



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

ORDER MO-1301

Appeal MA-990258-1

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 all documentation related to Incident Number 97-016381-0, which concerned an investigation of an alleged fraud involving the property of an elderly woman who is now deceased. The appellant is the Estate Trustee of the deceased individual.

The Police denied access to the requested information under sections 8(2)(a) and (c) (law enforcement) and 14(1) (invasion of privacy) of the Act. The Police advised the appellant that in order to exercise rights under section 54 of the Act, court documents must be produced which state the legal status of the administrator or executor, and that access to the information was sought in order to administer the estate. The Police also indicated to the appellant that should the record be required for civil litigation, the appellant could “motion the records”, failing which they could be summonsed to court.

The appellant appealed the decision of the Police.

This office provided a Notice of Inquiry to the appellant initially. The appellant submitted representations which were then shared in their entirety with the Police, along with a modified version of the original Notice of Inquiry. Similarly, the representations of the Police were shared, in part, with the appellant, who then made additional reply representations.

The records at issue in this appeal consist of the occurrence report prepared following the fraud investigation, as well as the notes taken by the investigating officer and the contents of the investigation file, which were located by the Police at the Inquiry stage of the appeal.

DISCUSSION:

PERSONAL REPRESENTATIVE UNDER SECTION 54(a)

The appellant is able to exercise the deceased’s right to request and be granted access to the deceased’s personal information if he can demonstrate: (1) that he is the deceased’s “personal representative” and (2) that his request for access to the information “relates to the administration of the deceased’s estate”.

The term “personal representative” in section 54(a) of the Act means an executor, an administrator, or an administrator with will annexed (Order P-294). The phrase “relates to the administration of the individual’s estate” in section 54(a) refers to records relating to financial matters to which the personal representative requires access in order to wind up the estate. (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 appellant has provided a Certificate of Appointment of Estate Trustee With a Will and a copy of the deceased person’s will, appointing the appellant as the Executor of her estate. The appellant asserts that as the Executor of the estate, he is entitled to exercise the same right to access information which relates to the administration of the estate that the deceased would have enjoyed.

I am satisfied that the appellant, in his capacity as the Executor of the estate, qualifies as the deceased's personal representative within the meaning of section 54(a).

The appellant submits that as the personal representative of the deceased, he is responsible for the administration and distribution of the estate's assets. Part of this responsibility entails investigating the true size of the estate and determining whether assets have been misappropriated. The appellant argues that he is, accordingly, required to determine whether monies which passed from the deceased to another individual prior to her death are properly an asset of the estate.

In Order MO-1241, Adjudicator Holly Big Canoe examined a similar situation in which allegations of fraud were made by a deceased's personal representative and a Police investigation ensued. She found that:

Although the Police did 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 the records relate to the Police investigation of the deceased's financial situation and a potential unlawful removal of money, it is reasonable to conclude that the type of information contained in the records would be relevant to the administration of the estate.

In my view, the appellant has provided sufficient evidence to establish that she requires the requested information to make an informed decision about matters relating to the administration of the estate. I find that the second requirement of section 54(a) has been established by the appellant.

In the present appeal, the Police also investigated allegations of fraud or theft of the deceased's property. Similarly, the records in this appeal relate directly to the financial situation of the deceased person and the possible misappropriation of her assets. I conclude, as did Adjudicator Big Canoe, that it is reasonable that the type of information contained in these records would be relevant to the administration of the estate by the appellant. Accordingly, I find that the second requirement of section 54(a) has been established by the appellant.

By making this finding, the appellant is able to "step into the shoes" of the deceased person and exercise the same rights of access to the information sought under section 36(1) of the Act which the deceased person had prior to her death, subject to any exemption claims established by the Police under section 38.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, as recorded information about an identifiable individual and includes, under paragraph (b), information relating to financial transactions in which the individual has been involved.

The information at issue consists of the police officer's notes of interviews with various individuals, information gathered by the investigating officer from the employer of the individual suspected of having committed the fraud and the concluding occurrence report by the officer.

I find that all of the records contain the personal information of the deceased, various individuals who provided information to the investigating officer and the appellant. The records contain detailed information about the financial transactions involving the deceased person in the last months of her life. They also contain the personal information of the suspect individual, including her name, address, date of birth, address and phone number. Information relating to this individual's financial transactions are also described in detail.

The records also contain the personal information of the appellant, including his name, address, telephone number, occupation and his status with respect to the deceased's estate.

INVASION OF PRIVACY

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by an institution. 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 other individuals, and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

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. Section 14(4) refers to certain types of information whose disclosure does not 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 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Police argue that the presumption in section 14(3)(b) applies. This section states:

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;

I am satisfied that all of the records at issue in this appeal were created as part of a police investigation into the circumstances surrounding allegations of fraud, with a view to determining whether criminal charges should be laid against any individual under the Criminal Code. I find that the personal information in these

records was compiled and is identifiable as part of an investigation into a possible violation of law. Thus its disclosure would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b). This presumption applies, even if, as in the present case, no charges were ultimately laid (Orders P-223, P-237 and P-1225).

I also find that none of the circumstances outlined in section 14(4) which rebut the section 14(3)(b) presumption are present in this appeal. Section 37(2) and/or section 4(2) of the Act require disclosure of as much of the record as can reasonably be severed without disclosing information that falls under one of the exemptions. In my view, the personal information of the deceased and the appellant are so intertwined with that of the other individuals mentioned therein, particularly the suspect in the fraud investigation, that they cannot reasonably be severed without disclosing information which qualifies for exemption under section 38(b).

Accordingly, I find that the disclosure of the information contained in the records would constitute an unjustified invasion of the personal privacy of individuals other than the deceased and the appellant under section 38(b) of the Act.

Because of the manner in which I have addressed the application of section 38(b) to the records, it is not necessary for me to apply the exemptions in sections 8(2)(a) and (c) or section 38(a) to them.

ORDER:

I uphold the decision of the Police to deny access to the requested records.

Original signed by: _____

Donald Hale
Adjudicator

_____ May 9, 2000