



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1777

Appeal PA-990016-1

Ministry of the Solicitor General



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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Solicitor General (formerly the Ministry of the Solicitor General and Correctional Services) under the Freedom of Information and Protection of Privacy Act (the Act) for access to police records relating to the death of her mother.

The Ministry located responsive records and provided the appellant with partial access to them. The Ministry advised the appellant that portions of the Ontario Provincial Police (OPP) officers' notes had been removed from the records as this information was not responsive to the request. The information which was removed pertains to other matters recorded by the OPP officers during their tour of duty. The Ministry then denied access to the remaining portions of the records on the basis of the following sections of the Act:

- discretion to refuse requester's own information - section 49(a);
- facilitate the commission of an unlawful act - section 14(1)(l);
- law enforcement report - section 14(2)(a);
- invasion of privacy - sections 49(b)/21(1) with reference to sections 21(2)(f) and 21(3)(b).

The appellant appealed the Ministry's decision.

During mediation of the appeal, the Mediator notified seven individuals (the affected persons) to determine whether they would consent to the disclosure of any information pertaining to them in the records. Four affected persons objected to disclosure and three did not respond.

Further mediation was not possible and this appeal was moved on to inquiry. I sent a Notice of Inquiry to the appellant and the Ministry. It appeared that the appellant may be the executor of her mother's estate and that she submitted her request on that basis. Therefore, I raised the possible application of section 66(a) (personal representative) as an issue in this appeal. Only the Ministry submitted representations in response to the Notice.

RECORDS:

The records at issue consist of the withheld portions of a Homicide/Sudden Death Report, Supplementary Reports, Property Report and OPP officers' notes, as well as four statements which were withheld in their entirety.

DISCUSSION:

NON-RESPONSIVE RECORDS

Although the Ministry was asked to respond to this issue in the Notice of Inquiry, it did not submit representations. As I noted above, however, the Ministry indicated that portions of the police officers' notes had been removed from the records as the Ministry considers this information to be not responsive to

the request. The information which was removed pertains to other matters recorded by the OPP officers during their tour of duty.

In Order P-880, former Adjudicator Anita Fineberg defined "responsive" as meaning "reasonably related to the request." I agree with this interpretation.

I have reviewed the portions of the OPP officers' notes which the Ministry claims are not responsive to the appellant's request. The subject portions of pages 108, 110, 111, 113, 116, 117, 118, 119, 124, 125, 126, 127, 128, 129, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148 document other events involving the OPP officers which occurred during their tour of duty and do not pertain, in any way, to the officers' investigation into the circumstances surrounding the death of the appellant's mother or to the complaint she made to the OPP afterwards. Therefore, I find that these portions of the records are not reasonably related to the appellant's request and were properly withheld as being non-responsive to the request.

PERSONAL REPRESENTATIVE

The term "personal representative" in section 66(a) is not defined in the Act. However, section 66(a) relates to the administration of an estate of an individual and the meaning of the term must be derived from this context.

An 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 demonstrate that she is the deceased's "personal representative" **and** that her request for access to the information "relates to the administration of the deceased's estate".

The term "personal representative" in section 66(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 66(a) 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.

In order for the appellant to establish that she is her mother's personal representative for the purposes of section 66(a) of the Act, the appellant would be required to provide evidence of her authority to deal with the estate of her deceased mother. The production by the appellant of letters probate, letters of administration or ancillary letters probate under the seal of the proper court would be necessary (Orders M-205 and P-294).

In the Notice of Inquiry, the appellant was asked to provide evidence of her authority to deal with her mother's estate, and to establish that her request "relates to the administration of the estate." The appellant did not submit representations and has, therefore, provided none of the requisite evidence. Based on my review of the appeal file and the records and in the absence of any evidence from the appellant on this issue, I find that section 66(a) has no application in the circumstances of this appeal.

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

Pages 21 - 44, 46 - 61, 62 - 71, 72 - 76 are witness statements taken from individuals who were interviewed by the OPP in connection with the death of the appellant's mother and a subsequent complaint made by the appellant. These records contain information relating to the witnesses, their relationship to the deceased and their observations/involvement with the appellant's mother around the time of her death. I find that these records contain the personal information of the witnesses, the appellant's mother and other individuals referred to in them. Pages 21 - 44, 46 - 61 and 62 - 71 also contain information pertaining to the appellant and this qualifies as her personal information. Pages 72 - 76 do not contain the appellant's personal information.

Pages 1 - 18 consist of a Sudden Death Report and Supplementary Reports. All of these pages contain information recorded by the attending OPP officers during the investigation of the circumstances of the death of the appellant's mother. As such, they include information which identifies the individuals who were involved and/or interviewed and the nature of their involvement. These records all contain the personal information of the individuals referred to in them, including that of the appellant.

Pages 19 - 20 comprise a Sudden Death Notification and page 80 is a Property Report. These records contain information which identifies named individuals in the context of the OPP involvement in this matter and as such qualifies as their personal information. These records do not contain the appellant's personal information.

Page 45 is an authorization which has been signed by the appellant. The only information which has been withheld from this page is the signature of the individual who witnessed her signature. In the context of the overall document of which the appellant has been given a copy, the signature of the witness qualifies as this person's personal information. This page also contains the appellant's personal information as it pertains to her actions taken as executor of her mother's estate.

Pages 108 - 110, 111 - 113 and 116 - 148 consist of OPP officers' notes. The information which has been withheld from these pages pertains to individuals who were involved and/or interviewed by the OPP during its investigation into the circumstances of the death of the appellant's mother and her subsequent complaint. This information qualifies as the personal information of the individuals referred to in the records. Pages 108 - 110 and 116 - 148 also contain information about the appellant and they, therefore, contain her personal information. Pages 111 - 113 do not contain any references to the appellant. As these pages document the investigation into the circumstances of her mother's death, I find that they do not relate to the appellant in any way and do not contain her personal information.

INVASION OF PRIVACY

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(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.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In the circumstances, the only exception which could apply is section 21(1)(f) which reads:

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.

In both these situations, sections 21(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 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. 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 section 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the Act or if a finding is made under section 23 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 23 exemption.

In its representations, the Ministry withdrew its reliance on the factor in section 21(2)(f) of the Act.

The Ministry claims that the presumption in section 21(3)(b) applies to exempt the personal information in the records from disclosure. This section states:

[IPC Order PO-1777/April 28, 2000]

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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 Ministry states that the OPP responded to a call regarding a death. The Ministry states further that in order to determine whether the death was by natural causes or as a result of a criminal act, the OPP conducted a criminal investigation into the circumstances surrounding the death.

It indicates that during the course of investigating this matter the OPP spoke to the appellant who raised concerns with respect to additional criminal matters. The Ministry states that as a result of the appellant's concerns the OPP commenced a further investigation to determine whether any breaches of the Criminal Code or a provincial statute had occurred.

The Ministry submits that all of the records at issue document the investigation of the circumstances of the appellant's mother's death and the subsequent complaint made by the appellant to the OPP. Accordingly, the Ministry submits that this was a law enforcement investigation and the disclosure of the personal information which was compiled as part of it would constitute a presumed unjustified invasion of privacy.

I am satisfied that the personal information in the records was compiled and is identifiable as part of an investigation conducted by the OPP, which is an agency that has the function of enforcing the law, into the circumstances of the appellant's mother's death and other matters arising in this context. I am also satisfied that the purpose of the investigations, in part, was to determine whether there has been a violation of law. Therefore, I find that disclosure of the personal information in this appeal would constitute a presumed unjustified invasion of personal privacy pursuant to section 21(3)(b) of the Act. Further, this presumption still applies, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225).

I find that none of the circumstances outlined in section 21(4) which would rebut a section 21(3) presumption are present in this appeal. The appellant has not raised the application of the public interest override and I find, in the circumstances of this appeal, that it does not apply.

Therefore, with one exception, I find that the personal information in pages 19 - 20, 72 - 76, 80 and 111 - 113 is exempt under section 21(1) of the Act and that the personal information in pages 1 - 3, 4, 5, 6 - 18, 21 - 44, 46 - 61, 62 - 71, 108 - 110 and 116 - 148 is exempt under section 49(b) of the Act.

In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This reasoning has been applied

in a number of subsequent similar orders of this Office and has been extended to include, not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (eg. MO-1196, P-1414 and PO-1679).

As I noted above, page 45 is an authorization which was signed by the appellant in her capacity as executor of her mother's estate. The only portion of this record which has been withheld is the signature of the individual who witnessed the appellant's signature. Although I accept that this record was compiled by the OPP as part of their investigation into the two matters referred to above, I find that applying the section 21(3)(b) presumption to deny access to information which the appellant is clearly aware of would, according to the rules of statutory interpretation, lead to an "absurd result". Further, in my view, this reasoning would apply to the application of any of the provisions in sections 21(2) or (3) in the circumstances of this appeal.

On this basis, I find that the disclosure of the signature of the witness would not constitute an unjustified invasion of personal privacy and section 49(b) does not apply to this information. The Ministry has not claimed any other exemption for this record. Accordingly, this portion of page 45 should be disclosed to the appellant.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

The Ministry has relied on section 49(a) to deny access to the undisclosed portions of the records. Under section 49(a), an institution has the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

Law Enforcement Report - section 14(2)(a)

The Ministry has claimed the application of section 14(2)(a) for the withheld information on pages 1 - 20. I found above that all of this information was exempt under section 21(1) or 49(b). Therefore, it is not necessary for me to consider the possible application of section 14(2)(a).

Facilitate Commission of Unlawful Act - section 14(1)(l)

The Ministry claims that section 14(1)(l) applies to the ten-codes in the OPP officers' notes. These references are found on pages 119, 128, 145 and 146.

Section 14(1)(l) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry states that “ten-codes” are used by OPP officers in their radio communications with each other and their Detachments and Communication Centres. The Ministry submits that release of the “ten-codes” would compromise the effectiveness of police communications and possibly jeopardize the safety and security of OPP officers. In this regard, the Ministry details how this could reasonably be expected to occur. The Ministry relies on previous orders of this office which have upheld the application of section 14(1)(l) or its municipal equivalent to “ten-codes” (see Orders M-393 and M-757).

In determining this issue, I have taken into account the previous decisions of this office and I concur with them. In my view, disclosure of the “ten-codes” would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space. Therefore, I find that the Ministry has properly applied section 14(1)(l) to this information and it is exempt under section 49(a) of the Act.

ORDER:

1. I order the Ministry to provide the appellant with page 45 in its entirety by sending her a copy of this page on or before May 18, 2000.
2. I uphold the Ministry’s decision to withhold the remaining information in the records from disclosure.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the portion of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ April 28, 2000