



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

ORDER MO-1410

Appeal MA_000236_1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all police photographs related to a sudden death that occurred on a certain date. The requester, through her legal counsel, provided a notarized copy of the deceased individual's will in which the requester is named as the Executor Trustee.

The Police identified fifteen photographs as responsive to the request and granted partial access. The Police denied access to eight photographs relying on the exemption at section 14(1) (unjustified invasion of privacy).

The requester, now the appellant, appealed the decision of the Police, and submitted a further request for access to the police report which was made at the investigation scene. During mediation, the appellant confirmed that she is no longer seeking access to the police report in this appeal.

Mediation was not successful and the appeal was moved to the adjudication stage. I sent a Notice of Inquiry to the Police initially, setting out the facts and issues in this appeal. As the appellant claimed to be acting as the executrix of the deceased person's estate, I added section 54(a) of the *Act* as an issue in the Notice. The Police responded with representations.

I then sent a Notice of Inquiry to the appellant, together with the non-confidential portion of the Police's representations. The appellant, through her counsel, returned detailed representations together with a copy of the Coroner's Investigation Statement.

RECORDS:

The records at issue consist of eight photographs, numbered as 4A, 5A, 6A, 8A, 9A, 10A, 11A and 12A.

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

I will first consider whether the appellant is entitled to exercise the access rights of her deceased spouse pursuant to section 54 (a) the *Act*.

Personal Representative

The term "personal representative" used in section 54(a) is not defined in the *Act*. However, section 54(a) relates to the administration of an individual's estate and the meaning of the term must be derived from this context.

Section 54(a) states:

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

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

Decisions of this office and the courts have confirmed the limited nature of a personal representative to obtain information relating to the deceased (see Orders M-919, M-1048 and *Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1996), 136 D.L.R. (4th) 12 (Ont. Div. Ct.)). Assistant Commissioner Tom Mitchinson has stated that the rights of a personal representative under section 54(a) are *narrower* than the rights of the deceased person, in that the deceased retains his or her right to personal privacy insofar as the administration of his or her estate is concerned (Order M-1075).

If the appellant meets the requirements of section 54(a), then she is entitled to have the same access to the personal information of the deceased as the deceased would have had. In other words, her access request would be handled under section 36(1) of the *Act* and would be treated as though it had been made by the deceased spouse himself (Order M-927). To meet the requirements of section 54(a) the appellant must establish not only that she is the deceased's personal representative, but also that she needs access to the records for the purpose of exercising the deceased's duties as a personal representative. To do this, the appellant must first provide evidence of the 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 (Orders MO-1075, MO-1375, PO-1849).

The appellant's legal counsel confirmed that the will had not been probated and that there was no intention to do so. Absent official documentation, I am unable to find that the appellant is the "personal representative" of the estate as that term has been defined by this office (Order M-919) and in the decision of *Adams v. Ontario* 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”.

As the appellant has not met the first requirement under section 54(a), I am precluded from allowing the appellant to stand in the place of the deceased person for the purpose of making a request for access to his personal information. In the circumstances, 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*.

PERSONAL INFORMATION

If the record contains personal information of an individual other than the appellant, the *Act* provides limits on the right of access to that information. Under section 2(1) of the *Act*, "personal information" is defined as “recorded information about an identifiable individual”. The *Act* also provides a list of information which is considered to be “personal information”, but this list is not exhaustive. Section 2(2) of the *Act* states that “personal information” does not include information about an individual who has been dead for more than thirty years. Because the deceased died in 2000, section 2(2) has no application in this case.

The appellant submits that the photographs do not record information about an identifiable individual as there are no identifying marks or signs that would assist anyone to identify the deceased person as being the subject of the photographs. The photographs should therefore not be considered to be “personal information”. I have reviewed the records and find that they consist of photographs with images of the deceased as he was found at the time of his death.

In my view, and consistent with finding of previous Orders of this office, the photographs contain information about the deceased person alone and therefore qualify as his personal information (see Orders M-528, MO-1378 P_1561-R).

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, and the release of this information would constitute an unjustified invasion of the personal privacy of this individual, section 14(1) of the *Act* prohibits an institution from releasing this information.

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) 76].

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 under section 14(3)(b) to support the position that section 14(1)(f) does not apply.

These sections read:

- (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
 - (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
 - (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Police state that the personal information was compiled as part of an investigation into a possible violation of law. Specifically, the Police state that “every death occurring outside of a supervised environment (i.e. hospital, hospice etc.) must be investigated to ensure there has not been a violation of law ... in determining whether that death has occurred as a result of a homicide, suicide or accident.” The fact that no criminal proceedings were commenced by the Police following their investigation does not negate the applicability of section 14(3)(b). This section only requires that there be an investigation into a possible violation of law (Orders M-198, P-237).

The appellant argues that the *Act* does not specify who is to “continue the investigation” and that she is entitled to continue the investigation into her spouse’s death by retaining legal counsel and an accident reconstruction expert. Previous orders of this office have established that the exception contained in the phrase “continue the investigation” refers to the **investigation for which the personal information was compiled**, i.e. the investigation “into a possible violation of law”. Therefore, even though another party, in this situation the appellant, is continuing the investigation, this presumption applies (Orders M-249, M-718).

As indicated earlier, I have reviewed the photographs and am satisfied that they were taken by the Police, who attended at the scene of the death, as part of the investigation. 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 sudden death situations and have found that the presumption applies to the personal information found in a variety of documents

(see further Orders M-1075, MO-1260, MO-1320, MO-1352). In my view, the reasoning and application of the presumption in previous orders is similarly applicable in the present appeal.

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). The appellant had asked that subsections 14(2)(d), (g) and (i) be considered in the determination of this appeal. As stated earlier, 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.

PUBLIC INTEREST IN DISCLOSURE

The appellant raised the possible application of public interest override in section 16 in her representations. She stated that the “Police have failed to take into account the provisions of section 16, which permits disclosure if a compelling public interest outweighs the interest of the purpose of the exemption.” She submitted that there is a compelling public interest as a result of the “need for a proper investigation to have been performed, a reasonable conclusion to have been reached by the coroner and, and the need for [the appellant] to have the true facts of the [deceased’s] death recorded.”

Section 16 may operate to permit disclosure of a record even if a provision in section 14 would otherwise prohibit such disclosure. Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In Order P-984, former Adjudicator Holly Big Canoe discussed the meaning of section 16:

In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

There is nothing in the material before me demonstrating a compelling **public** interest which outweighs the protection of personal privacy. Rather, the appellant’s interest in this appeal is primarily a private one. Therefore, I find that section 16 is not applicable.

To conclude, as worthy and deserving of support the appellant’s request for access may be, as the *Act* stands, it permits the Police to deny access to the records. The Commissioner’s office has dealt with previous requests for access to information concerning a sudden death (Orders MO-1320, MO-1352). In Order MO-1320, which dealt with a request for information from the Police relating to a sudden death, Adjudicator Sherry Liang stated:

It is not without sympathy for the appellants' situation that I have arrived at my decision here. My role is to interpret and apply the provisions of the *Act*, which governs the release of information by, among others, the Police. In reviewing the decision of the Police, I am also governed by the *Act*, and I cannot substitute my own views on the fairness and merits of the appellants' request where the *Act* provides a clear direction.

In the 1999 Annual Report of the Information and Privacy Commissioner, the Commissioner 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. Part of that 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*.

....

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 IPC.

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.

It may be that in the future, the *Act* will be amended to reflect the recommendations of the Commissioner. For the present purposes, however, I must apply the *Act* as it stands today.

Pending the implementation of the recommended changes to the *Act*, I too am bound to interpret the provisions as they now stand.

ORDER:

I uphold the decision of the Police to deny access to the requested records.

Original signed by:
Dora Nipp
Adjudicator

March 26, 2001