



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1789

Appeal PA-990226-1

Ministry of the Solicitor General



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BACKGROUND AND NATURE OF THE APPEAL

An uninsured driver was killed in a motor vehicle accident in June 1994. A passenger injured in this accident commenced an action against the uninsured driver. Because no defence was filed, the passenger notified the Motor Vehicle Accident Claims Fund (the Fund). The Fund then appointed legal counsel to defend the action on behalf of the estate of the deceased driver.

The purpose and workings of the Fund were described by Adjudicator Holly Big Canoe in Order P-538 as follows:

The Fund was created in the 1960s to provide relief for persons injured by uninsured motorists. Where an accident occurs in which a person is injured by an uninsured driver, the injured party has the option of making an application for payment from the Fund or of commencing an action against the uninsured driver.

In cases where the injured party chooses to commence a legal action against the uninsured driver, the uninsured driver often does not file a defence. The injured party (the plaintiff) notifies the Fund that the defendant is in default in defending the claim and the Fund responds to the claim and defends or settles the action. All acts done by the Fund in accordance with the lawsuit are deemed to be the acts of the defendant.

Where the Fund cannot settle the action directly, it often retains counsel to conduct the defence of the action. After settlement or trial, the Fund pays the claim to the plaintiff after a judgment is taken out and assigned to the Minister, to whom the Fund is responsible. The Fund then attempts to recover the money from the defendant.

Counsel for the Fund submitted a request to the Ministry of the Solicitor General and Correctional Services (now the Ministry of the Solicitor General) (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the Coroner's Report regarding the deceased driver.

The Ministry identified a one-page responsive record titled "Coroner's Investigation Statement" dated August 24, 1994, and denied access to it pursuant to section 21 of the Act. The Ministry relied on the "presumed unjustified invasion of personal privacy" under sections 21(3)(a) and (b) and the factor listed under section 21(2)(f) in support of this exemption claim.

The requester (now the appellant) appealed the Ministry's decision claiming that "[i]n order to fully and properly defend the Estate of [the deceased], we require a copy of the coroner's report concerning the death of [the deceased]."

During mediation, it became apparent that the appellant was relying on section 8 of the Motor Vehicle Accident Claims Act (the MVACA), which gives the Minister of Finance (the member of the Executive Council assigned responsibility for administering the MVACA) certain powers to defend claims made against the Fund.

I sent a Notice of Inquiry to the Ministry and the appellant, and received written representations from both parties. I also received unsolicited submissions from a third party involved in the litigation.

In its representations, the Ministry withdrew its reliance on 21(3)(b) of the Act.

DISCUSSION:

What rights does the Fund have, by virtue of the MVACA, to access personal information of a deceased individual whose interests are being represented by the Fund?

Sections 7 and 8 of the MVACA provide, in part:

7. (1) Subject to section 8, where a person recovers in any court in Ontario a judgment for damages on account of injury to or the death of any person or loss of or damage to property occasioned in Ontario by a motor vehicle owned or operated by the judgment debtor within Ontario, upon the determination of the proceeding, including any appeals, the person may apply, in the form prescribed by the Lieutenant Governor in Council, for and the Minister shall pay the amount of the judgment or of the unsatisfied portion thereof out of the Fund, provided that, in respect of a judgment for loss of or damage to property, only that amount by which the judgment exceeds \$100 is payable out of the Fund.

(2) Where an application is made to the Minister under subsection (1), the Minister at any time within thirty days of the receipt of the application or within such further time as may be allowed upon application to a judge of the Ontario Court (General Division) [Superior Court of Justice] give written notice to the applicant of any objection to payment of the judgment or part of the judgment, and, where the Minister gives the notice, the applicant may apply to a judge of the Court for a finding or determination in respect of any matter in connection with the application for payment out of the Fund.

(3) The Minister shall not pay out of the Fund any amount in respect of a judgment unless the judgment was given in an action brought against all persons against whom the applicant might reasonably be considered as having a cause of action in respect of the damages in question and prosecuted against every such person to judgment or dismissal.

8. (1) Section 7 does not apply in the case of a judgment that has been signed in an action in which,

- (a) [Repealed]
- (b) the defendant did not file a statement of defence; or
- (c) the defendant did not appear in person or by counsel at the trial; or

(d) the defendant did not appear in person at an examination for discovery; or
(e) judgment was signed upon the consent or with the agreement of the defendant, unless the Minister has been given notice of such failure, consent or agreement and has been afforded an opportunity to take such action as he or she may consider advisable under subsection (2).

(2) Within thirty days after receiving notice under subsection (1), the Minister may file a defence, make payment into court, appear by counsel at the trial or take such other action as he or she considers appropriate on behalf and in the name of the defendant, and may thereupon, on behalf and in the name of the defendant, conduct the defence, and may, where he or she considers it advisable to do so, consent to judgment in such amount as he or she may consider proper in all the circumstances, and all acts done in accordance therewith shall be deemed to be the acts of such defendant.

(3) Where the Minister or defendant is noted in default, the Minister may give notice to the local registrar or clerk of the court, as the case may be, that he or she intends to defend the action on behalf of and in the name of the defendant, and may require the noting of default to be set aside.

...

(5) Where a deceased person, if living, would be the defendant or the defendant in the action dies and the personal representative, if any, of the deceased person does not defend the action and no litigation administrator is appointed, the Minister may exercise the rights and take the action referred to in subsection (2) in the name of the deceased and may assert a counterclaim on behalf of the estate of the deceased.

The Notice of Inquiry asked the parties to respond to the following questions:

1. Has the Minister of Finance (the Minister) received notice under section 8(1) of the MVACA in regard to an action involving the deceased?
2. If yes, has the Minister taken any action in the name of and on behalf of the defendant?
3. If yes, what actions have been taken?
4. Was this request/appeal made in accordance with any of the actions referred to in answer to question 3? If so, please explain the nature of the relationship between the request/appeal and those actions, and/or, please explain how the record at issue relates to the defence of the action or whatever other action the Minister has taken in regard to this matter.

5. Does the appellant have the full rights of access to all personal information of the deceased under section 47 of the Act, or are those rights limited to the rights of a personal representative outlined in section 66(a) of the Act?

In response to questions 1, 2 and 3, the appellant provided a copy of a Notice of Default served on the Minister pursuant to section 8(1)(b) of the MVACA. The appellant states that he was appointed to defend the action, and included a copy of the Statement of Defence filed on behalf of the estate. The Ministry does not dispute these facts.

With respect to questions 4 and 5, the appellant submits:

Subsection 8(2) of the [MVACA] has the effect of making the Minister the legal representative of an uninsured defendant in a motor vehicle action which is not defended by the uninsured defendant. Further, subsection 8(2) empowers the Minister to take whatever action he deems appropriate on behalf of and in the name of an uninsured defendant and all such actions are deemed to be actions of the uninsured defendant.

In defending the action against the [estate of the deceased], the Minister is bound to comply with the Rules of Civil Procedure just as [the deceased] would have been had he survived the accident and defended the action himself. Rule 30 requires that “every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed” and “produced for inspection if requested”. Because of the allegations ... [the deceased]’s physical condition as of the time of his death is clearly a matter in issue in this proceeding and, as such, the Coroner’s report is a relevant document which [the deceased], or in this case the Minister, is required to produce for inspection.

...

Since subsections 8(2) and (5) of the [MVACA] empower the Minister to act in the name of the deceased and provide that all such acts of the Minister are deemed to be the acts of the deceased, and since the Minister is required by the Rules of Civil Procedure to produce all relevant documents, it is submitted that the Minister (Appellant) has full rights of access to all personal information of the deceased.

The Ministry, on the other hand, submits:

The Ministry is of the view that section 8(2) of the MVACA authorizes the [Minister] to exercise the rights of a defendant only in relation to litigation arising from a motor vehicle accident involving an unidentified or uninsured driver. The rights of the [Minister] in section 8(2) include the right to file a defence, make payment into court, appear by counsel at the

trial, conduct a defence and consent to judgement. All of the specific acts relate to the process of litigation. The section does not expressly provide the [Minister] with the authority to exercise the rights and powers of an identified defendant in relation to other legislation such as [the Act].

With specific reference to section 8(5) of the MVACA, the [Minister] is authorized to exercise the rights of a deceased individual with respect to the acts expressly identified in section 8(2) and to assert a counterclaim on behalf of the estate of a deceased person in certain circumstances. Specifically, the [Minister] is empowered to take action on behalf of the deceased individual where the personal representative of the deceased individual (if any) does not defend an action against the estate of the deceased individual and no litigation administrator is appointed. The wording of the statute suggests that the [Minister] is not deemed to be the personal representative of the deceased person.

I am in basic agreement with the Ministry's position on this issue.

Section 8 of the MVACA sets out a scheme for dealing with litigation in circumstances where a judgment has been signed in an action based on consent of an uninsured driver or failure on the part of the driver to defend the action. Section 8(2) lists the various rights accorded to the Fund (as the Minister's representative) to defend an action on behalf of an uninsured driver, and section 8(5) extends these rights to the specific circumstance of a deceased uninsured driver whose estate has not taken steps to defend an action.

In my view, section 8 was included in the MVACA for the specific and narrow purpose of allowing the Fund to stand in the shoes of an uninsured driver in order to defend actions initiated against that driver. The section's application is limited to the context of pre-existing litigation and, as the appellant points out, the Fund, as representative of the deceased driver is able to exercise the rights provided through the Rules of Civil Procedure. Although certain disclosure obligations flow from the application of these Rules in the civil litigation context, they do not equate to the rights of access to personal information under the Act. The reference to Rule 30 in the appellant's representations is a good example. This rule requires disclosure of "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to that action". It is clear that the record at issue in this appeal is in the possession and control of the Ministry of the Solicitor General, not the deceased or the Fund. If pressed to obtain the record for the purpose of meeting disclosure obligations, the rules of the civil court process provide the appellant and other parties to the litigation with the appropriate forum to assess relevance and determine rights and obligations.

The Ministry's representations do not address the fact that section 8(2) of the MVACA includes a general right for the Fund to "take such other action as he or she considers appropriate". This broadens the scope of section 8(2) beyond the acts expressly authorized by the section. However, the phrase follows a list of specific activities related to civil litigation and, in my view, any more generalized rights associated with this

section are restricted to the specific litigation context and do not extend to a right of access to records under a completely different statute not even referred to in the MVACA.

The Act has recognized that there are certain limited situations when someone other than an actual individual should have rights associated with that individual. These situations are outlined in section 66. The only provision of section 66 that deals with a deceased individual is section 66(a) which allows a requester to exercise the access rights of a deceased individual 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".

Previous orders of this Office have adopted the definition of "personal representative" used in the Estates Administration Act, the Trustee Act, and the Succession Law Reform Act: a court-appointed executor, administrator, or administrator with the will annexed (Order M-919). Previous orders have also taken the position that the rights of a "personal representative" under section 66(a) are specific and limited and that the phrase "relates to the administration of the individual's estate" should be interpreted narrowly to include 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 (Ont. Div. Ct.), quashing Order P-1027; see also Orders M-919, MO-1174, MO-1241, P-294 and PO-1654).

There is no suggestion that the appellant is acting as "personal representative" of the deceased driver, as that term is used in section 66(a), nor does section 66(a) provide the Minister with a specific right of access that would entitle the Fund to stand in the shoes of the deceased driver for the purpose of accessing that individual's personal information under the Act. It is interesting to note that the equivalent provision to section 66(a) in the Alberta Freedom of Information and Protection of Privacy Act (section 38.1(dd)) includes a specific provision allowing that disclosure of personal information of deceased drivers to the administrator of that province's motor vehicle accident claims statute in comparable circumstances.

For these reasons, I find that the MVACA does not provide the appellant with a right of access to the personal information of the deceased driver, and that the appellant's request is appropriately treated as a request for access to general government records under Part II of the Act.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The Ministry and the appellant both take the position that the record contains the personal information of the

deceased only. I concur.

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 driver died in 1994, section 2(2) has no application in this case.

Once it has been determined that a record contains personal information of someone other than the appellant, section 21(1) of the Act prohibits disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) of the Act provides:

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.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of personal privacy. 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, and section 21(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 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Ministry claims that the information falls within the scope of the presumed unjustified invasion of personal privacy described in section 21(3)(a) as follows:

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

relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

The Ministry submits:

... the Coroner's Investigation Statement contains detailed medical information about the deceased driver. The record includes details of the circumstances of this individual's death, his injuries, the results of post-mortem blood and urine analysis, his medical cause of death and related information.

The appellant's submissions on this issue are linked to rights he maintains exist by virtue of sections 8(2) and

(5) of the MVACA. I have rejected these arguments earlier in this order.

A number of previous orders of this Office have determined that forensic test results and coroners' reports, which include blood alcohol analyses, form part of the medical history and/or condition of a deceased person, and that the presumption in section 21(3)(a) applies to this information (Orders P-362, P-412, P-482, P-519, P-945 and P-1121). I find that the reasoning in these past orders is applicable to the circumstances of the present appeal, and disclosure of the personal information of the deceased driver would constitute a presumed unjustified invasion of the deceased's personal privacy under section 21(3)(a) of the Act.

I also find that none of the circumstances listed in section 21(4) which would rebut this presumption are present in the circumstances of this appeal, and the appellant has not raised any public interest considerations under section 23 of the Act.

Although not specifically raised by the appellant, the Ministry's representations address the possible application of the exception to the section 21 exemption provided by section 21(1)(d), which states:

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

under an Act of Ontario or Canada that expressly authorized the disclosure;

The Ministry submits that it gave careful consideration to whether section 21(1)(d) gives the appellant, as legal counsel to the Minister, a right of access to the record, but came to the conclusion that it does not. In reaching this conclusion, the Ministry relies on the findings of Senior Adjudicator David Goodis in Order MO-1179, where he made the following comments on the possible application of section 14(1)(d) of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent of section 21(1)(d) of the provincial Act):

Previous orders of this Office have said that the interpretation of the words "expressly authorizes" in section 14(1)(d) of the Act closely mirrors the interpretation of similar words in section 28(2) of the Act and its provincial counterpart, section 38(2) of the Freedom of Information and Protection of Privacy Act (Orders M-292 and —1154). In the Commissioner's Compliance Investigation Report I90-29P, the following comments are made about the latter section:

The phrase "expressly authorized by statute" in subsection 38(2) of the [provincial] Act requires either that the specific types of personal information collected be expressly described in the statute or a general reference to the activity be set out in the statute, together with a specific

reference to the personal information to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.

The Ministry submits that sections 7 and 8 of the MVACA do not expressly authorize disclosure of the record. The Ministry also considered section 18(2) of the Coroners Act, which authorizes disclosure of the coroner's findings (where an inquest is determined to be unnecessary) to the spouse, parents, children, siblings and personal representative of a deceased, and came to the conclusion that it also does not expressly authorize disclosure of the record.

I accept the Ministry's position. The MVACA does not provide an express statutory authorization to disclose the record to the appellant, and the appellant does not fit into any of the categories of the individuals set out in section 18(2) of the Coroners Act.

Accordingly, I find that the exception under section 21(1)(d) does not apply in the circumstances of this appeal.

Therefore, I find that the record qualifies for exemption under section 21(1) of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ May 24, 2000