



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

# **ORDER PO-1654**

Appeal PA-980188-1

Ministry of the Solicitor General and Correctional Services



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## **NATURE OF THE APPEAL:**

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to criminal charges laid by the Ontario Provincial Police (OPP) against the requester's deceased husband. The charges stemmed from allegations that he had committed sexual assaults. The Ministry located 24 pages of records and one videotape responsive to the request, and granted partial access to one page, an arrest record, on the basis that it contained the requester's personal information.

The Ministry denied access to the remaining records (and portions of one record) on the basis of the exemptions at sections 49(a)/14(2)(a) (law enforcement), and 49(b)/21 (personal privacy) of the Act. In addition, access to certain information in the records was denied on the basis that it was not responsive to the request. The requester, now the appellant, appealed the Ministry's decision. During mediation of the appeal, the Mediator appointed by the Commissioner confirmed with the appellant that she was not seeking access to the information the Ministry identified as non-responsive.

I sent a Notice of Inquiry to the appellant and the Ministry, seeking representations on the issues raised by the law enforcement and personal privacy exemption claims. Both parties submitted representations to me.

In her representations, the appellant indicated that while she is not seeking a copy of the requested videotape of a witness interview, she does seek access to a "synopsis" of the videotape, should the police be in possession of such a record. The appellant further stated:

. . . I am also making this request on behalf of [my deceased husband's] Estate as I am the Executrix of the Estate of [my deceased husband].

In addition, the appellant stated that she was not seeking the names, addresses or other identifying information relating to the alleged victims.

As a result, I sent a supplementary Notice of Inquiry to the appellant and the Ministry, seeking representations on the additional issues raised by the appellant.

## **DISCUSSION:**

### **REASONABLE SEARCH**

As stated above, in her initial representations, the appellant indicated that while she is not seeking a copy of the requested videotape of a witness interview, she does seek access to a "synopsis" of the videotape, should the Ministry be in possession of such a record. This raises the issue of whether or not the Ministry has conducted a reasonable search to determine whether or not this record is "in the custody or under the control" of the Ministry within the meaning of section 10(1) of the Act. The Ministry is not required to prove with absolute certainty that the record is not in its custody or under its control, but simply that it has conducted a reasonable search for it.

In its supplementary representations, the Ministry submits that it checked with the OPP which confirmed that it does not possess a “synopsis” of the video statement provided to the OPP by one of the witnesses. The Ministry states that “the OPP did not prepare a ‘synopsis’ of the video statement as the investigation of the case ceased shortly after the death of the [husband]. No further action was deemed necessary and no new records were created.” The appellant made no additional submissions on this issue.

In the circumstances, I am satisfied with the Ministry’s explanation, and I find that the Ministry has conducted a reasonable search for the requested synopsis.

As a result, the records at issue in this appeal consist of police general occurrence reports, supplementary reports, witness statements and witness interview reports.

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual. The general occurrence reports and supplementary reports contain statements by the OPP of facts gathered during the course of the investigation into the allegations against the appellant’s husband. The witness statements and witness interview reports contain the alleged victims’ and witnesses’ recollection of events surrounding the allegations. This information consists of descriptions of events involving the husband, the victims and the witnesses, views or opinions about these individuals, and other descriptive information about them. Therefore, I find that the records contain the personal information of the husband, the alleged victims and other witnesses. The records do not contain the appellant’s personal information.

The appellant has indicated that she does not seek the names, addresses and other identifying information relating to the alleged victims. However, given the appellant’s relationship to the alleged perpetrator and her knowledge of some of the circumstances surrounding the allegations, even if one were to remove the names, addresses and other personal identifiers from the records, it is still reasonable to conclude that the appellant could identify the alleged victims from the remaining information. Therefore, I find that all of the information in the records relating to the alleged victims, as well as the other witnesses, is “identifiable” and therefore fits within the definition of “personal information”.

Section 2(2) provides that personal information does not include information about an individual who has been dead for more than thirty years. Because the appellant’s husband has been dead for less than thirty years, the information in the records which is about him continues to qualify as his personal information.

### **RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE**

#### ***General***

Section 66(a) of the *Act* states:

Any right or power conferred on an individual by this Act may be exercised, where 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.

Under section 66(a), the appellant would be able to exercise the deceased's right to request and be granted access to the deceased's personal information if she is able to demonstrate that:

1. she is the "personal representative" of the deceased; and
2. her request for access relates to the administration of the deceased's estate.

In Order M-927, former Inquiry Officer John Higgins made the following comments about the application of the equivalent provision to section 66(a) contained in the Municipal Freedom of Information and Protection of Privacy Act, section 54(a):

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 [sections 12 through 22 of the Act].

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 [sections 12 through 22 of the Act].

### ***Personal representative***

The term "personal representative" in section 66(a) of the Act means an executor, an administrator, or an administrator with will annexed [Adams v. Ontario (Information and Privacy Commissioner) (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.), quashing Order P-1027; Orders P-294, M-919, MO-1174].

The Ministry submits that the appellant at no time in her request or otherwise indicated to the Ministry that she was making her request in her capacity as her husband's personal representative. As a result, the Ministry states that it processed her request on the basis that it was made in the appellant's personal [IPC Order PO-1654/January 22, 1999]

capacity. The Ministry further states that given the lack of information from the appellant, it is not in a position to issue a decision on the application of section 66(a) of the Act. The Ministry argues that this decision is one that must be made by the Ministry based on the information provided to it by the appellant, although it would be subject to appeal to the Commissioner. Finally, should I decide that the appellant is the personal representative of her husband under section 66(a), the Ministry requests that it be permitted to (i) process the appellant's request on behalf of her husband as a new request; (ii) review the responsive records in relation to the administration of the husband's estate; (iii) apply any necessary mandatory and discretionary exemptions to the requested records, notwithstanding any time limitations that might otherwise apply; and (iv) issue a new decision letter to the appellant in her capacity as the personal representative of her husband.

The appellant provided me with a copy of a will and codicil, with an attached copy of a certificate from a notary public. The will nominates the appellant as sole executrix of the husband's estate, and the codicil does not alter this nomination. In the circumstances, I am satisfied that the appellant meets the definition of "personal representative" in section 66(a) of the Act.

I accept the Ministry's submission that the appellant did not bring to its attention the fact that she was her husband's personal representative. However, in light of my disposition under section 66(a) below, it is not necessary for me to deal with the Ministry's submissions regarding its request to make a new decision on this issue.

***Relates to the administration of the individual's estate***

Assistant Commissioner Tom Mitchinson stated the following with respect to this provision in Order M-1075:

The rights of a personal representative under section 54(a) [of the Municipal Freedom of Information and Protection of Privacy Act] are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the *Act*, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.

In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's 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 appellant submits the following:

As the Executrix of [my husband's] estate I must ensure that all of [his] debts have been paid and monies owing to [him] have been collected in order to distribute them to all beneficiaries.

I am not aware as to whether there [were] any monetary transactions involved in the alleged offences for which [he] was charged. Therefore, the Estate, in my opinion, cannot be concluded unless I have reviewed the full documentation in the hands of the Ontario Provincial Police to confirm that [my husband] did not lend funds to third parties, owe funds to third parties, or received funds from third parties that I may have to track down.

Furthermore, while the above is the technical administration of the Estate, there is also the emotional administration of an Estate whereby the Executrix and Beneficiaries can cope and accept the loss of a person, especially under the circumstances under which [my husband] died.

I would request that the narrow interpretation of Section 66(a) and 54(a) would not be so narrow as to not include the Executrix's review to ensure that the Estate is not out-of-pocket funds or that the funds are not owing to the Estate as a result of certain transactions by the deceased with other persons prior to his passing.

The records in this case relate solely to allegations of sexual offences and subsequent criminal charges against the husband. They do not contain information relating to the husband's financial transactions. Accordingly, they are not required to wind up the husband's estate in the sense argued by the appellant. Without lessening the seriousness of the emotional impact of these events on the appellant and her family, the need to cope with and accept the loss of the deceased does not meet the requirements of section 66(a). Therefore, section 66(a) does not apply to permit the appellant to stand in the place of her deceased husband for the purpose of making a request for access to his personal information. In the circumstances, I will treat this appeal as a request by an individual for another individual's personal information under Part II of the Act.

## **INVASION OF PRIVACY**

The records in this case contain the personal information of individuals other than the appellant only. Therefore, the relevant exemption to consider is section 21, which prohibits an institution from releasing personal information relating to individuals other than the requester, unless one of the exceptions in paragraphs (a) through (f) of section 21 applies. In this case, the only exception which could apply is section 21(1)(f), which reads:

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

if the disclosure does not constitute an unjustified invasion of personal privacy.

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Sections 21(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 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(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 21(2) [Order P-1456, citing John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.)]. The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 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 21 exemption.

The Ministry submits that the presumption at section 21(3)(b) is applicable in the circumstances. That section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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.

The Ministry submits that the information was compiled and is identifiable as part of an OPP investigation into a possible violation of the Criminal Code (Canada) and that these records document the OPP's investigation into allegations of sexual assault against the appellant's husband. The Ministry states that in the course of investigating the allegations, the OPP interviewed the alleged victims and other witnesses and took statements from them, which resulted in the creation of the records at issue. On this basis, the Ministry submits that disclosure of the personal information in the records would constitute a presumed unjustified invasion under section 21(3)(b). The Ministry further submits that none of the exceptions at section 21(4) applies in this case to overcome the application of section 21(3)(b).

In my view, the content of the records, in these circumstances, supports the Ministry's position, and I find that section 21(3)(b) applies to the information found by the Ministry to be exempt. In addition, I find that section 21(4) has no application here. Finally, neither the records nor the representations of the appellant support a finding that section 23, the "public interest override", applies in this case. Therefore, section 21(1)(f) does not apply, and the information contained in the records is exempt under section 21.

I understand the appellant's desire to know more details surrounding the allegations against her husband, and realize that she will likely be disappointed that she is not entitled to access to this information under the

Act. However, in the circumstances of this appeal, I am bound by the provisions of the Act and the Divisional Court's interpretation of section 21 in the John Doe case referred to earlier in my order.

Because of the manner in which I have disposed of the issues raised by this appeal under sections 2(1) and 21, it is not necessary for me to consider the application of section 14(2)(a) of the Act.

**ORDER:**

I uphold the decision of the Police.

Original signed by: \_\_\_\_\_  
David Goodis  
Senior Adjudicator

\_\_\_\_\_ January 22, 1999