



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

ORDER M-934

Appeal M_9700012

Halton Regional Police Services Board



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for records containing information about a boating accident which resulted in the death of a named individual. The appellants are the named individual's sons. The Police identified a number of records as responsive to the request and denied access to them, claiming the application of the following exemptions contained in the Act:

- law enforcement - section 8(2)(a)
- invasion of privacy - section 14(1)

In addition, the Police advised the appellants that, pursuant to section 54(a) of the Act, the records are only accessible to the personal representative of a deceased person, where that individual requires the information to "administer the estate". I will address the application of section 54(a) to the circumstances present in this appeal below.

The appellants appealed the Police decision to deny access to the records. A Notice of Inquiry was provided to the appellants, the Police and to another individual whose rights may be affected by the disclosure of the records (the affected person). Representations were received from all of the parties. In his representations, the affected person consented to the disclosure of his personal information to the appellants.

The Police submit that because the information which it maintains regarding this incident, as well as that contained in the national database maintained by the Royal Canadian Mounted Police (also known as CPIC), describe the appellants' father as a "missing person", they are not prepared to accept the characterization of this individual as deceased. I note, however, that by order of Mr. Justice Richard Huneault of the Ontario Court (General Division), the appellants were granted a Certificate of Appointment of Estate Trustee Without a Will. The Police were provided with a copy of the Certificate of Appointment.

I am satisfied that the position of the Police is untenable, particularly in light of the Order made by the Court. Clearly, the Ontario Court (General Division) is satisfied that it had been provided with sufficient evidence to establish that the appellants' father is dead. I agree with the Court's finding on this issue for the purposes of this appeal. I will, therefore, now address the possible application of section 54(a) to the circumstances of this appeal.

In Order M-927, Inquiry Officer John Higgins made the following comments about the application of section 54(a). He held that:

This section merely provides that particular individuals may exercise the rights of others under the Act in certain situations. Section 54(a) is **not** an exemption, and it does **not** create an absolute prohibition on access to information about deceased persons by individuals who do not qualify under it.

In a request for the personal information of a deceased person, if section 54(a) applies, it means that the institution applies the standards used where an individual is requesting his or her own personal information. If an exemption is to be applied, it would have to be one of the exemptions in section 38, which may apply in that situation, rather than the exemptions in sections 6 through 15.

On the other hand, where an individual who does not qualify under section 54(a) requests a deceased individual's information, the institution applies the standards used where an individual requests another individual's information, or makes a request for general records. If an exemption is to be applied, it would have to be found in sections 6 through 15.

In this appeal, the Police have claimed that sections 8 and 14 apply to preclude access. In the circumstances of this appeal, the question to be decided is not whether the appellant qualifies under section 54(a), but whether the claimed exemptions apply to the information at issue.

In the present appeal, the Police have also claimed that sections 8 and 14 apply to preclude access to the records. Because it appears that the appellants may satisfy the requirements of section 54(a), and because Page 9 of the records contains the personal information of the appellants, I asked the parties to submit further representations on the application of sections 38(a) and (b) to the records, in addition to sections 8 and 14. Additional submissions were received from the Police only.

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

I will first consider whether, under section 54(a) of the Act, the appellants are entitled, as the Estate Trustee Without a Will of the estate of the deceased, to exercise the same right of access to the personal information contained in the records as the deceased.

Under section 54(a), the appellants would be able to exercise the deceased's right to request and be granted access to the deceased's personal information if they are able to:

1. demonstrate that they are the "personal representative" of the deceased; and
2. demonstrate that their request for access "relates to the administration of the deceased's estate".

Personal Representative

In Order M-919, Inquiry Officer Anita Fineberg reviewed the law with respect to section 54(a) and came to the following conclusions:

The meaning of the term "personal representative" as it appears in section 66(a) of the Freedom of Information and Protection of Privacy Act, the equivalent of section 54(a) of the Act, was considered by the Divisional Court in a judicial review of Order P-1027 of this office. In Adams v. Ontario (Information and Privacy Commissioner) (1996), 136 D.L.R. (4th) 12 at 17-19, the court stated:

Although there is no definition of "personal representative" in the Act, when that phrase is used in connection with a deceased and the administration of a deceased's estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s.1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1:

1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.

...

The question to be decided is whether the person seeking the information is the personal representative of the deceased individual with the power and authority to administer the deceased's estate.

...

... The executor may require certain financial information for the administration of the estate, or even certain personal information in order to pursue a lawsuit on behalf of the estate ... [emphasis added]

Based on the court's analysis set out above, I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the Act if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

I adopt the analysis of Inquiry Officer Fineberg for the purposes of this appeal. Accordingly, I must first determine whether the appellants, in their capacity as "Estate Trustee Without a Will" qualify as "an administrator with the power and authority to administer the deceased's estate".

Again in Order M-919, Inquiry Officer Fineberg analysed in detail the law with respect to the various types of court-appointed administrators who might be involved in the administration of a deceased's estate where that person has died without a will. One type of administrator canvassed in that decision is termed a "General Administrator", whose function is to administer all aspects of an intestate person's estate, as opposed to one specific area.

As noted above, the appellants were issued a Certificate of Appointment of Estate Trustee Without a Will on September 10, 1996 by order of Mr. Justice Huneault of the Ontario Court (General Division). In my view, this appointment grants to the appellants rights with respect to their father's estate which are equivalent to those of a "General Administrator" of the estate of a deceased person. Accordingly, I find that the appellants are "administrators with the power and

authority to administer the deceased's estate" for the purposes of the Estates Administration Act and the first part of the section 54(a) test has been satisfied.

"Relates to the Administration of the Individual's Estate"

The appellants submit that the information requested is required in order to establish whether or not their father's death was accidental. The appellants are the sole beneficiaries of their father's estate and, as noted above, have been appointed as Estate Trustee Without a Will in relation to that estate. They submit that the death benefits which fell due under an insurance policy upon their father's death have been paid but that additional insurance monies for accidental death are being withheld by the insurance company which issued the policy until further information relating to the circumstances surrounding the father's death has been provided. The appellants conclude that they require the requested information in order to finalize the estate by gathering any insurance proceeds for distribution to the estate's beneficiaries.

The Police submit that the phrase "relates to the administration of the estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate. The Police acknowledge that "the information is required for an insurance pay out or death benefits" and that "the records may indirectly create a potential asset for the estate". They go on to argue, however, that these records have nothing to do with administering the estate and therefore "does not entitle the personal representative to access that record".

In my view, the appellants have established that they require the requested information in order to pursue their claim for accidental death benefits on behalf of their father's estate. I find that the gathering of assets, including any insurance proceeds, on behalf of the estate relates directly to its administration. The second part of the section 54(a) test has, accordingly, been met.

Pursuant to section 54(a), the appellants are, therefore, entitled to exercise the same right of access to the requested records as the deceased. In their capacity as Estate Trustee Without a Will, as found under section 54(a), the appellants have a right of access under section 36(1) of the Act to the personal information of the deceased which is contained in the records. In other words, the appellants will be permitted to stand in the place of the deceased in connection with their access request which will be dealt with as if the deceased were the requester.

LAW ENFORCEMENT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 2(1) of the Act defines "personal information", in part, to include recorded information about an identifiable individual. Section 2(2) provides that personal information does not include information about an individual who has been dead for more than 30 years. Since the deceased died in 1995, section 2(2) does not apply in the circumstances of this case.

I have reviewed the information contained in the records and find that, with the exception of Page 17, it satisfies the definition of personal information. I further find that Pages 1, 2, 3, 6 and 7 contain the personal information of both the deceased and the affected person, while Pages 4, 13, 14 and 15 contain the personal information solely of

the deceased. Pages 8, 9, 10 and 11 contain the personal information of the deceased, the affected person and a number of other identifiable individuals, including the appellants. Pages 5 and 12 contain the personal information of the deceased, the affected person and another individual. Pages 16 and 18 contain the personal information of the affected person only and Page 17 contains no personal information whatsoever.

Under section 38(a) of the Act, the Police have the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

The Police have exercised their discretion to refuse access to all of the records at issue under section 8. Because all of the records, except Pages 16, 17 and 18 contain the personal information of the appellants or the deceased, in order to determine whether the exemption provided by section 38(a) applies to the information in this record, I must first consider whether the exemption in section 8(2)(a) applies.

This section states as follows:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

In order to qualify under these sections, the matter to which the record relates must first satisfy the definition of "law enforcement" in section 2(1) of the Act, which states:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b).

Given that the matter in question was a police investigation, this definition has been satisfied.

The remaining question to consider under section 8(2)(a) is whether any of the records at issue qualify as a "report". In Order 200, Commissioner Tom Wright determined that in order to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact. I agree with this analysis and adopt it for the purposes of this appeal.

The records at issue consist of various "reports" completed by the Police in the course of their investigation into the appellants' father's death. They include a "Missing Persons Report", five "Follow-Up Reports", two "Motor Vehicle and Boat Reports", a one-page "Towed Vehicle Report", a one-page "Identification Bureau Report", a one-page "Report of Seized Property", two "Property Tags" and copies of the deceased's driver's license and motor vehicle permit.

In my view, despite the titles ascribed to each document, none of these records meet the definition of "report" in Order 200. The information contained in the records represents "mere observations or recordings of fact" and cannot be characterized as a formal statement or account of the collation and consideration of information. I find that they are not, therefore, exempt under section 8(2)(a). As Pages 1-15 do not qualify for exemption under this section, they are not exempt from disclosure under section 38(a).

INVASION OF PRIVACY

I have found above that all of the records at issue, with the exception of Page 17, contain the personal information of individuals other than the appellants. In addition, Page 9 contains the personal information of the appellants, along with other individuals. As I have found that section 8(2)(a) does not apply to Page 17, and no mandatory exemptions apply, it should be disclosed to the appellants.

Where a record contains the personal information of both the appellant and other individuals, as is the case with Page 9 of the records, section 38(b) allows the institution 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 only contains the personal information of other individuals, as with Pages 1-8, 10-16 and 18, section 14(1) of the Act prohibits an institution from disclosing it except in the circumstances listed in sections 14(1)(a) through (f). Of these, only sections 14(1)(a) and (f) could apply in this appeal. They permit disclosure if the individual to whom the personal information relates consents to its disclosure or if disclosure "does not constitute an unjustified invasion of personal privacy."

As noted above, the affected person has consented to the disclosure of his personal information to the appellants. Accordingly, as I have found that section 8(2)(a) does not apply to this information and no other mandatory exemptions apply, it ought to be disclosed to the appellants.

In my discussion of section 54(a) above, I found that the appellants may now exercise the access rights of the deceased. For this reason, the exemptions in sections 14(1) and 38(b) have no application to those portions of the records which contain the personal information of the deceased, just as they would not apply if the deceased was the requester. Because I have also found that sections 8(2)(a) and 38(a) do not apply to exempt this information from disclosure, it should be disclosed to the appellant in its entirety.

The remaining information consists of portions of Pages 5, 8, 9, 10 and 12 which contain the personal information of other identifiable individuals. 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.

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 there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

The Police submit that the information which remains at issue in the records is subject to the presumption in section 14(3)(b). This information relates to individuals other than the appellants, the affected person and the deceased and is contained in Pages 5, 8, 9, 10 and 12. Section 14(3)(b) states that:

A disclosure of personal privacy 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;

With regard to section 14(3)(b), the Police submit that the personal information contained in the records was compiled as part of an investigation into a possible violation of law. I accept this submission, which in my view supports the application of section 14(3)(b) to the information which remains at issue. Therefore, I find that this information was compiled and is identifiable as part of the investigation into a possible violation of law and the presumption in section 14(3)(b) applies.

As I have indicated previously, once a presumption is found to apply, the only way in which it can be rebutted is if it falls under section 14(4) or where section 16 is found to apply. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and

Privacy Commissioner) (1993), 13 O.R. (3d) 767. I have not been provided with any information to substantiate the application of section 14(4) or 16 to the information at issue, nor is their application apparent from a review of the records.

Accordingly, I find that the disclosure of the information which relates to individuals other than the appellants, the affected person and the deceased on Pages 5, 8, 9, 10 and 12 would constitute an unjustified invasion of the personal privacy of these persons. This information, which appears in Page 9 of the records (which also contains the personal information of the appellants) is exempt under section 38(b). The information in Pages 5, 8, 10 and 12 of the records (which do not contain the personal information of the appellants) is exempt under section 14(1). I have highlighted the information which is exempt from disclosure in the copy of Pages 5, 8, 9, 10 and 12 which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator for the Police.

In summary, the personal information which relates to the appellants, the affected person and the deceased contained in the records is not exempt under either sections 14(1) or 38(b). This includes all of Pages 1, 2, 3, 4, 6, 7, 13, 14, 15, 16 and 18 and those portions of Pages 5, 8, 9, 10 and 12 which are **not** highlighted on the copy which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator for the Police.

ORDER:

1. I uphold the decision of the Police not to disclose the information contained in Pages 5, 8, 9, 10 and 12 of the records which has been highlighted on the copy of these records which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police.
2. I order the Police to disclose to the appellants, in their entirety, Pages 1, 2, 3, 4, 6, 7, 11, 13, 14, 15, 16, 17 and 18 of the records and those parts of Pages 5, 8, 9, 10 and 12 which are **not** highlighted on the copy of these records which is being sent to the Freedom of Information and Privacy Co-ordinator for the Police, by sending a copy of the records to the appellants' counsel by **June 6, 1997**, but not before **June 1, 1997**.
3. In order to verify compliance with Provision 2 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.

May 2, 1997

Donald Hale
Inquiry Officer