) (compassionate grounds) of the *Act*, on the basis that disclosure of the information at issue is desirable for compassionate reasons.

The mediator contacted by telephone the three affected parties who had not replied to the Police's notification letters, to seek their views on disclosure. None of these affected parties consented to the release of the information in the records that relates to them.

After discussion with the mediator, the Police reconsidered their decision with respect to the statement provided by the affected party who had consented to disclosure at the request stage. Accordingly, the Police issued a revised decision granting partial access to this affected party's witness statement. However, the Police denied access to the name of this affected party pursuant to section 38(b), read with section 14(1) and the presumption in section 14(3)(b). The appellant indicated that he was not interested in pursuing access this affected party's name. As a result, the name of this affected party is no longer at issue in this appeal and the record relating to this affected party has been removed from the scope of the appeal. However, the appellant confirmed that he still wishes to pursue access to the remaining responsive records.

No further mediation was possible and the file was transferred to the adjudication stage for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the Police and three remaining affected parties. The Police provided representations and agreed to share them in their entirety with the appellant. The affected parties did not submit representations.

I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the Police's submissions. The appellant submitted representations in response.

RECORDS:

There are seven records at issue, totalling 27 pages, all of which have been withheld in full. They are listed in the following table. Of note, while the Police have raised the application of the section 38(b) exemption for all of the information remaining at issue, for the reasons discussed below under the "Personal Information" issue, section 38(b) can only apply to Records 1, 6 and 7. For the remaining records, the issue for me to determine is whether the mandatory exemption under section 14(1) applies.

<i>Record #</i>	Description	Exemptions Claimed or Exemptions that Could Apply
1	Computer printout of a police contact list (4 pages)	38(b)/14(1)
2	Affected party's witness statement (4 pages)	14(1)
3	Affected party's witness statement (2 pages)	14(1)
4	Affected party's witness statement (2 pages)	14(1)
5	Investigating police officer's notes (5 pages)	14(1)
6	Police officer's notes (3 pages)	38(b)/14(1)
7	Police officer's notes (7 pages)	38(b)/14(1)

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) 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,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

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 [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(2.1) and 2(2.2). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(2.1) modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”. Section 2(2.2) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

The Police submit that the records contain the personal information of the deceased and witnesses to the motor vehicle accident, including their names, addresses, dates of birth and employment information. With specific regard to the witnesses, the Police state that some of the records also contain their independent account of the accident.

The appellant concedes that the records contain the personal information of the deceased and witnesses to the motor vehicle accident. During the course of the inquiry the appellant also confirmed that he is representing the estate of the deceased and the following members of the deceased’s family: the deceased’s mother, father and two brothers.

Analysis and Findings

I have carefully reviewed all of the records and find that they contain the personal information of the deceased, as defined in section 2(1). The information in the records includes the deceased’s name, his phone number and address, and the circumstances surrounding his death.

I also find that Records 1, 2, 3, 4, 5 and 7 variously contain the “personal information” of four affected parties who were witnesses to events surrounding the accident, including their names, addresses, phone numbers and observations of the circumstances surrounding the deceased’s death.

I note that Records 1 and 7 contain the personal information of other individuals who were interviewed by the Police at or near the scene of the accident. The information about these individuals includes their names and their personal observations of events surrounding the accident.

Records 1 and 5 contain information about emergency medical services and fire department workers. Some of this information includes their names, titles and contact information which identify those individuals in a “business, professional or official capacity”. In accordance with section 2(2.1), I find that this information does not qualify as personal information. This information should, therefore, be disclosed to the appellant. However, I do find that there are snippets of information relating to these individuals, including their dates of birth, home phone numbers, home addresses, ethnicity, marital status and first language, which constitutes their personal information.

Records 5 and 7 also contain information about other named individuals, including a Coroner, a person associated with a towing company and an employee of Hydro One. Also in accordance with section 2(2.1), I find that this information does not qualify as personal information. It, too, should be disclosed to the appellant.

I also find that Records 1, 6 and 7 contain the personal information of members of the deceased’s family, including their names, addresses, phone numbers, marital status and dates of birth. Although the actual requester in this case is the lawyer for the deceased estate and specific members of his family, as identified above, I am satisfied that, for the most part, those family members identified in the records stand in the shoes of the requester for the purposes of my analysis. For the purposes of this inquiry I will refer to these family members collectively as the appellant. Accordingly, I find that Records 1, 6 and 7 contain the appellant’s personal information for the purposes of my discussion of the personal privacy issue.

PERSONAL PRIVACY

Under section 38(b), where a record contains personal information of both the requester and another individual, and the disclosure of the information would constitute an “unjustified invasion” of another individual’s personal privacy, the institution may refuse to disclose that information to the requester.

Based on its wording, the discretionary section 38(b) exemption will apply if I am satisfied that disclosure *would* constitute an unjustified invasion of personal privacy. In this case, I have found that Records 1, 6 and 7 contain the personal information of the appellant and other

identifiable individuals, namely the deceased and various witnesses to the events surrounding the accident. Therefore, I will make a determination under section 38(b) in relation to these records.

However, as I have found that the remaining records (Records 2, 3, 4 and 5) do not contain the personal information of the appellants, I must consider whether the mandatory personal privacy exemption in section 14(1) applies to these records. Section 14(1) prohibits an institution from releasing the personal information of an individual other than the requester unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14.

The section 14(1)(a) to (e) exceptions are relatively straightforward. The section 14(1)(f) exception is relevant to this appeal and it is more complex. Section 14(1)(f) requires a determination of whether disclosure of the personal information *does not* constitute an unjustified invasion of personal privacy and it requires a consideration of additional parts of section 14. The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f). If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. If the presumptions in 14(3) do not apply, then a consideration of the factors in section 14(2) is necessary.

A presumed unjustified invasion of personal privacy under section 14(3) cannot be rebutted by the factors set out in section 14(2). A presumption can, however, be overcome if the personal information is found to fall under section 14(4) of the *Act* [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. Section 14(4) creates an exception to the exemption in section 14(1) and if it applies, disclosure is *not an unjustified invasion of personal privacy* and the information is not exempt under section 14. Section 14(4)(c) has been raised by the appellant and has potential relevance to this appeal.

In this case, the Police have raised the application of the section 14(3)(b) presumption. Therefore, in reviewing the application of the section 38(b) and 14(1) exemptions, I must first consider the application of the section 14(3)(b) presumption before I turn to consider the possible application of section 14(4)(c).

Section 14(3)(b) – investigation into possible violation of law

Section 14(3)(b) states:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that

disclosure is necessary to prosecute the violation or to continue the investigation;

Even if no criminal proceedings were commenced against any individuals, section 14(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242, PO-1849].

The Police state that section 14(3)(b) applies to the records at issue as they were created and compiled as part of an investigation into a fatal motor vehicle accident. The Police state that all of the records were compiled during the investigation to help in determining whether there was a possible violation of law under the *Criminal Code of Canada*. The appellant does not address the application of this section in his representations.

Having carefully reviewed the records and the Police's representations, I find that the section 14(3)(b) presumption applies to the personal information in the records of the deceased and all of the affected parties, as the records were compiled and are identifiable as part of an investigation into a possible violation of law. As stated above, section 14(3)(b) applies whether or not charges were laid. Accordingly, the disclosure of the information at issue in the records is presumed to constitute an unjustified invasion of personal privacy. I now turn to consider whether the exception in section 14(4)(c) applies to this information.

Section 14(4)(c) – compassionate reasons

Section 14(4)(c) reads:

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

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

In Orders MO-2237 and MO-2245, Assistant Commissioner Brian Beamish considered the interpretation of this section. After reviewing the legislative history, he came to the following conclusion, as stated in both Orders MO-2237 and MO-2245:

...by using the words "in the circumstances" the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons." In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. *It is recognized*

that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate. [Emphasis added]

In these previous orders, he also found that a determination regarding the application of section 14(4)(c) requires a consideration of the following questions, all of which must be answered in the affirmative for the section to apply:

1. Do the records 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 desirable for compassionate reasons, in the circumstances of the request?

In Order MO-2237, Assistant Commissioner Beamish also considered how to treat information that qualifies as the personal information of both the deceased and another individual or individuals, which has potential relevance in the circumstances of this appeal. He stated:

The first question to address here is whether the reference to “personal information about a deceased individual” can include information that also qualifies as that of another individual. In my view, this question should be answered in the affirmative. The circumstances of an individual’s death, particularly one that is followed by a police or coroner’s investigation, are likely to involve discussions with other individuals that will entail, to a greater or lesser extent, the collection and recording of those individuals’ personal information. In my view, an interpretation of this section that excludes any information of a deceased individual on the basis that it also qualifies as the personal information of another individual would be inconsistent with the definition of “personal information”, set out above, since the information would clearly qualify as recorded information “about” the deceased individual. It would also frustrate the obvious legislative intent behind section 14(4)(c), of assisting relatives in coming to terms with the death of a loved one.

...

Accordingly, in my view, it is consistent with both the definition of “personal information” in section 2(1) and the legislative purpose behind this section to interpret “personal information about a deceased individual” as including not only personal information solely relating to the deceased, but also information that qualifies as the personal information of not only the deceased, but another individual or individuals as well.

The conclusion that personal information about a deceased individual can include information about other individuals, raises the further question of how the information of those other individuals should be assessed in deciding what to

disclose under section 14(4)(c). In my view, assistance is provided in that regard by the legislative text, which permits disclosure that is “in the circumstances, desirable for compassionate reasons.”

Where this is the case, the “circumstances” to be considered would, in my view, include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 14(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 14(4)(c).

As well, the fact that the protection of personal privacy is one of the *Act*’s purposes, articulated in section 1(b), must be considered in assessing whether to disclose information that, in addition to being personal information of the deceased, also qualifies as the personal information of another individual or individuals.

Another circumstance to consider is the privacy of the deceased individual. ...

I will adopt the approach in Orders MO-2237 and MO-2245 in determining whether section 14(4)(c) applies to the records at issue in this appeal.

Personal information of the deceased

I have already found that all of the records at issue contain the personal information of the deceased, at times intermingled with the personal information of the affected parties. In this case, I find that the first requirement for the application of section 14(4)(c) has been met.

“Close relative”

The terms “close relative” and “spouse” are defined in section 2(1) of the *Act* as follows:

“close relative” means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; (“proche parent”);

Neither the Police nor the appellant provide representations that assist me in addressing this issue. However, for the reasons cited above in my characterization of the deceased’s family members’ personal information, I am satisfied that the “appellant” qualifies as a “close relative”, to the extent that he stands in the shoes of the deceased’s parents and siblings. Accordingly, I find that this requirement for the application of section 14(4)(c) is also satisfied.

Desirable for compassionate reasons

Representations

The parties' representations are brief.

The main thrust behind the Police's position appears to be that they question the extent to which the appellant's reliance on section 14(4)(c) was made in good faith. The Police point to the wording of the request and the appellant's late raising of section 14(4)(c) to support their conclusion. The Police note that the request itself was made by a lawyer representing the estate and family of the deceased individual "with respect to matters arising from a motor vehicle collision." The Police state that there was no mention in the request that it had been made for compassionate reasons. In addition, the Police state that section 14(4)(c) was first raised by the appellant at the mediation stage of the appeal process. The Police, therefore, concluded that the records were required to assist a lawyer with a civil matter, and not for compassionate reasons.

The appellant takes issue with the Police's interpretation of the request. The appellant states he submitted a standard request letter that he utilizes in all files of this nature and he disputes the Police's interpretation of his intentions. The appellant submits that the family of the deceased have always sought an understanding of the circumstances surrounding the deceased's death in order to achieve some measure of closure. The appellant suggests that this was the primary reason behind the request. The appellant notes that the conclusions reached by the Police regarding the family's motivation for making the request were reached without any input from the appellant. The appellant suggests that had the Police sought clarification after the request was made they would have learned that the appellant was seeking the information for compassionate reasons. The appellant, therefore, disputes the Police's concerns regarding the apparent late raising of section 14(4)(c). The appellant adds that whether there would be a "civil matter" is an issue to be determined on a secondary basis after the family has an understanding of how the deceased was killed.

Analysis and findings

In my view, the timing of the appellant's raising of section 14(4)(c) should not be a determining factor in assessing its application. The key issue is whether the information being sought is desirable for compassionate reasons.

In this case, it may well be that the family of the deceased is considering legal action. However, the prospect of legal action should not preclude the disclosure of personal information where it is otherwise desirable for compassionate reasons. The family of the deceased has experienced the tragic loss of a loved one and I am satisfied that obtaining as much information as possible regarding the circumstances surrounding the deceased's death can be a vital part of the family's grieving process. Clearly, the deceased's family is in the best position to determine the therapeutic value of any personal information received. In my view, this was the intent of the

Legislature in adding section 14(4)(c) to the *Act*. Accordingly, I am satisfied that disclosure of the personal information of the deceased is desirable for compassionate reasons.

However, disclosing the deceased's personal information could present a challenge in places where it is intertwined with the personal information of a number of other identifiable individuals who were interviewed by the Police as witnesses to the accident. The question is whether the intrusion on the personal privacy of these affected parties is necessary and justified in order to provide the appellant with access to the deceased's personal information. In my view, it is not. However, I am satisfied that for the most part the deceased's personal information can be disclosed without compromising the personal privacy of the affected parties by simply removing all personal identifiers associated with the affected parties in the records. In my view, this strikes a fair balance, allowing the deceased's family access to the deceased's personal information and the insight and understanding it seeks into the circumstances surrounding his death, while preserving the affected parties' personal privacy.

Finally, with regard to the personal information of the emergency medical services and fire department workers contained in Records 1 and 5 (including their dates of birth, home phone numbers, home addresses, ethnicity, marital status and first language), I am not satisfied that disclosing this information would assist the deceased family in achieving closure. Accordingly, I see no basis concluding that disclosure would be desirable for compassionate reasons.

SEVERANCE

Section 4(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be released without disclosing material which is exempt.

The key question raised by section 4(2) is one of reasonableness. Where a record contains exempt information, section 4(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information.

The Police indicate that they considered this issue in the processing of the request. The Police state that they reconsidered their position regarding the release of portions of one witness statement, after receiving consent from that witness to the release of his information. In that case, the Police subsequently released the witness' statement with the exception of that individual's personal identifiers. The Police submit that since consent was not obtained for the release of any of the other records that disclosure was properly denied under the *Act*.

In my view, the Police have misunderstood the purpose of the severing exercise in this case. The issue is whether the Police have disclosed as much of any record as can reasonably be released without disclosing material which is exempt. In my view, the Police have not done so. Aside from providing the appellant with access to those portions of the witness statement identified above, the Police did not provide the appellant with any information relating to the deceased's family members. Clearly, in light of the appellant's role as the representative of the estate and family of the deceased, he stands in the shoes of the deceased's family. I recognize that in some

cases this information was intertwined with the deceased's and that the Police, having relied on section 38(b) to deny access to the deceased's information, did not disclose the family members' information to the appellant. However, in other cases, the information relating to the deceased's family members is not exempt and easily severable. It should have been disclosed to the appellant. I will order the release of all information pertaining to the deceased's family members.

ORDER:

1. I order the Police to disclose the records in part, in accordance with the highlighted version of the records included with the copy of this order that I am sending to the Police, by **May 7, 2009** but not before **April 30, 2009**. For the sake of clarity, I have highlighted the portions of the records that are **not** to be disclosed.
2. In order to verify compliance with this order, I order the Police to provide me with copies of the records ordered disclosed pursuant to order provision 1 above.

Original signed by: _____
Bernard Morrow
Adjudicator

_____ March 30, 2009