



Information and Privacy
Commissioner/Ontario

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

ORDER PO-1849

Appeal PA-000065-1

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to copies of all documentation compiled by the Special Investigations Unit (SIU) in the course of its investigation into the death of the appellant's sister, who died while in the custody of the Windsor Police Service (the Police) on or about February 7, 1999. The appellant indicated to the Ministry that she is the personal representative of her sister's estate.

Based upon telephone conversations with the appellant's counsel, the Ministry understood that the appellant was requesting access to the requested information pursuant to section 66(a) of the *Act*, which provides that any right or power conferred on an individual by this *Act* may be exercised, where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate. The appellant provided the Ministry with what she termed a "letter of authority" indicating that the appellant is the personal representative of the estate of the deceased individual.

The Ministry responded by granting partial access to the requested information. Access to the remainder of the records (approximately 651 pages plus audio tapes and photographs) was denied under the following provisions of the *Act*:

- section 21(1) - invasion of privacy - with reference to the presumption against disclosure which is contained in section 21(3)(b) where 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; and
- section 14(2)(a) - law enforcement - which provides that a head may refuse to disclose a record that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

With respect to section 66(a), the Ministry asked the appellant to provide a statement demonstrating how the information being sought relates to the administration of the estate of the deceased individual as it was not apparent from the materials provided to it.

The appellant appealed the Ministry's rejection of her s.66(a) claim and the Ministry's decision to deny access under sections 21(1) and 14(2)(a). The appellant indicated that the records are sought in order to assist in the administration of the estate of the deceased, including the initiation of a civil action against the Police and some of the individuals who have provided information to the SIU during its investigation.

During the mediation stage of the appeal, the Ministry provided the appellant with an Index of Records containing a brief description of each of the documents at issue, along with the exemptions claimed for each. The Ministry also agreed to provide the appellant with access to Records 112, 113, 115, 116 and 121, which are correspondence between the SIU and the appellant's counsel, and Records 125 - 127, 128 and 129, which are media releases and press clippings which were compiled by the SIU during the course of its investigation.

In addition, the appellant indicated that she was no longer seeking access to the SIU Director's Report to the Attorney General of Ontario, designated as Record 4 in the Index provided to the appellant.

Further mediation was not successful and the appeal was then moved into the Adjudication stage. I decided to seek the representations of the Ministry, initially. The Ministry made submissions in response to the Notice of Inquiry which were shared, in their entirety, with the appellant. Similarly, the appellant made submissions which were also shared with the Ministry. The Ministry was invited to make reply submissions on whether the appellant had provided sufficient evidence to substantiate a finding that she was the personal representative of the deceased within the meaning of section 66(a). In addition, because the deceased was a citizen of the United States, the Ministry was asked to comment on whether this is a consideration which should weigh in favour of the disclosure of the information contained in the records. The Ministry then provided me with further representations by way of reply, responding to these issues.

DISCUSSION:

PERSONAL INFORMATION

The section 21 personal privacy exemption applies only to information which qualifies as "personal information", which is defined, in part, in section 2(1) of the *Act* to mean recorded information about an identifiable individual.

I have reviewed each of the records remaining at issue in this appeal and find that because they relate to the SIU's investigation of the circumstances surrounding the death of the appellant's sister, they contain her personal information. The records include detailed information respecting her race, religion, age, sex and marital status (section 2(1)(a)), her medical history (section 2(1)(b)), her address, telephone number, fingerprints and blood type (section 2(1)(d)), the views or opinions of another individual about the deceased sister (section 2(1)(g)) and the deceased sister's name along with other personal information about her (section 2(1)(h)).

Many of the records also contain the personal information of other identifiable individuals, including other prisoners who were in custody at the time of the appellant's sister's death. In addition, the personal information of the appellant appears in Records 6-2, 10-2, 10-5, 10-6, 10-8, 10-10 and 13-2. Specifically, this information describes the appellant's familial relationship to the deceased (section 2(1)(h)) and the appellant's name, address and telephone number (section 2(1)(d)).

ACCESS BY A PERSONAL REPRESENTATIVE

Section 66(a) of the *Act* states:

Any right or power conferred on an individual by this *Act* may be exercised,

where the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate.

Under section 66(a), the appellant would be able to exercise the deceased's right to request access to the deceased's personal information if she is able to demonstrate that:

1. She is the "personal representative" of the deceased; and
2. her request for access relates to the administration of the deceased's estate.

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

In Order M-919, former Adjudicator Anita Fineberg reviewed the law with respect to section 54(a), the provision in the municipal *Act* which is the equivalent to section 66(a), and came to the following conclusion:

... 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".

The rights of a personal representative under section 66(a) are narrower than the rights of the deceased person. That is, the deceased person retains the right to personal privacy except insofar as the administration of his or her estate is concerned.

In Order M-1075, it was established that in order to give effect to the rights established by section 54(a), the phrase "relates to the administration of the individual's estate" should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate. Therefore, the appellant in this case must establish not only that she is the deceased's personal representative for the purposes of section 66(a), but also that she requires access to the records for the purposes of exercising her duties as a personal representative. To do this, the appellant must first provide evidence of her authority to deal with the estate of the deceased. As set out in the Notice of Inquiry, the production by the appellant of letters probate, certificate of appointment of estate trustee, letters of administration or ancillary letters probate under the seal of the proper court would be necessary to establish that she has the requisite authority.

The Ministry states that even if the appellant qualified as the "personal representative" of the estate for the purposes of section 66(a), the records relate to a criminal law enforcement investigation and do not contain financial information. Accordingly, the Ministry submits that their disclosure is not necessary for the administration of the estate, as is required by section 66(a). In addition, the Ministry points out that the lawsuit initiated by the family of the deceased does not include a claim on behalf of the estate.

The appellant states that the family of the deceased have commenced a civil action against the Police and a number of other individuals for the wrongful death of the appellant's sister. The appellant provided me with a copy of the Statement of Claim in that action. I note that the estate has not been named as a Plaintiff in the action. It would appear that, as suggested by the Ministry, the estate is precluded by section 38(1) of the *Trustee Act* from commencing or participating as a plaintiff in an action for wrongful death. Despite what is argued by the appellant, I find the estate will not benefit in any way should the lawsuit proceed to a

successful conclusion as it is not a party to the action and, because of the operation of section 38(1) of the *Trustee Act*, the estate is not entitled to bring such an action on its own behalf.

The appellant has not provided me with any documentation to demonstrate that she has been appointed the executor, administrator or administrator with will annexed of the deceased's estate, either in Ontario or in the state of Michigan, where the deceased resided. As such, I am unable to find that the deceased's sister is the "personal representative" of the estate as that term has been defined in *Adams v. Ontario (Information and Privacy Commissioner)* 1996, 136 D.L.R. (4th) 12 at 17-19 where 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".

I also find that the records at issue in this appeal, which consist of the documents compiled by the SIU in the course of their investigation into the deceased's death, do not relate to the administration of the estate. In my view, the right of access being asserted by the appellant does not relate to a claim for financial entitlements being denied to the estate, nor will the disclosure of these documents assist in the administration of the estate. Rather, the rights being asserted belong to the family members who are named as plaintiffs in the action. As such, I am not satisfied that the request relates to the administration of the deceased's estate as this term has been applied in previous orders.

Therefore, section 66(a) does not apply and I am precluded from allowing the appellant to stand in the place of the deceased person for the purposes of making a request for access to her personal information. In the circumstances, with the exception of those records identified above which contain the personal information of the appellant, I will treat this request and the subsequent appeal as a request by an individual for the personal information of another individual under Part I of the *Act*.

INVASION OF PRIVACY

Section 47 of the *Act* gives an individual 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 Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the

requester access to that information. Accordingly, I will consider whether the disclosure of the personal information in Records 6-2, 10-2, 10-5, 10-6, 10-8, 10-10 and 13-2 would be an unjustified invasion of the personal privacy of other individuals under section 49(b).

Where, however, a record **only contains the personal information of other individuals**, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the *Act* prohibits the Ministry from releasing this information. Therefore I will consider whether the disclosure of all of the other records at issue would be an unjustified invasion of personal privacy under section 21(1)(f).

Under both sections 21(1) and 49(b), sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the *Act* applies to the personal information [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the *Act*, as well as all other considerations that are relevant in the circumstances of the case.

The Ministry states that the personal information was compiled as part of the SIU investigation into a possible violation of criminal law. Accordingly, the Ministry argues that the presumption in section 21(3)(b) applies to exempt this information from disclosure. This section provides:

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

The Ministry also submits that there are strong policy reasons which “militate for the protection of personal information contained in the records in issue.” It reasons that:

It is necessary that an investigative law enforcement agency be able to protect personal information compiled as a component of an investigation into potentially criminal conduct. Central in any such investigation is the willingness of witnesses to come forward and provide information that they might have which is relevant to an investigation. This type of information, particularly in the context of a criminal investigation involving potential criminal liability on the part of police officers, is often of a very sensitive nature whose provision is often only forthcoming where confidentiality can be assured. The concern is shared equally between police officers and civilians.

The appellant submits that the police officers involved in the investigation could not have any expectation of confidentiality in relation to the appellant's sister's death as "they were all public servants charged with the duty to safely handle and hold the deceased in their custody". The appellant also points out that this investigation generated a great deal of public interest and that the police officers involved gave testimony to a coroner's jury on the circumstances surrounding the appellant's sister's death. The appellant also makes reference to:

. . . considerations of Comity of Nations [that] would dictate sensitivity in relation to the death of a foreign national while in custody in a foreign country (Canada). Those individuals [the deceased's family] are entitled to know if that death was caused by the neglect of a foreign government or one of its police forces and to be assured that the search for truth and compensation would not be denied by further government impediment. In order to dispel the appearance of there being a secretive Canadian society conspiring to deny information to a citizen of a neighbouring country where a death is involved, only open disclosure of all documentation which could satisfy and answer any questions about this issue will suffice.

The appellant also submits that additional considerations under section 21(2) come into play in this appeal. She suggests that a complete airing of the circumstances surrounding the health and welfare of prisoners in police custody would promote health and safety for other prisoners who are taken into custody (section 21(2)(b)). The appellant further submits that the personal information contained in the records is relevant to a fair determination of her and her deceased sister's rights (section 21(2)(d)). The appellant also suggests that the presumption in section 21(3)(b) does not apply because:

the dominant purpose of the investigation by the Special Investigations Unit is not for determining a possible violation of law but rather for determining the circumstances surrounding death in circumstances involving police and that criminal charges are not necessarily the focus of that investigation. It is submitted that only a pure criminal-oriented investigation is one which qualifies under section 21(3)(b) in order to create the presumption of an unjustified invasion of personal privacy and that an SIU investigation does not meet that criterion.

I find that 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*. The fact that no criminal proceedings were commenced by the SIU has no bearing on this issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Orders M-198 and P-237). Therefore, I find that the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies. Because the exempt information falls within the scope of one of the section 21(3) presumptions, *John Doe, supra*, precludes me from considering the application of any of the factors weighing for or against disclosure under section 21(2), or any other unlisted considerations such as the concept of "Comity of Nations". I further find that none of the considerations in section 21(4) apply in the circumstances of this appeal. The appellant has raised the possible application of the "public interest override" provision in section 23 of the *Act*.

Consequently, I find that the disclosure of the personal information contained in those records which do not contain any of the personal information of the appellant would constitute an unjustified invasion of the deceased sister's privacy, and that this information qualifies for exemption under section 21(1) of the *Act*. Similarly, Records 6-2, 10-2, 10-5, 10-6, 10-8, 10-10 and 13-2, which include the personal information of the appellant, as well as the deceased sister, are exempt under the discretionary exemption in section 49(b).

PUBLIC INTEREST IN DISCLOSURE

The appellant submits that section 23 of the *Act* operates to "override" the provisions of section 21 and "for reasons of international Comity and full inquiry into the death of an individual in custody in Ontario that disclosure be made of the documents in the files of the Special Investigations Unit."

Section 23 of the *Act* provides that:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [my emphasis]

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

Is There a Compelling Public Interest?

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

The appellant has not made any specific submissions on the question of whether there exists a public interest in the disclosure of the records which I have found to be exempt under section 21(1). Included in the records which were disclosed to her, however, are various news releases and press clippings respecting the death of her sister and the SIU and Coroner's investigations into the circumstances surrounding her death. In my view, there does exist a public interest in the subject matter of the records. The local community interest was expressed through the continued reporting by local media outlets of the sister's death and the subsequent investigations. Due to the nature of the circumstances surrounding the sister's death, a certain level of public interest was created.

I also agree with the appellant that this public interest could properly be described as compelling, as that term has been defined in previous orders of this office. I find that the disclosure of the information contained

in these particular records would serve the purpose of informing the citizenry about the activities of their local police, in particular the procedures in place for the handling of prisoners in their custody.

Does This Interest Outweigh the Purpose of the Section 21(1) Exemption?

I have found above that the vast majority of the records at issue contain only the personal information of the deceased person and other individuals other than the appellant and that they are exempt from disclosure under section 21(1).

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. It is also important to note that section 21 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. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. [Order PO-1705]

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that “[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure”.

[See Order MO-1254]

Balancing the privacy interests of the deceased person against the appellant's right of access in the circumstances of this appeal is particularly difficult. Because of the sensitive nature of much of the personal information of the deceased which is contained in the records and the fact that this information was found to be subject to the presumption in section 21(3)(b), I find that the balance favours the non-disclosure of the information. I find that the public interest in the disclosure of this information is not outweighed by the purpose of the personal privacy exemption. As noted above, one of the fundamental principles underlying the *Act* includes the protection of the personal privacy of individuals, living or dead. In my view, the public interest in the disclosure of this information is not sufficient to “override” this important right which is conferred by section 21(1). Accordingly, I find that section 23 has no application in the circumstances of this appeal.

Because I have found that section 21(1) or 49(b) applies to all records, it is not necessary for me to determine whether they also qualify for exemption under section 14(2)(a).

I understand the appellant's desire to know more details surrounding her sister's death, and realize that she will be disappointed that she is not entitled to access to her sister's personal information under the *Act*.

However, my role is to interpret and apply the provisions of the *Act*, even if the result may seem unfair to the appellant.

In Order MO-1330, Assistant Commissioner Tom Mitchinson commented on the issue of access to the personal information of deceased family members as follows:

In the 1999 *Annual Report* of the Information and Privacy Commissioner, Commissioner Ann Cavoukian recommended statutory changes which would recognize the needs of grieving families, and remove restrictions from the *Act* preventing them from having greater access to information about the death of a loved one. The Report states:

Of the various types of appeals processed by the IPC, those involving a request for information about a deceased family member are among the most sensitive. Requests of this type are submitted to institutions (most often to local police forces or the Ontario Provincial Police) by immediate family members, or their representatives, in order to obtain information surrounding the circumstances of the relative's death.

Except in certain limited circumstances, institutions must deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the provincial and municipal *Acts*.

In 1999, the IPC undertook a study on the impact of the legislation on individuals seeking access to information about deceased loved ones. We surveyed appellants for their experience and view of the legislation; contacted professionals with expertise in the field of bereavement counseling; looked at the legislative history, including the reports of the provincial and municipal three-year review committees; and reviewed freedom of information and privacy legislation across Canada. We also consulted broadly with freedom of information professionals in the police community, since they are most frequently the point of first public contact by grieving family members.

A broad consensus emerged from our discussions: the *Acts* do not serve the interests of relatives of deceased family members in these circumstances.

After highlighting a number of findings from this review, the Report goes on to state:

A statutory amendment to address this sensitive and compelling issue is clearly required, and would be supported by a broad cross section of stakeholders: requesters and appellants; Freedom of Information and Privacy Co-ordinators in both the provincial and municipal sectors,

including the police community; professionals in the field of grief counseling; and [the Commissioner's Office].

Specific language for a new subsection for section 21 (section 14 of the municipal *Act*) is included in the *Commissioner's Recommendations* section, which follows this review of key issues.

In future, the *Act* may be amended to reflect the recommendations of the Commissioner. However, for present purposes, I must apply the *Act* as it stands today.

I am similarly required to apply the *Act* as it stands today in the circumstances of this appeal.

ORDER:

I uphold the decision of the Ministry.

Original Signed By: _____ December 21, 2000
Donald Hale
Adjudicator