

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3862

Appeal MA18-12

Niagara Regional Police Services Board

November 15, 2019

Summary: The Niagara Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the police report relating to the death of the appellant's adult granddaughter. The police issued a decision granting partial access with severances under section 38(b) (personal privacy) of the *Act*. In this order, the adjudicator upholds the police's decision in part, and orders the police to disclose additional information relating to the death of the appellant's granddaughter on compassionate grounds under section 14(4)(c).

Statutes Considered: The *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 38(b), 14(3)(b), 14(4)(c).

Orders Considered: Orders MO-2237, MO-2245 and Order MO-2515.

OVERVIEW:

[1] The Niagara Regional Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the police report relating to the death of the requester's granddaughter.

[2] The police issued an initial decision granting partial access to the police report with severances pursuant to section 38(b) (personal privacy) of the *Act*. The police stated that some information had been removed from the report as it is not responsive to the request. The police also stated that ". . . the toxicology report must be requested through the coroner's office."

[3] The requester, now appellant, appealed the police's decision to this office.

[4] During mediation, the appellant stated that he has concerns about the way the police and coroner's office conducted their investigation into his granddaughter's death. It was clarified with the appellant that this office cannot review concerns about the investigations by the police and coroner that are unrelated to his request for access to information.

[5] Following discussions with the mediator, the police issued a revised decision disclosing additional information to the appellant. The police stated that access to the remaining information at issue continued to be denied pursuant to section 38(b) of the *Act*. The police also confirmed that some information was severed from the report as it is not responsive to the request.

[6] The appellant made a request to the Coroner's Office for its report and asked that the appeal be placed on hold pending the outcome of that request. The appellant obtained a copy of the coroner's report and reactivated his appeal. The appellant also advised that he is not pursuing the toxicology results contained in the record at issue. Accordingly, page 19 of the record is no longer at issue in this appeal.

[7] The mediator then obtained consent from one affected party for the disclosure of her personal information to the appellant.

[8] The police subsequently disclosed additional information to the appellant in a second revised decision. The police stated that, in addition to disclosing information about the affected party who provided consent, they also revised their decision and disclosed some pages that were previously withheld as not responsive. The police confirmed that access to the remaining portions of the record continues to be denied pursuant to section 38(b) of the *Act*.

[9] As no further mediation was possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. Representations were invited and received from the police, the appellant and an affected party. The affected party's representations were brief and he does not consent to releasing any of his information.

[10] In this order, I uphold the police's decision in part, and order disclosure of the highlighted portions of the record accompanying the police's copy of this order, because I find that the compassionate grounds disclosure provision in section 14(4)(c) applies to them.

RECORDS:

[11] At issue in this appeal is the withheld information on pages 2-16, 18 and 20-23, of a 28-page General Occurrence Report.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?
- C. Did the police exercise their discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[12] 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):

"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 if 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;

[13] 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.¹ To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[14] The police submit that the record contains "personal information" as defined in section 2(1) of the *Act*. The police submit that the personal information relates to the appellant, the appellant's granddaughter, the appellant's daughters, the coroner, paramedics, and various witnesses, and consists of information such as dates of birth, home addresses, phone numbers, and ethnicities. The police submit, however, that some of the information with respect to the coroner and paramedics is about them acting in their professional capacity, which would not be considered "personal information".

[15] The appellant submits that he is not pursuing access to the following information about other individuals: sex, date of birth, telephone numbers, addresses, driver's licence number, physical descriptions, employment, citizenship, marital status, ethnicity and language. The appellant submits that the record contains the personal information of his granddaughter, which is the information he is seeking access to.

[16] As noted above, the affected party's representations were brief, but he does acknowledge that his information is contained within the record at issue. However, he does not specify whether or not it is personal information as defined by section 2(1) of the *Act*.

[17] After reviewing the record and the representations of the parties, I find that the record at issue contains the mixed personal information of the appellant, his granddaughter, the affected party, and other individuals. To begin, I find that the record contains personal information about the appellant's granddaughter such as the affected party's observations about her health immediately before her death, and that it fits within paragraphs (a) and (g) of the definition in section 2(1) of the *Act*. It appears that there is also personal information about other individuals that fits within paragraphs (a), (c), (d), (e), (g) and (h) of the definition in section 2(1) of the *Act*.

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[18] The police have not withheld any information that is the appellant's personal information alone. However, because the record as a whole contains the appellant's personal information, the relevant personal privacy exemption is the discretionary one in section 38(b).³ Additionally, some of the information withheld by the police under the personal privacy exemption is about individuals acting in a professional capacity. However, as stated above, the appellant is not pursuing access to this information about these individuals, such as their addresses, phone numbers, etc. Accordingly, this information is not at issue in this appeal.

[19] Finally, I acknowledge that the appellant has removed much of the personal information about other individuals from the scope of the appeal. Accordingly, I will consider the possible application of the discretionary personal privacy exemption in section 38(b) only in relation to the personal information of the appellant's granddaughter and other individuals that remain at issue.

B. Does the discretionary personal privacy exemption at section 38(b) apply to the information at issue?

[20] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 38(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[21] Sections 14(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 38(b). If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

[22] Sections 14(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 38(b). Also, section 14(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b). As will be seen below, of relevance to this appeal is section 14(4)(c) (compassionate grounds).

³ When a record does not contain a requester's personal information, the applicable personal privacy exemption is the mandatory one in section 14(1).

[23] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3) and balance the interests of the parties.⁴

[24] 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 38(b). Section 14(2) also lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy. The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).⁵

Representations of the Parties

[25] As noted above, the representations from the affected party were brief, and his position is that none of his information should be disclosed.

[26] The appellant submits that he has concerns and issues about the circumstances surrounding his granddaughter's death, and the information released by the police has not addressed those concerns. The appellant submits that the police have not shown all the comments of witnesses that they interviewed and there appears to be a lot of missing information. The appellant further submits that too many assumptions were made without proper testing and investigation. The appellant argues that there are shortcomings in the police investigation that leave a lot of questions unanswered, especially because his granddaughter died under unknown circumstances. The appellant submits that these omissions could impact his understanding of what occurred, and the appellant argues that witness statements should be disclosed even if their names are not.

[27] The appellant reiterates that he is not seeking the personal information of any other individuals contained within the record at issue. Although he does not use the phrase "compassionate reasons," I understand the appellant's submissions to suggest that this is the basis on which he is asking for disclosure of further information about the circumstances of his granddaughter's death, especially the witness statement from the night of her death. The appellant argues that the witness statements should be disclosed, because any personal information contained in those statements can be severed, so the privacy of the individuals would not be compromised.

[28] The police submit that none of the exceptions at sections (a) to (e) of 14(1)

⁴ Order MO-2954.

⁵ Order P-99.

apply. The police submit that the presumption at paragraph (b) of section 14(3) (investigation into possible violation of law) applies as they were investigating a sudden death. The police further submit that they must always rule out the possibility of foul play in a sudden death investigation. The police submit that none of the section 14(2) factors apply.

[29] The police argue that the compassionate grounds provision at section 14(4)(c) does not apply to the information at issue in this appeal, because they have already released the personal information of the appellant's granddaughter to him for compassionate reasons. The police argue that they did not release personal information of the appellant's granddaughter that was intermingled with the personal information of the affected party in the interest of protecting his personal privacy.

Analysis and findings

[30] As noted above, the appellant is not seeking the following information about other individuals: sex, date of birth, telephone numbers, addresses, driver's licence number, physical descriptions, employment, citizenship, marital status, ethnicity and language. Accordingly, these types of information are not at issue in this appeal.

[31] The police argue that none of the exceptions at sections (a) to (e) of 14(1) apply. I agree and find that none apply to the withheld information. The police argue that the presumption at paragraph (b) of section 14(3) applies to the information at issue. 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[.]

[32] Based on my review of the record, I am satisfied that the withheld information was compiled and is identifiable as part of an investigation into a possible violation of law. 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.⁶ Therefore, I find that the presumption at section 14(3)(b) applies to the withheld information, and its disclosure is presumed to be an unjustified invasion of the personal privacy of the individuals to whom the information relates.

[33] The police argue that none of the section 14(2) factors apply. While the

⁶ Orders P-242 and MO-2235.

appellant made arguments that the withheld information should be disclosed, he did not raise or argue that any factors favouring disclosure in section 14(2)(a) to (d) are relevant, and I find that none apply in the circumstances of this appeal. I have also considered whether any unlisted factors favouring disclosure, such as inherent fairness issues, apply and I find that none apply.

[34] Since I have found that the section 14(3)(b) presumption applies and there are no factors in section 14(2) favouring disclosure of the withheld information, I must consider whether or not any of the paragraphs in section 14(4) apply. The appellant argues that the withheld information should be disclosed, so he can have a better understanding of the circumstances of his granddaughter's death. Therefore, I must consider whether or not the exception in section 14(4)(c) applies to the withheld information because if it does, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 38(b).

Does the compassionate reasons exception at section 14(4)(c) apply?

[35] The application of section 14(4)(c) requires a consideration of the following questions, all of which must be answered in the affirmative in order 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 of the deceased individual desirable for compassionate reasons, in the circumstances of the request?⁷

Parts 1 and 2: Do the records contain the personal information of a deceased individual and is the requester a spouse or "close relative" of the deceased individual?

[36] 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")

[37] The police and the appellant agree, and I find that the record contains the personal information of a deceased individual, specifically, the appellant's granddaughter, and that the appellant is a "close relative" of this individual as defined in the *Act*. Accordingly, I find that the first two requirements for the application of

⁷ Orders MO-2237 and MO-2245.

section 14(4)(c) have been met.

Part 3: Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

[38] The police argue that section 14(4)(c) does not apply to the information at issue in this appeal, and that they did not release personal information of the appellant's granddaughter that was intermingled with the personal information of the affected party in the interest of protecting his personal privacy. However, personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the "circumstances" to be considered would 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).⁸

[39] In Orders MO-2237 and MO-2245, Commissioner Brian Beamish made the following findings:

... 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.

[40] In Order MO-2515, Adjudicator Laurel Crolley ordered the disclosure of records relating to police involvement with a deceased individual in the weeks prior to the individual's death. She stated:

In assessing the relevant circumstances of the current appeal, I give significant weight to the fact that the records at issue contain information about the deceased's health and physical state within a short period of time prior to his death. This information sheds some light on the deceased's circumstances shortly before his death [...] I also attribute significant weight to the appellant's need for this information as part of her grieving process.

⁸ Order MO-2237.

[41] I adopt a similar approach in this appeal. After the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons."⁹

Pages 10, 11, 14, 15, 21 and the top of page 22 of the record

[42] The withheld information on these pages contains the mixed personal information of the appellant's granddaughter and the affected party, including the name of the affected party, his licence plate number and his statement regarding the night of the appellant's granddaughter's death.

[43] Having considered all the circumstances of this appeal, including the interests of the appellant, the appellant's granddaughter and the affected party, I find that the exception at section 14(4)(c) applies to the withheld statements found on pages 10, 11, 14, 15, 21 and the top of page 22 of the record. I find that disclosure of the withheld information on these pages is desirable for compassionate reasons in the circumstances of this appeal. In coming to this conclusion, I considered that this was a sudden death investigation and the affected party is the only person with knowledge of what transpired the night of the appellant's granddaughter's death. It is clear from the appellant's representations that he continues to struggle with her death and still has many questions about what happened that night.

[44] I give significant weight to the fact that the appellant is seeking information for the purpose of understanding the circumstances of his granddaughter's death and to remove his suspicions of foul play. I also give significant weight to the appellant's need for this information as part of his grieving process, because the appellant submits, and I accept, that the information that has been disclosed to him to date has not provided him with clarity regarding the circumstances of her death.

[45] In assessing the relevant circumstances, I give significant weight to the fact that much of the withheld personal information about the appellant's granddaughter includes the affected party's observations about her health and circumstances prior to her death, which falls within paragraphs (b) and (g) of the definition of personal information in section 2(1) of the *Act*. I note that with his name and licence plate severed (because the appellant does not seek access to this information), the affected party is not identifiable from the witness statements. Even if he were, I find that in the circumstances of this appeal, disclosure of his statement is still desirable for compassionate reasons. Therefore, I find that disclosure of the personal information contained in the withheld portions of pages 10, 11, 14, 15, 21 and the top of page 22 of

⁹ Order MO-2245.

the record is desirable for compassionate reasons, in the circumstances of this appeal, and that section 14(4)(c) applies to it.

[46] Since the requirements for the application of section 14(4)(c) have been met, this overcomes the presumed invasion of privacy in section 14(3)(b). As a result, I find that disclosure of the appellant's granddaughter's personal information in the affected party's witness statement identified in the records at issue would not be an unjustified invasion of any individual's personal privacy under section 38(b).

Pages 2-9, 12-13, 16, 18, 20, 23 and the rest of page 22 of the record

[47] I find that the exception at section 14(4)(c) does not apply to the rest of the withheld personal information, which consists of the personal information of various individuals and the appellant's granddaughter unrelated to her death. As I noted above, the appellant has expressly stated that he is not interested in the personal information of other individuals, and some of this personal information is not at issue. Based on my consideration of the remainder of this personal information in the context of this appeal, I am not satisfied that its disclosure would provide the appellant with a better understanding of the circumstances of his granddaughter's death.

[48] With respect to the rest of the withheld personal information, I have found that the section 14(3)(b) presumption applies and there are no factors favouring disclosure. Since I do not find that the exception at section 14(4)(c) applies to the withheld personal information on pages 2-9, 12-13, 16, 18, 20, 23 and some remaining portions of page 22, balancing the interests of the parties, I am satisfied that the facts of this appeal weigh against its disclosure. Therefore, I find that the withheld personal information on pages 2-9, 12-13, 16, 18, 20, 23 and the rest of page 22 of the record is exempt from disclosure pursuant to the discretionary exemption at section 38(b) of the *Act*, subject to my findings below with respect to the police's exercise of discretion.

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

[49] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[50] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[51] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ This office may not, however, substitute its own discretion for that of the institution.¹¹

[52] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹²

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

¹⁰ Order MO-1573.

¹¹ Section 43(2).

¹² Orders P-344 and MO-1573.

Analysis and findings

[53] The police submit that they exercised their discretion under section 38(b), and that this office should uphold the exercise of discretion. The police submit that they considered that the appellant should have the right to his own information and that of his granddaughter as it pertains to her death. The police further submit that they considered that there was a sympathetic need for the appellant to receive the information and attempted to release as much information concerning his granddaughter's death as permitted under the *Act* without breaching the privacy of other individuals.

[54] As noted above, the affected party's representations were brief and focused on his wish not to have any of his information disclosed. His representations did not address the police's exercise of discretion.

[55] While the appellant also did not specifically address the exercise of discretion under section 38(b) in his representations, it is clear that he does not agree with the police's exercise of discretion in this appeal.

[56] After considering the representations of the parties and the circumstances of this appeal, I find that the police did not err in their exercise of discretion with respect to the application of section 38(b) for the part of their access decision that I have decided to uphold. I am satisfied that they did not exercise their discretion in bad faith or for an improper purpose. I am also satisfied that the police took into account relevant factors, and did not take into account irrelevant factors in its exercise of discretion. Accordingly, I find that the police exercised their discretion in an appropriate manner to withhold the personal information that I found exempt under section 38(b), and I uphold it.

ORDER:

1. Pursuant to section 14(4)(c), I order the police to disclose to the appellant the portions of the records relating to the circumstances of his granddaughter's death, as set out in the copy of the record that accompanies this order. For the sake of clarity, I have highlighted the portions of the written record to be disclosed. The information highlighted is to be disclosed by December 20, 2019, but not before December 13, 2019.
2. In order to verify compliance with order provision 1, I reserve the right to require the police to provide me with a copy of the record disclosed to the appellant.

Original Signed By: _____
Anna Truong
Adjudicator

November 15, 2019