



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

ORDER MO-1256

Appeal MA-990133-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) from a lawyer representing the wife of a deceased individual who was the victim of a fatal subway accident. The request was for access to “all correspondence, reports, police notes, field notes, pictures, memoranda, applications and any other documentary information regardless of physical form or characteristic that pertains to the [fatality].”

The responsive records identified by the Police are 49 pages in length and consists of a “Homicide and Sudden Death Report”, a computer generated “Occurrence Report”, an “Event Details Report” and police officers’ notebooks. Prior to issuing their decision, the Police wrote to the requester with the following information and request:

Under the *Act*, the right to privacy of personal information is protected unless the individual has been deceased for more than thirty years. However, the *Act* also recognizes that the executor or administrator of a deceased person’s estate may require additional personal information. The *Act* provides in section 54(a) that “*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 estate*”.

In light of the foregoing, please forward to this office photocopies of the documents certifying your client’s position as executrix **and** the relevance of the requested information to the administration of the estate of the [deceased].

In response, the requester provided the Police with the “Consent and Authorization” signed by the deceased’s wife and stated that she was entitled to exercise the same right of access to the records as the deceased pursuant to section 54(a) of the Act because she was contemplating commencing a lawsuit and required the information in order to assess the potential evidence and information arising from the accident.

The Police then issued their decision to the requester, stating that section 54(a) did not apply in the circumstances because the records “are relevant to causes of action which the estate intends to initiate rather than the extent to which the information is necessary to wind up the estate”. The Police granted access in full to five pages, partial access to 36 pages and denied access in full to the remaining eight pages. For those pages to which access was denied in whole or in part, the Police claimed exemption pursuant to section 14(1)(f) of the Act. In so deciding, the Police relied on the “presumed unjustified invasion of personal privacy” in section 14(3)(b) of the Act and the factor listed under section 14(2)(g) of the Act. The Police also claimed that information severed from 22 pages was not responsive to the request.

The requester (now the appellant) appealed the decision of the Police, and claimed that the deceased’s wife meets the criteria set out in section 54(a) of the Act. The appellant also claimed that there is a compelling public interest in the disclosure of the records pursuant to section 16 of the Act.

During mediation, the appellant agreed not to pursue access to the information that the Police claimed was not responsive to the request. This was the only type of information severed from nine pages (Page 17 –

“Event Detail Report” and Pages 22, 30, 31, 35, 37, 38, 48 and 49 - police officers’ notes), so these pages are no longer at issue in this appeal. Also during mediation, one of the witnesses identified in the records advised the Mediator that she consented to disclosure of information relating to her. However, the Police maintained their position that access should be denied to this information pursuant to section 14(1) of the Act.

The Police also conducted a further search for responsive records, including photographs. As a result, the Police located an additional three pages of records: a “Property Report”, an “Internal Transfer of Property”, and an additional page of handwritten notes. The Police denied access to these records pursuant to section 14(1) of the Act, and they have been included within the scope of this appeal. The Police also confirmed that photographs were taken at the accident scene, but were never developed.

A Notice of Inquiry was sent to the Police and the appellant. As stated above, one of the issues in this appeal is whether the deceased’s wife meets the criteria set out in section 54(a) of the Act. Accordingly, section 38(b) of the Act may be relevant to the circumstances of this appeal and, therefore, was added to the scope of this inquiry. Representations were received from both parties.

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 all pertain to the investigation into the death of the appellant’s husband. As such, I find that the records in their entirety contain the personal information of the deceased. Certain pages include witness statements and personal identifiers of the witnesses, such as their names, addresses, telephone numbers and dates of birth, and I find that these portions also contain the personal information of these individuals. The records do not contain any of the appellant’s personal information.

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 1999, 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 she is able to:

1. demonstrate that she is the "personal representative" of the deceased; and
2. demonstrate that her 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".

Therefore, in order for the appellant to establish that she is her husband's personal representative for the purposes of section 54(a), she must provide evidence of her authority to deal with the estate of her deceased husband. As set out in the Notice of Inquiry, the production by the appellant of letters probate, letters of administration or ancillary letters probate under the seal of the proper court are required.

In her representations, the appellant again states that she is the executrix of the estate of her deceased husband. However, she provides none of the requisite documentation set out in the Notice of Inquiry.

The Police state that after receiving the request, they asked the appellant's lawyer for the required documentation but received only the "Consent and Authorization" from the appellant which enabled her lawyer to act on her behalf in discussions with the Police concerning the circumstances of her husband's death. The Police state that the appellant provided no evidence to establish that she was the executrix of the estate.

In the absence of the evidence required to establish that the appellant is her husband's personal
[IPC Order MO-1256/December 3, 1999]

representative, I find that the first requirement under section 54(a) has not been met.

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 she requires the information contained in the records in order to assess the potential evidence and information arising therefrom which would support a lawsuit of the estate. The appellant adds:

... the Appellant is contemplating bringing a suit and therefore attempting to make the proper and informed decision as an executrix i.e. does the estate commence litigation based on information about the incident?.

The Police submit that such a claim, although understandable on a compassionate level, falls clearly outside the intended purpose of the Act.

The records in this case relate exclusively to the police investigation into the circumstances surrounding the death of the appellant's husband. None of the records contain information relating to the deceased's finances or financial transactions. In addition, the appellant does not require access to the records in order to defend a claim being made against the estate (Order M-919) or to exert a right to financial entitlements being denied to the estate (Order M-943). 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.)).

Therefore, section 54(a) does not apply, and I am precluded from allowing 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 I of the Act.

INVASION OF PRIVACY

Where a requester seeks personal information of other individuals, 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.

As noted above, one of the witnesses has consented to the disclosure of her personal information to the appellant. However, because the personal information of the witness is intertwined with the personal information of the deceased, the records containing the witnesses's personal information must be considered under section 14(1)(f) (Order MO-1244).

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 institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which 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 section 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the Act or if 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.

In this case, the only exception to the section 14(1) exemption which could apply is section 14(1)(f). The Police have cited the presumption of an unjustified invasion of privacy at section 14(3)(b) to support its position that section 14(1)(f) does not apply. Those sections read:

- (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
 - (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
 - (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;

The appellant submits:

The Police rely on s. 14(3)(b) of the Act. This provision ought to be interpreted in such a way as to not permit the police to merely ‘hide’ behind the provision or rely upon it without looking at matters on a case by case basis. Was the information compiled as part of an investigation into a possible violation of the law or was it compiled because the Police are required to do so and it was primarily for records keeping and for the coroner? Is there any information that would lead the Information and Privacy Commissioner (“IPC”) to conclude that the Police while compiling the records believed that there was a possible violation of law?

The appellant further submits that disclosure of the records is relevant to a fair determination of her rights under section 14(2)(d) and would provide some sense of closure for her and promote the healing process.

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 husband. The Police submit:

The focus of a law enforcement investigation in the instance of a sudden death is twofold: to endeavour to establish the factual cause of the event, and further, to endeavour to rule out any other possible causes (i.e. foul play). Although a decision with respect to the cause of death lies with the Coroner, the police investigation plays a key role in the determination.

The Police further submit, in accordance with past precedent, the fact that no criminal proceedings were commenced by the Police does not negate the applicability of section 14(3)(b). This section only requires that there be an investigation into a possible violation of law. The Police refer to Orders M-198 and P-237 in support of their position.

In Order MO-1192, Adjudicator Laurel Cropley stated, in the context of a request for police records concerning an alleged assault:

The appellant submits that since the Police made a judgment call not to lay charges against the suspect, they have not established the application of the presumption in section 14(3)(b).

I am satisfied that the Police investigated an alleged assault on the appellant at the named high school and that the investigation was conducted with a view to determining whether criminal charges were warranted. Accordingly, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225). As I indicated above, once a determination has been made that the presumption in section 14(3)(b) applies, it cannot be rebutted by factors in section 14(2). Therefore, even if I were to find that section 14(2)(d) applies in the circumstances, it would not be sufficient to rebut the presumption in section 14(3)(b). I

have considered section 14(4) and find that it does not apply in the circumstances of this appeal.

In my view, the principles articulated by Adjudicator Cropley in Order MO-1192, and in other previous orders such as those referred to by the Police, are also applicable in the circumstances of this case. The information contained in the records was clearly compiled and is identifiable as part of an investigation into a possible violation of law; specifically the Criminal Code. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies to the requested information. Because none of the exceptions under section 14(4) applies, the information is exempt under section 14(1). In the circumstances, it is not necessary for me to consider the application of any of the factors weighing either for or against disclosure under section 14(2).

The appellant identifies a local transit authority as one body she is contemplating suing. She also states that others may be sued, although she does not specify any particular individual. A law suit against the transit authority can be initiated by the appellant without having access to the records at issue in this appeal. As far as other individuals are concerned, if the identity of these individuals is at issue, the appellant has alternative methods of gaining access to the information required for the purpose of commencing a civil action against the individual. Adjudicator Laurel Cropley in her Order M-1146 made the following comments which the appellant may find useful:

I will now consider the extent to which the dog owner's address may be available by other means. First, with regard to the court, I have reviewed the relevant provisions of the Rules of Civil Procedure. I have also taken into account court practices of the Ontario Court (General Division) with respect to the commencement of civil actions.

The appellant could commence an action against the dog owner by way of a statement of claim under rules 14.03 and 14.07, even in the absence of a defendant's address. While form 14A of the Rules of Civil Procedure indicates that a plaintiff should include the name and address of each defendant in the statement of claim, in practice, the registrar will issue a statement of claim without a defendant's address, or with an "address unknown" notation ...

Once the claim is issued, the appellant, as plaintiff, could bring a motion under rule [30.10] for the production of the record in question from the Health Unit, in order to obtain the address ...

These principles could apply where the name as well as the address of the potential defendant is unknown, by use of a pseudonym such as "John Doe" [see Randeno v. Standevan (1987), 61 O.R. (2d) 726 (H.C.), and Hogan v. Great Central Publishing Ltd. (1994), 16 O.R. (3d) 808 (Gen. Div.)].

COMPELLING PUBLIC INTEREST

Section 16 of the Act states:

[IPC Order MO-1256/December 3, 1999]

An exemption from disclosure of a record under sections 7, 9, 10, 11, 23 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

The appellant points to the factors he raised under section 14(2) as the basis for his position that there is a compelling public interest in disclosure. In particular, she submits:

It goes without saying that a spouse's access to the information of the deceased would provide some sense of closure and promote the healing process and therefore the health of the individual. Is the policy and purpose of the legislation to deny information to the surviving spouse about the details of the incident? Could one imagine saying this to surviving spouses of the recent Air Egypt airplane crash or the parents of children killed in a school bus accident? Canada should pride itself on its privacy protections but something has surely gone wrong when a surviving spouse cannot obtain information about the death of her spouse, let alone prohibiting access to other immediate family members who are trying to recover from such a devastating loss. If the evidence leads to suicide, then perhaps the family members would seek the appropriate counselling or learn to accept that conclusion if all of the information leads to that conclusion.

All citizens in the position of the Appellant should have the right to access such information under these kinds of circumstances. The disclosure promotes psychological and spiritual health in a family's attempt to find a peaceful and meaningful resolution to a traumatic event.

The Police submit that:

... the private interests of [the appellant] both in the circumstances of [the husband's] death, and in the possible pursuit of a civil action, constitute private - no public - interests. Such interests cannot be allowed to override the personal privacy of someone no longer able to speak in protection of his own rights.

Without lessening the seriousness of the emotional impact that her husband's death may have had on the appellant, in my view, the purposes behind the appellant's request for access are to assist her in dealing with the emotional trauma of her husband's death and to help her decide whether to commence a civil action, both of which are essentially private rather than public interests. Based on my review of the records, and having considered the representations provided by the appellant and all other related circumstances in this appeal, I am not persuaded that there is a compelling **public** interest in disclosure of the records, nor that

any public interest that may be present is sufficient to outweigh the purpose of the mandatory personal information exemption claim.

Therefore, I find that the requirements of section 16 are not present in this appeal.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

December 3, 1999