



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

ORDER M-818

Appeal M_9600220

Sudbury Regional Police Services Board



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NATURE OF THE APPEAL:

The appellant requested information from the Sudbury Regional Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The information related to the investigation of the appellant's husband's death, which occurred in 1994.

The Police denied access to the record identified as responsive to the request based on the following exemptions:

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

The appellant appealed the decision to deny access. This office notified the Police and the appellant of the appeal and provided both parties with the opportunity to submit representations on the issues identified in the notice. Both parties submitted representations.

RECORD:

The record consists of 332 pages of investigative material relating to the fatality. The record includes a coroner's brief prepared by the Police, copies of the investigating officer's notebooks, and a copy of the notebook found with the deceased. During the inquiry, the Police decided to disclose to the appellant Pages 7, 11, 12, 13, 15, 121, 129, 158, 164 and 165, which consist of title pages and one page from a calendar.

DISCUSSION:

PERSONAL REPRESENTATIVE

The appellant states that she is the legal representative of her husband's estate. Section 54(a) of the Act states that the appellant would be able to exercise her deceased husband's right to request and be granted access to his personal information if she is able to demonstrate that she is deceased's "personal representative" **and** if her request for access to the information "relates to the administration of the deceased's estate".

In order to establish that the appellant is her husband's "personal representative" for the purpose of section 54(a), this office asked her to provide evidence of her authority to deal with the estate of her deceased husband. This office also indicated to her that previous orders have established that producing letters of probate, letters of administration or ancillary letters probate under the seal of the proper court is necessary in this regard.

The only evidence produced by the appellant is a holograph will that she states was executed by the deceased and a Proof of Death document that indicates she is responsible for funeral expenses. In my view, this is not sufficient to establish that she is her husband's personal representative for the purpose of section 54(a) of the Act.

LAW ENFORCEMENT

In order for a record to qualify for exemption under sections 8(1)(a) or (b) of the Act, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act.

The appellant's husband died in a mining accident. The Coroner's Act requires the Coroner to hold an inquest where a worker dies as a result of an accident occurring in the course of the worker's employment in a mine. The Coroner appointed members of the Sudbury Regional Police to conduct an investigation on his behalf under section 16(4) of the Coroner's Act, and it is the record of this investigation which is at issue in this appeal.

The accident was also investigated by the Ministry of Labour and charges were laid under the Occupational Health and Safety Act (the OHSA). The Ministry of Labour's investigation did not give rise to the record at issue in this appeal. The mining company pled guilty to the OHSA charges and has been fined.

An investigation under the Coroner's Act is conducted by the Regional Coroner. Section 2(2) of the Coroner's Act states that the powers conferred on a coroner to conduct an inquest shall not be construed as creating a criminal court of record. Though the investigation was carried out by police officers, the power to investigate was that of the Coroner. The Police have not established that the investigation was aimed at anything other than providing information to the Coroner, with the Police acting as agents for the Coroner. The Coroner's Court is not a court or tribunal which is empowered to impose penalties or sanctions and its proceedings do not, therefore, meet the definition of law enforcement under section 2(1) of the Act. Accordingly, sections 8(1)(a) and (b) do not apply.

Section 8(2)(a) requires that the report be prepared in the course of law enforcement inspections or investigations. As I have found that the Police were acting in the capacity of agents for the Coroner, whose investigation does not qualify as law enforcement, I find that the record was not prepared in the course of law enforcement inspections or investigations, and section 8(2)(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. Having reviewed the record, I find that the information is primarily about the appellant's husband and the circumstances surrounding his death. The record, therefore, contains his personal information. The record also contains the personal information of a number of other identifiable individuals, including the appellant. The appellant is identified in parts of the record as next of kin, and parts of the record refer to the contents of interviews with her and her family.

The record also includes references to other employees of the mine. In some cases, the employees are acting as witnesses in an investigation and, in my view, these parts of the record constitute their personal information, as well as that of the deceased. In other cases, the employees are acting in their professional capacities and, in my view, these parts of the record do not constitute their personal information. The parts of the record which involve investigations

conducted by or which seek the opinions of experts were, in my view, prepared in the professional capacity of these experts and do not qualify as their personal information.

Section 36(1) of the Act allows individuals access to their own personal information held by a government institution and the appellant, therefore, has a general right to access those parts of the record which contain her personal information. Although it is unusual for this office to divide the consideration of one record under the two invasion of privacy exemptions, in my view this is an appropriate case to do so given that the appellant's personal information is contained in a very small proportion of the record.

Section 38 sets out exceptions to this right. Where a record contains the personal information of both the appellant and other individuals, section 38(b) of the Act allows the Police to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Where, however, the record contains only the personal information of other individuals, as is the case with the parts of the record which do not refer to the appellant, section 14(1) prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 14(1)(f), which permits disclosure if it "... 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 Police 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 Police must consider the factors listed in section 14(2) as well as all other relevant circumstances.

The Police submit that the presumption in section 14(3)(b) applies, and I have identified that the presumption in section 14(3)(a) is relevant. These sections state:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) 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.

Pages 51 and 88 of the record are copies of a toxicology report relating to the appellant's husband. Pages 52-56 are a report of the autopsy. In my view, the information contained in these records relates to a medical diagnosis, condition or evaluation and falls within the

presumption in section 14(3)(a). The information does not fall within section 14(4) of the Act and the appellant has not argued that section 16 applies. Accordingly, I find that Pages 51-56 and 88 are exempt under section 14 of the Act.

The information contained in the record was compiled and is identifiable as part of the investigation conducted by the Coroner, which in these circumstances is not properly categorized as an investigation into a possible violation of law. Accordingly, I find the presumption in section 14(3)(b) does not apply in the circumstances of this appeal.

With respect to the factors listed in section 14(2), the appellant submits that she requires the personal information contained in the record in order to pursue compensation for the death of her husband. These submissions are relevant to section 14(2)(d) of the Act (fair determination of rights), and weighs in favour of disclosure of her own personal information as well as that of her husband.

The Police did not refer to section 14(2) in its representations. Having reviewed all of the circumstances in this appeal, it is my view that the following factors are also relevant:

- it is apparent from the record that the persons interviewed were obviously upset by the nature of the fatality and the fact that it occurred in their workplace.
- many of the interviews were conducted with investigators from the Ministry of Labour present who were investigating a possible violation of law.
- the persons interviewed were aware that the Police were investigating the fatality on behalf of the Coroner.
- the Coroner's proceedings are open to the public, and parties to the proceeding receive a copy of the Coroner's brief prepared by the Police.

Having carefully considered the circumstances of this appeal, it is my view that the appellant has established a compelling case for disclosure of her deceased husband's personal information, which outweighs the considerations favouring the protection of his privacy. Accordingly, I find that disclosure of the personal information of the deceased, with the exception of the toxicology and autopsy reports, to the appellant would not constitute an unjustified invasion of the personal privacy of the deceased, and sections 14 and 38(b) do not apply.

With regard to the personal information of other individuals contained in the record, since their statements are largely about the deceased and the circumstances of his death, in my view, there is a strong argument in favour of disclosing this information to the appellant. I find, however, the appellant has not established that disclosing this information in identifying form would not constitute an unjustified invasion of privacy of these other individuals. Accordingly, I find that section 14 of the Act applies to the name, date of birth, age, address and telephone number of each witness who was interviewed in his or her personal capacity, as well as their position, years of seniority and any other identifying particulars. I have highlighted this information on the copy of the record which is being sent to the Police with this order.

ORDER:

1. I uphold the decision of the Police not to disclose Pages 51-56 and 88 of the record and those parts of the record which I have highlighted on the copy of the record which is being sent to the Police with this order.
2. I order the Police to disclose the remaining information to the appellant by sending her a copy no later than **September 3, 1996**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ August 13, 1996