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

ORDER MO-1260

Appeal MA-990244-1

Peel Regional Police Services Board

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NATURE OF THE APPEAL:

The requester is a solicitor representing both the estate of an individual who was killed in a motor vehicle accident and the family of the deceased as defined in section 61 of the Family Law Act. He made a request in both capacities to the Peel Regional Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the final technical collision report relating to the accident.

The Police denied access to the requested record pursuant to sections 8(1)(a) (law enforcement) and 14(1)(f) (invasion of privacy) in conjunction with section 14(3)(b) (compiled as part of a law enforcement investigation) of the Act. In doing so, the Police provided the solicitor with a copy of Order M-976 and indicated that they were relying on the findings in this order as it relates to an "accident report".

The solicitor appealed the denial of access indicating that he had instructions from the family to commence legal proceedings on behalf of the family and the estate. In this regard, the solicitor has raised the application of sections 54(a) (access by personal representative) and 14(2)(d) (fair determination of rights) of the Act.

During mediation, it was clarified that the record at issue is not a "technical" report but is, rather, a "Motor Vehicle Collision" report. Also during mediation, the solicitor indicated that he is prepared to accept this record with the personal information of any "secondary witnesses" blanked out.

During mediation, the Mediator provided the solicitor with Order MO-1224, which dealt with the effective result of the application of a presumption under section 14(3) of the Act as well as the distinction between access under the Act and through other alternate means, and Reconsideration Order R-980036, which ruled on the application of the presumption in section 21(3)(b) of the provincial Act (which is identical to section 14(3)(b) of the municipal Act) to "technical accident investigation reports".

I initiated the inquiry by sending a Notice of Inquiry to the solicitor on behalf of the appellants. For the purpose of determining all of the issues in this appeal, the "appellants" shall include the solicitor as representative of the estate of the deceased as well as the living family members he represents.

In addition to the exemptions in sections 8 and 14, sections 38(a) and (b), and 54(a) of the Act may be relevant to the circumstances of this appeal. Therefore, this Notice sought the appellants' representations in relation to these issues.

The appellants' solicitor wrote to this office on November 12, 1999 indicating that he would not be submitting representations in this matter. Rather he wished to rely on previous correspondence sent to this office during mediation. As a result, I have decided the outcome of this appeal based only on the records and the material received prior to the inquiry.

RECORD:

The record at issue is a one-page document entitled "Motor Vehicle Accident Report" completed by the officer who attended at the scene of the accident.

PRELIMINARY MATTER:

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

During his discussions with the Mediator, the appellants' counsel indicated that he believes his clients' rights under the Canadian Charter of Rights and Freedoms (the Charter) have been infringed by the denial of access to this record. He indicated further that he intends to bring an application before the court seeking to strike down certain provisions of the Act in the event that the Commissioner's office upholds the denial of access.

It was not clear to me whether the appellants' counsel wished to make these arguments before the Commissioner. Therefore, I notified him in the Notice that if he did wish to pursue this argument, it would appear that section 109(1)1 of the Courts of Justice Act (the CJA) requires that a notice of constitutional question be served on the Attorney General of Canada and the Attorney General of Ontario. If the required notice is not given, section 109(2) states that the relevant Act "shall not be adjudged to be invalid or inapplicable". I included the following requirement in the Notice:

> Should you wish to pursue your position on the constitutional inapplicability of the Act at this level, you should comply with the requirements for a notice of constitutional question set out in section 109 of the CJA or satisfy me that these requirements are not applicable in the circumstances of this appeal. If you do decide to issue a notice of constitutional question, I would ask that you provide a copy to this office and to the Police.
>
> Please advise me of your intention and/or compliance in this respect no later than **November 10, 1999**. If I do not receive confirmation of your intention or compliance by that date, I will proceed with my inquiry into this appeal which will not address your constitutional argument.

In his November 12, 1999 letter, the appellants' counsel indicated that he does not wish to make any arguments before the Commissioner on this issue but will await my decision and then seek instructions whether to proceed with his Charter claim before the courts. Consequently, I will not consider the appellants' constitutional argument in this order. I note, however, that the vast majority of the correspondence and documentation which the appellants' counsel sent to this office during mediation relates to his impending Charter challenge of certain provisions of the Act as opposed to the application of the exemptions claimed by the Police or otherwise raised in the Notice of Inquiry.

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, to include recorded information about an identifiable individual. Section 2(2) provides that personal information does not include information about an individual who has been dead for more than 30 years. Since the deceased died this year, section 2(2) does not apply in the circumstances of this case.

The record contains personal background information of the two drivers involved in a motor vehicle accident such as name, address, date of birth, drivers licence and insurance information, plus a brief description of the accident. I find that the record contains the personal information of both the deceased driver and the driver of the other vehicle. The record does not contain personal information of any other identifiable individual.

Based on the facts of this case, I will consider whether, under section 54(a) of the Act, the appellants are entitled to exercise the same right of access to the personal information contained in the records as the deceased.

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Under section 54(a), the appellants' counsel 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 or any other of the individual appellants 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

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*, s.1, the *Trustee Act*, s.1; and in the *Succession Law Reform Act*, s.1:
>
> > 1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.

In Order M-919, former Adjudicator Anita Fineberg reviewed the law with respect to section 54(a) and concluded:

> ... 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 any of the individual appellants, including their counsel, to establish that they are the deceased's personal representative for the purposes of section 54(a), he or she must provide evidence of his or her authority to deal with the estate of the deceased. In order to establish his or her authority to deal with the estate, the production by the appellants of letters probate, letters of administration or ancillary letters probate under the seal of the proper court is required (Orders M-205 and P-294).

In responding to the Mediator's Report which was sent to the appellants prior to the issuance of the Notice of Inquiry, counsel for the appellant states:

> ... that I act not only on behalf of the Estate but also on behalf of the family members who are defined under Section 61 of the Family Law Act, and thereunder qualified to bring wrongful death proceedings and to seek damages in connection with the death of the [deceased].

However, the appellants' counsel provides none of the requisite documentation referred to above. In the absence of the evidence required to establish that any of the individual appellants is the deceased's personal representative, I find that the first requirement under section 54(a) has not been met. However, even if I were to find that one of the appellants is the deceased's personal representative, in my view, the section 54(a) claim fails under the second requirement.

Relates to the Administration of the Individual's Estate

In Order M-1075, Assistant Commissioner Tom Mitchinson 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 appellants' counsel indicates that he requires the information contained in the record in order to commence a "wrongful death" lawsuit on behalf of the estate and the deceased's family.

The record in this case relates exclusively to the police investigation into the circumstances surrounding the accident which resulted in the death of the deceased. In similar circumstances, Assistant Commissioner Mitchinson found in Order MO-1256:

> 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.)).

I agree with these conclusions and find that they apply in the circumstances of this appeal and the second part of the test is not satisfied. Therefore, section 54(a) does not apply, and the appellants cannot stand in the place of the deceased 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, section 14(1) of the Act prohibits an institution from disclosing this information unless disclosure would not constitute an unjustified invasion of the personal privacy of these individuals.

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 their 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;

As I indicated above, the appellants' counsel claims that one of the reasons he requires access to the records is to commence proceedings on behalf of the deceased's estate and on behalf of the family under the provision of the Family Law Act. In so claiming, the appellant's counsel relies on section 14(2)(d) in that disclosure of the records is relevant to a fair determination of the rights of the estate and the family.

The record was prepared by a police officer who attended at the scene of a fatal motor vehicle accident. As part of his investigation into the accident the police officer recorded information regarding the drivers involved and the circumstances under which the accident occurred.

Many previous orders of this office have considered the application of the presumption in section 14(3)(b) to information collected by various law enforcement agencies in similar situations and have found that the presumption applies to the personal information found in a variety of documents, including "accident reports" (see for example: Orders PO-1692, PO-1665, M-927, P-1044 and Reconsideration Order R-980036). These orders recognize that investigations into motor vehicle accidents often require the collection of large amounts of personal information in order to come to specific conclusions as to whether there have been any violations of law under the Criminal Code or the Highway Traffic Act (PO-1692).

In my view, the reasoning and application of the presumption in these previous orders is similarly applicable in the present appeal. Therefore, I find that the personal information in the record 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 privacy under section 14(3)(b). As I indicated above, once a finding is made that a presumption applies to the personal information in the record, the factors in section 14(2) cannot be used to rebut the presumption.

I find that section 14(4) does not apply to the information in the record and the appellant has not raised the public interest override in section 16. Despite this, I have considered whether the appellant's correspondence with this office provides any information as to the application of section 16. In my view, based on the material before me, the appellant's interest in this matter is primarily private rather than public, and section 16 does not apply.
Accordingly, I find that disclosure of the personal information in the record would constitute a presumed unjustified invasion of personal privacy and it is exempt under section 14(1) of the Act.

Severance

In Order PO-1727, Senior Adjudicator David Goodis made the following comments regarding the issue of severance under section 10(2) of the provincial Act (the equivalent to section 4(2) of the Act):

> Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. In Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner) (1997), 102 O.A.C. 71, the Divisional Court stated:
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> > I would note, however, that while the Commissioner has taken an excessively aggressive approach with respect to s. 10(2), the Ministry's position that 49 of the 50 documents were subject to Cabinet privilege and that s. 10(2) has no application whatsoever to the records at issue plainly went too far. The Act requires the institution head to disclose what can be severed and it is contemplated that the severance exercise will be conducted by those most familiar with the records. Had the Ministrymade an effort to disclose what is severable, it is possible that the request could have been dealt with much more efficiently and much more expeditiously. While the Commissioner's order is, in my view, patently unreasonable, it should not go unmentioned that the situation before this Court was to some extent produced by the unreasonably hard line taken by the Ministry in its response.
> >
> > In my view, it would not be appropriate to this Court's function on judicial review to engage in a detailed record-by-record review of what should and should not be disclosed. That task should be left to the Commissioner in light of the legal principles enunciated here. Accordingly, I will say no more about precisely what, if anything, must be disclosed from the records at issue here.
> >
> > I would, however, adopt as a helpful guide to the interpretation of s. 10(2) the following passage from the judgment of Jerome A.C.J. in Canada (Information Commissioner) v. Canada (Solicitor General), [1988] 3 F.C.

551 at 558 interpreting the analogous provision in the Access to Information Act, S.C. 1980-81-82-83, c. 111, sch. I, s. 25:

> One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.
>
> Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes. Section 25 of the Access to Information Act, which provides for severance, reads:
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> Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of an institution is authorized to refuse to disclose under this Act by reason of information or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains any such information or material. [Emphasis added]
>
> Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.
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> Similarly, in Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs) (1988), 51 D.L.R. (4th) 306 at 320, Jerome A.C.J. stated:
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> To attempt to comply with s. 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

I adopt these principles for the purpose of this appeal. It is arguable that some of the information contained in the records is not, taken in isolation, exempt under section 14. However, in my view, the record cannot

reasonably be severed, since to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. As a result, I uphold the decision of the Police not to sever information from the record for the purpose of disclosing it to the appellants.

Because of these findings it is not necessary for me to consider the application of the exemption in section 8(1)(a) of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: December 17, 1999
Laurel Cropley
Adjudicator