



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1675

Appeal MA-030013-1

Hamilton Police Service



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Hamilton Police Service (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

...the Sudden Death Report and any other evidence gathered, including 1st response and investigating officers memorandum books, statements of witnesses and suspects and any other written material in relation to the death of [the requester's] son.

The Police located eight responsive records, comprising 74 pages, and denied access to all of them on the basis of the following exemption claims:

- Section 38(a), in conjunction with sections 8(2)(a) and (c) (law enforcement).
- Section 38(b), in conjunction with section 14(1) (invasion of privacy). The Police identified the presumptions in sections 14(3)(a), (b), and (g) and the factors in sections 14(2)(f), (h), and (i) in support of the section 38(b) claim.

The Police also identified certain portions of records as non-responsive.

The requester, now the appellant, appealed the Police's decision.

After reviewing the records, the Mediator noted that the Police had identified portions of certain records as being non-responsive to the request. The non-responsive portions are all contained in police officer notebook entries (Record 8). This issue was not resolved during mediation, so was added to the scope of the appeal.

Mediation was not successful in resolving the issues, so the file was transferred to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Police, setting out the facts and issues and seeking representations. The Police responded with representations, the non-confidential portions of which were shared with the appellant, along with the Notice. The appellant also submitted representations.

RECORDS:

The records at issue in this appeal consist of the following:

1. Sudden/Violent Death Report (1 page);
2. Criminal Negligence Cause Death/Sudden Death Report (6 pages);
3. witness statements (5 pages);
4. witness statement and officer's "willsay" statement (2 pages);
5. Sudden Death Supplementary Report (5 pages);
6. officers' "willsay" statements (2 pages);
7. Sudden Death Supplementary Report (5 pages);
8. handwritten notebook entries by various investigating officers (47 pages).

DISCUSSION:

RESPONSIVENESS

The Police have identified certain portions of Record 8, the police officers' notebook entries, as non-responsive to the appellant's request.

The appellant submits that these portions, "may have a direct impact on the responsive records". He states that other policing activity was taking place at the time of the investigation into his son's death, and if this other activity took precedence, the non-responsive information "may shed light on the quality of the police investigation".

Previous orders have established that to be responsive, a record must be "reasonably related" to the request. As former Adjudicator Anita Fineberg stated in Order P-880:

... I am of the view that, in the context of freedom of information legislation "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness, I believe that the term describes anything that is reasonably related to the request.

I have reviewed all of these entries and confirm that they relate to policing activities on matters unrelated to the investigation involving the death of the appellant's son. The appellant's request is clear in scope and is restricted to records gathered during the Police investigation following his son's death. In my view, information gathered by Police officers on unrelated policing matters that happened to take place on the same day as activities concerning the investigation, is not reasonably related to the request and therefore not "responsive" in these circumstances.

PERSONAL INFORMATION

"Personal information" is defined in section 2(1) of the *Act* to mean recorded information about an identifiable individual, including the personal opinions or views of the individual [paragraph (e)], the views or opinions of another individual about the individual [paragraph (g)], or the individual's name where 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 [paragraph (h)].

The Police submit:

The information in the records at issue is clearly personal information as defined in s. 2(1) of the *Act*, in that it is information about identifiable individuals, including, but not limited to, the deceased. Included are statements of affected individuals, including the appellant. The statements are the mixed personal information of both the affected individuals and the deceased. There is medical information of the deceased, addresses, phone numbers, dates of birth and

employment information of affected individuals and opinions of other individuals.
... [The Police] consider the Sudden Death Investigation as a whole to contain the personal information of the deceased and other affected individuals.

The records all relate to investigative activity stemming from the sudden death of the appellant's son. This information is clearly about the son and I find that all of the records contain his personal information. Although the appellant is the father of the deceased individual, I have not been provided with any evidence that he is acting in the capacity of a "personal representative" of his son, as that term is used in section 54(a) of the *Act*.

I also find that Record 1, pages 3-5 of Record 3, portions of page 2 of Record 6, portions of pages 1 and 4 of Record 7, and portions of six pages of handwritten notebook entries (Record 8) contain information about the appellant gathered during the course of the investigation, which qualify as his "personal information".

Some records contain information about other individuals contacted by the Police during the course of the investigation, including witnesses who provided statements. I find that these portions contain the "personal information" of these individuals.

INVASION OF PRIVACY

Sections 14(1) and 38(b) of the *Act* are both exemptions dealing with privacy protection.

Section 14(1) is a mandatory exemption that requires an institution to deny access to the personal information of an individual other than the requester unless one of the exceptions in sections 14(1)(a) through (f) apply. Section 14(1)(f) permits disclosure when it does not represent an unjustified invasion of the other individual's privacy.

Section 38(b), on the other hand, is a discretionary exemption available to an institution when dealing with records containing a requester's own personal information. If a record contains the personal information of both the requester and another individual, an institution may deny the requester access to his or her personal information if, after considering all of the relevant circumstances, it concludes that disclosure would constitute an unjustified invasion of the other individual's privacy.

In this appeal, I will consider section 14(1) of the *Act* for records containing the appellant's personal information, and for the records that do not contain the appellant's personal information I will consider section 38(b).

In both instances, sections 14(2), (3) and (4) 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 Police 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; and 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 Police rely on the presumption in section 14(3)(b) for all records at issue in this appeal. This section reads:

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 ...

The fact that criminal proceedings do not follow an investigation does not negate the applicability of subsection 14(3)(b). The presumption in subsection 14(3)(b) only requires that there be an investigation into a possible violation of law (Order P-242).

As the Police point out in their representations, the records were all compiled in the context of an investigation into the sudden death of the appellant's son. As the description of Record 2 indicates, the investigation concerned possible charges under the *Criminal Code* of Canada, specifically criminal negligence causing death. As noted above, the fact that these charges did not proceed has no bearing on the applicability of section 14(3)(b).

Accordingly, I find that disclosing all of the records or portions of records that do not contain the personal information of the appellant would constitute a presumed unjustified invasion of the privacy of the appellant's deceased son and/or the other individuals whose personal information is contained in these records. Therefore, the mandatory section 14(1) exemption applies and the Police are precluded from disclosing these records to the appellant.

Turning to the records containing the appellant's personal information, I make the following findings:

- Record 1 consists of a summary of the information gathered by the Police at the beginning of the investigation and makes only passing reference to the appellant. As such, I find that disclosing the information in this record would constitute an unjustified invasion of the privacy of the other individuals identified in the record, including the appellant's son, and Record 1 qualifies for exemption under section 38(b) of the *Act*.
- Pages 3-5 of Record 3 (pages 10-12 under the Police's numbering system) consist of a witness statement given by the appellant to the Police during the course of the investigation. Each page is signed by both the appellant and the officer taking the statement. I find that denying the appellant access to information provided by him to the Police in the context of the investigation would lead to an "absurd"

result, and Pages 3-5 of Record 3 should be disclosed (see Orders M-444, MO-1196, P-1414, PO-1686 and MP-1670).

- Portions of page 2 of Record 6, portions of pages 1 and 4 of Record 7, and portions of six pages of handwritten notebook entries (Record 8) contain either information recorded by various police officers on the basis of information provided by the appellant, or information that documents dealings the Police had directly with the appellant during the investigation, of which he is clearly aware. For the same reasons as pages 3-5 of Record 3, I find that denying the appellant access to this information would lead to an “absurd” result, and these portions of page 2 of Record 6, pages 1 and 4 of Record 7, and the six pages of handwritten notebook entries (Record 8) should be disclosed to the appellant. I will attach a highlighted version of these records with the copy of this order sent to the Police, identifying the portions that are subject to my finding.

As a result of these findings, the only record containing the appellant’s personal information that will not be disclosed is Record 1. Considering all of the circumstances of this appeal, I find nothing improper about the approach taken by the Police in exercising discretion to deny access to Record 1 under section 38(b) of the *Act*.

It is not necessary for me to deal with the section 38(a)/14(2)(a) and (c) exemption claim, other than to state that my “absurd result” finding under the section 38(b) discussion would also apply if the same information were found to fall within the scope of section 38(a) of the *Act*.

ORDER:

1. I order the Police to disclose pages 3-5 of Record 3 and the portions of Records 6, 7 and 8 that contain the personal information of the appellant by August 22, 2003. I have attached highlighted versions of the relevant portions of Records 6, 7 and 8 with the copy of this order sent to the Police that identify the portions that should be disclosed.
2. I uphold the Police’s decision to deny access to Records 1, 2, 4 and 5, and all other portions of Records 3, 6, 7 and 8 not covered by Provision 1 of this order.
3. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Police to provide me with copies of the records that are disclosed to the appellant.

Original signed by _____
Tom Mitchinson
Assistant Commissioner

July 31, 2003