



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

ORDER MO-1271

Appeal MA-990141-1

Hamilton-Wentworth Regional Police Services Board



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NATURE OF THE APPEAL:

The Hamilton-Wentworth Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to all information and reports which exist in relation to the death of the requester's daughter, including reports and information relating to items alleged to have been taken from the deceased or her residence by three named individuals.

The responsive records identified by the Police total 25 pages, and consist of a "Sudden/Violent Death Report", "Occurrence and Supplementary Reports", a "Supplementary Property Description", a "Property Tag", a "Report of the Centre for Forensic Sciences", an "appraisal" and a computer print-out. The Police denied access to these records in their entirety pursuant to sections 8(1)(a), (b) and (f), 8(2)(a) and 14(3)(b) of the Act.

The requester (now the appellant) appealed the decision of the Police. The appellant also maintained that he should be entitled to utilize section 54(a) of the Act (personal representative), because he has been appointed as estate trustee and requires the information for the administration of his daughter's estate.

During mediation, an issue arose as to whether additional responsive records exist, in particular police officers' notebook entries. This issue was not resolved by the end of mediation.

I sent a Notice of Inquiry to the appellant and the Police. Because some records appeared to contain the personal information of the appellant, and also because of the possible application of section 54(a), I added sections 38(a) and (b) of the Act to the scope of this inquiry. I also included an issue relating to the adequacy of search for responsive records.

Along with their representations, the Police provided a copy of the police officers' notebook entries covering the time frame of the appellant's request, claiming exemption for these records on the same basis as other responsive records. Consequently, the "reasonable search" issue has been resolved.

Attached to the appellant's representations was a copy of the "Report of the Centre for Forensic Sciences" referred to above. I will assume that the appellant is no longer interested in pursuing access to this record which he already has, and I have removed it from the scope of this inquiry.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual.

As stated earlier, the records remaining at issue in this appeal all pertain to the investigation into the death of the appellant's daughter. As such, I find that they all contain the personal information of the deceased. Some individual records also include witness statements and personal identifiers of witnesses interviewed by the Police, such as names, addresses, telephone numbers and dates of birth, and I find that these records contain the personal information of the witnesses as well as the deceased. Some of the records contain

information which identifies the appellant as the deceased's next of kin as well as information about the appellant, such as the information he provided to the Police. I find that these records contain the appellant's personal information as well as that of his deceased daughter and, in some instances, other identifiable individuals.

Section 2(2) provides that personal information does not include information about an individual who has been dead for more than 30 years. Because the deceased died in 1998, section 2(2) has no application in this case.

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Under section 54(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 he is able to:

1. demonstrate that he is the "personal representative" of the deceased; and
2. demonstrate that his request for access "relates to the administration of the deceased's estate".

Personal Representative

In Order M-919, former Adjudicator 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.

...

... 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 agree with this analysis. The appellant has provided a copy of the Certificate of Appointment of Estate Trustee Without a Will which appoints him as the “Estate Trustee” for his daughter’s estate. In my view, this appointment is comparable at law to the positions listed under the definition of “personal information” in the statutes referred to by the Court in Adams, and I find that the appellant has established that he is the “personal representative” of his daughter’s estate, for the purposes of section 54(a). (See also Order MO-1196).

Relates to the Administration of the Individual’s Estate

In Order M-1075, I made the following statements about the second requirement of section 54(a):

The rights of a personal representative under section 54(a) 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 states that:

... [I]n order to complete the proper administration of [the deceased’s] Estate it will be necessary to litigate with the insurance company with regard to the theft of her valuables, it will probably be necessary to litigate with [three identified individuals] over the possible wrongful or negligent death of [the deceased] and the return of goods taken and it may be necessary to seek damages on behalf of the Estate against the police ...

On the issue of litigation for wrongful death or seeking damages against the Police, my findings in Order MO-1256 are relevant and applicable here. In that order, I stated:

Although I accept the appellant’s position that she is seeking access to the records in order to determine whether there is any cause for a civil action, I am not satisfied that this purpose relates to the administration of the estate of the deceased in the sense contemplated by section 54(a). Any damages recovered by family members as a result of a derivative action such as the one being considered by the appellant in the present appeal, go to individual

family members, not to the estate (Adams v. Ontario (Information and Privacy Commissioner) (1996), 136 D.L.R. (4th) 12 (Div. Ct.)).

In addition, section 38(1) of the Trustee Act sets out the rights of personal representatives to maintain actions for all torts or injuries on behalf of a deceased person, but states that:

... if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life ...

(See also Order M-400)

On the issue of litigation with the insurance company, the appellant provides evidence indicating that insurance coverage for the theft of valuables of the deceased was denied on the basis that she and a named individual were living in a common-law relationship and thus “the theft, if such occurred, was a result of the “insured” under the policy and no payment [was] required.” The appellant submits:

... since ... [the named individual] made similar comments and this had an impact on no charges being laid for theft, it is clear that the issue of whether [the deceased] and [the named individual] were in a common-law relationship is key to any legal action against the insurance company and is also highly relevant to any action against [the named individual] for the theft, value or return of the items taken from [the deceased’s] home.

The Police submit that the appellant has not provided any proof of the nature required to establish his right to access under section 54(a) and state:

Furthermore ... rights under s. 54(a) are limited to those required for the administration of the deceased’s estate. It is our position that the reasons for this request ... do not fall within the narrow ambit of estate administration. Rather, the records are apparently sought for the purpose of precipitating civil action.

The records relate exclusively to the investigation by the Police into the circumstances surrounding the death of the appellant’s daughter and the alleged theft of various items from her residence. The only reference to “finances” contained in the records is information provided by the appellant, specifically his estimate of the value of items allegedly stolen from the deceased’s home.

Based on the representations and my independent review of the records, I am unable to conclude that records pertaining to the circumstances surrounding the death of the appellant’s daughter relate to the administration of her estate, as required by section 54(a). In my view, the appellant has not demonstrated any need for the information contained in these records in order to discharge his responsibilities as Estate Trustee, nor are any of them relevant to this purpose in any event. Any gains realized from a successful lawsuit commenced by the appellant on behalf of the deceased would accrue to beneficiaries, not to the estate.

For these reasons, I find that the second requirement of section 54(a) has not been established for the records pertaining to the circumstances surrounding the death of the appellant's daughter, and I am precluded from allowing the appellant to stand in the place of his deceased daughter for the purpose of making a request for access to those records containing this type of information.

As far as any action involving the insurance company is concerned, although the Police may not lay criminal charges in response to the appellant's allegations of theft, the appellant is not precluded from initiating a private prosecution or civil proceeding if there are grounds to do so. Because some of the records relate to the Police investigation of the deceased's financial situation and a potential unlawful removal of property, it is reasonable to conclude that the type of information contained in these records would be relevant to the administration of the estate (see also Order MO-1241).

In my view, the appellant has provided sufficient evidence to establish that he requires the information contained in the records pertaining to the alleged theft of various items from his deceased daughter's residence to make an informed decision about matters relating to the administration of her estate. I find that the second requirement of section 54(a) has been established by the appellant for these particular records.

Therefore, I find that the appellant, in his capacity as Estate Trustee, has a right of access under section 36(1) of the Act to the personal information of the deceased which is contained in the records pertaining to the alleged theft of various items from her, subject to any exemption claims established by the Police under section 38.

INVASION OF PRIVACY

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and another individual, and the Police determine that the disclosure of the information would constitute an unjustified invasion of the other individual's personal privacy, the Police have discretion to deny the appellant access to that information. However, where a record contains only the personal information of individuals other than the appellant, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 14(1) of the Act prohibits an institution from releasing this information.

In both of these situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure 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 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 section 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 14(3) apply, the Police must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case. The appellant submits that sections 14(2)(d), (e) and (i) are all relevant considerations in determining that disclosure of the records would not be an unjustified invasion of personal privacy, and that the presumption under section 14(3)(b) does not apply.

The Police submit that the following factors and presumptions apply: sections 14(2)(e), (f), (g), (h) and (i), and 14(3)(b). I will begin with the presumption in section 14(3)(b).

Section 14(3)(b) provides that:

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, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Police state that all of the information was recorded as a result of an investigation into the circumstances of the death of the appellant's daughter and the allegations of the theft of some of her property. The Police submit that this was an investigation into a possible violation of law (in this case the Criminal Code of Canada), specifically whether there was any criminal activity involved in the death and the missing property. I agree, and find that the presumption in section 14(3)(b) applies.

None of the personal information contained in the records falls under section 14(4), and the appellant has not raised the possible application of section 16 of the Act.

Accordingly, I find that the records pertaining to the circumstances of the death of the appellant's daughter qualify for exemption from disclosure under section 14(1) for those records which do not contain the personal information of the appellant, and under section 38(b) for those records which contain the personal information of the appellant and other individuals, including his daughter. As far as records pertaining to the alleged theft are concerned, all of them contain the personal information of the deceased's daughter and one or more individuals in addition to the appellant, and I find they all qualify for exemption under section 38(b) of the Act.

Because of the manner in which I have disposed of the issues in this appeal, it is not necessary for me to consider the possible application of sections 8(1)(a), (b) and (f), 8(2)(a) and 38(a) of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

February 3, 2000

POSTSCRIPT

In the Report of Mediator provided to the parties at the end of mediation, one outstanding issue identified by the Mediator was:

Whether the Police are obliged to identify officers' notebooks as responsive to a request when the Police claim the investigation is on-going and provide copies to the Office of the Information and Privacy Commissioner/Ontario as part of the records at issue in the appeal

As stated above, the Police did in fact identify these records and provided them to this Office in response to the Notice of Inquiry. However, for the purpose of future appeals, I want to make it clear to the Police that the answer to this question is "yes". With few exceptions, this Office requires all responsive records in order to properly assess the application of exemption claims and to adjudicate issues which have not been resolved through mediation. Since the inception of the Act in 1991, Police Services have routinely provided police officers' notebook entries to this office along with other responsive records, regardless of whether sections 8(1)(a) and/or (b) are being relied on as grounds for denying access.

I would encourage the Police to co-operate in future by responding promptly to requests by this Office for records, including copies of police officers' notebook entries, whenever they have been identified as records required for review by this Office during the course of an appeal under the Act.

I would also take this one step further. At the request stage, even if the Police are considering the possible application of sections 8(1)(a) and/or (b) as the basis for denying access, all responsive records should be gathered and reviewed before making a decision, including police officers' notebook entries. As Adjudicator Holly Big Canoe pointed out in Order MO-1252, which also involved the Hamilton-Wentworth Police Service, the criminal law enforcement investigation and prosecution process and the request process under the Act can and do operate concurrently. Sections 8(1)(a) and (b) are discretionary exemptions available to institutions, dependent on the particular circumstances of a request, and upon review and assessment of the impact of disclosure in a particular context. Reviewing responsive records is an integral part of this process.

In finding that the searches undertaken by the Police were not adequate, Adjudicator Big Canoe made the following comments in Order MO-1252:

Based on the evidence provided to me by the Police it is clear that the search by the Police was neither reasonable nor thorough. In fact, it would appear that the position of the Police is that as long as a matter is before the Courts there is no need to search for any records beyond that of the original occurrence reports. This is particularly distressing given the apparent time sensitive nature of a request for [a particular type of] information.

This, in my view, is unacceptable and contrary to the provisions and intent of the Act. In addition, it is also not acceptable for the Police to provide a response to some of the aspects of the appellant's request in their representations ... that should have been included, but were not, in their access decision.

The prompt and comprehensive identification of responsive records is integral to the effective operation of any freedom of information scheme. As long as the Police discharge their responsibilities properly at the request stage, all responsive records would be in the possession of the Freedom of Information and Privacy Co-ordinator, and readily available for transfer to this Office if and when an appeal is initiated.