



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

# **ORDER M-1048**

**Appeal M-9700116**

**Hamilton-Wentworth Regional Police Services Board**



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## **NATURE OF THE APPEAL:**

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Hamilton-Wentworth Regional Police Services Board (the Police). The request was for access to records relating to a fatal motor vehicle accident. The request was submitted by the insurer of the driver of a vehicle which struck and killed two pedestrians. The driver (the insured) provided his consent to the Police to disclose his personal information contained in the records to his insurer (the appellant).

The Police denied access to a copy of the Fatal Motor Vehicle investigation report, including statements and photographs. In its decision letter, the Police stated that the report can only be accessed under section 54(a) by an administrator or executor for purposes of administering the estate. The Police then denied access to the records on the basis of the following exemptions:

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

This office sent a Notice of Inquiry to the appellant, the Police and two individuals whose interests could be affected by the outcome of this appeal (the affected parties). Representations were received from the Police only.

## **RECORDS:**

In response to the request, the Police identified 47 pages of records relating to the accident investigation. The appellant is not pursuing access to Records 14 and 15, which consist of two witness statements. The following duplicate records will also be eliminated from the scope of the appeal:

- Record 22 (duplicate of Record 18)
- Records 27-30 (duplicates of Records 23-26)
- Records 34, 35 (duplicates of Records 5, 6)
- Record 36 (duplicate of Record 5)

Accordingly, in addition to copies of the photographs, the records at issue in this appeal are Records 1-13, 16-21, 23-26, 31-33 and 37-47.

## **PRELIMINARY MATTERS:**

During the course of this appeal, it was learned that the insured is now deceased. The Police were informed in the Notice of Inquiry that it is this office's position that the consent which the insured provided to the Police prior to his death is still valid. The Police were also advised that, although section 54(a) was cited in the decision letter, it is not at issue in this appeal.

The Police submit that if the insured was still alive this consent would be valid but since he died the consent "... would not be valid as deceased persons information is protected." The Police also submit

[IPC Order M-1048/December 15, 1997]

that they believe that section 54(a) is "... very relevant and important to this appeal." Having reviewed the Police representations in detail, I am concerned that they have misinterpreted some of the sections of the Act pertaining to deceased individuals, and I believe that a review of the interaction of these sections would be instructive.

Section 54(a) provides:

Any right or power conferred on an individual by this Act may be exercised,  
  
if the individual is deceased, by the individual's personal representative if  
exercise of the right or power relates to the administration of the  
individual's estate.

The Police have incorrectly interpreted this section as dictating "when and only when the personal information of a deceased person can be released." The Police go so far as to state that, "If these criteria are not met the deceased information cannot be released."

Persons who have been deceased for less than 30 years enjoy the same privacy protection as when they were living, although the fact of their death may be a relevant consideration under section 14(2) of the Act. As with the living, disclosure of personal information of a deceased individual is not always going to be considered an unjustified invasion of privacy, once all the circumstances are reviewed. For example, if the personal information of a deceased individual fell within section 14(4) of the Act, the Act specifies that its disclosure would not be an unjustified invasion of privacy, and section 14 would not apply. Similarly, were a requester able to show that any of the exceptions to the mandatory exemption under section 14(1) were applicable, section 14 would not apply. As well, in certain circumstances, the requester may be able to establish the application of section 16 of the Act (the public interest override), such that the personal information of a deceased individual would be disclosed. Whether an individual is living or has been deceased for less than 30 years, the same prohibitions **and exceptions** in the Act apply.

Section 54(a) is not a privacy protection provision or an exemption. This section simply provides that in the case of a deceased individual, the personal representative may "step into the shoes" of the deceased to exercise the rights conferred on the deceased by this Act in certain specific circumstances for a specific and limited purpose. These rights include the deceased's right to access information, to request correction of personal information and to appeal a head's decision under section 39 of the Act. This section is in the Act for personal representatives to rely on, not institutions. Unless a requester or appellant asserts that they are a personal representative and that their request or appeal relates to the administration of the deceased individual's estate, it is not relevant.

If a requester asserts that they are a personal representative, it is the institution's obligation to ensure that the individual qualifies as a personal representative, and that the request relates to the administration of the deceased individual's estate. A number of orders have provided guidelines respecting the evidence

required in this regard. If the requester is unable to satisfy the institution that they and their request meet the requirements of section 54(a), the institution should inform the requester of this decision, and process the request under Part I of the Act. These are, of course, appealable decisions. If the requester satisfies the requirements of section 54, the institution should inform the requester of this decision and process the request under Part II of the Act, as though the requester were the deceased.

The appellant in this appeal sought to exercise his own right to access information under section 4 of the Act. He did not attempt to exercise the right conferred on the insured under section 36 of the Act. This is evidenced by the fact that the insured was living at the time of the request, decision, and appeal, as well as the fact that the appellant sought the consent of the insured to disclose his personal information to the appellant, as opposed to a direction from the insured for the appellant to act on the insured's behalf. The appellant has also launched his own appeal, as is his right under section 39 of the Act. Accordingly, as the records clearly do not contain the personal information of the appellant, section 38 is not relevant. As well, as the appellant is not asserting that he is the insured's personal representative, section 54 is not relevant either.

## **DISCUSSION:**

### **LAW ENFORCEMENT**

In order for a record to qualify for exemption under section 8(2)(a) of the Act, the Police must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Orders 200 and P-324]

All of the records were prepared by the Police during the course of their investigation into a fatal motor vehicle accident. I am satisfied that parts 2 and 3 of the above test have been met.

The word "report" is not defined in the Act. However, previous orders have found that in order to qualify as a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

I have reviewed the records and the representations submitted by the Police. I find that the records contain the statements of witnesses and the observations made by the police officers during the investigation. I find that the records contain recordings of fact and do not qualify as “reports” for the purposes of section 8(2)(a) of the Act. Accordingly, the records do not qualify for exemption under section 8(2)(a).

## **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 records, I find that the photographs and Records 5, 31, 44, 45, 46 and 47 do not contain personal information of an identifiable individual, and cannot qualify for exemption under section 14 of the Act. I find that the remaining records contain the personal information of the insured, the victims, and/or certain witnesses to the accident.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, sections 14(1)(a) and (f) of the Act read as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

As previously indicated, the insured consented to the disclosure of his personal information to the appellant. This information can be found on Records 7 and 8 (with the exception of the second paragraph), Record 9 (with the exception of the second sentence), Record 10, Record 11 (with the exception of the third paragraph), Records 12, 13, 16, 17, 18, Record 19 (with the exception of the fifth, sixth and seventh paragraphs), the first and last three paragraphs on Record 20, and Records 21, 24, 25, 37, 39 and 43. Accordingly, section 14(1)(a) applies, and this information does not qualify for exemption under section 14.

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 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. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. 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).

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 a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

The Police submit that sections 14(2)(f), (h), (i) and 14(3)(a) and (b) are relevant in the circumstances of this appeal. These sections state:

- (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
  - (f) the personal information is highly sensitive;
  - (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
  - (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
- (3) 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.

In the circumstances of this appeal, the only representations I have been provided with weigh in favour of finding that disclosure of the personal information remaining at issue in this appeal would constitute an unjustified invasion of personal privacy. Having found that the remaining records or parts of records contain information which qualifies as personal information of individuals other than the appellant, and in the absence of any representations weighing in favour of finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply, and the personal information of individuals other than the appellant is properly exempt from disclosure under section 14(1) of the Act.

**ORDER:**

1. I order the Police to disclose the photographs and Record 5, Record 7 (with the exception of the second paragraph), Record 8, Record 9 (with the exception of the second sentence), Record 10, Record 11 (with the exception of the third paragraph), Records 12, 13, 16, 17, 18, Record 19 (with the exception of the fifth, sixth and seventh paragraphs), the first and last three paragraphs on Record 20, and Records 21, 24, 25, 31, 37, 39, 43, 44, 45, 46 and 47 to the appellant by sending him a copy by **January 19, 1998** but not earlier than **January 14, 1998**.
2. I uphold the decision of the Police not to disclose the remaining records or parts of records.
3. In order to verify compliance with 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 1.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ December 15, 1997