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

ORDER MO-1449

Appeal MA-000194-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The appellant submitted a request to the Toronto Police Services Board (the Police) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of all materials regarding their investigation into the death of her brother.

The Police responded to the appellant initially, indicating that if she was seeking the information pursuant to section 54(a), she was to provide them with evidence that she was the deceased's personal representative and an explanation of the relevance of the requested information to the administration of his estate. The appellant provided the Police with a copy of a "Certificate of Appointment of Estate Trustee without a Will" issued in the appellant's name.

The Police issued a decision indicating that access to the memorandum book notes of a named officer could not be provided as such record does not exist. The Police indicated further that some information which is contained in the memorandum books of other officers is not responsive to the request as this information pertains to other events recorded by them during their tour of duty. The Police granted partial access to the remaining records. The Police denied access to certain information in these remaining records on the basis of the following sections of the *Act*:

- advice or recommendations - section 7(1) (a portion of page 16 only);
- relations with other governments - section 9(1)(d) (pages 57 - 64);
- invasion of privacy - section 38(b) in conjunction with sections 14(1)(f), 14(3)(a) and (b) (all of the records);
- discretion to refuse requester's own information - section 38(a) (those records for which sections 7(1) and 9(1)(d) were claimed).

The appellant appealed this decision.

During mediation, the appellant clarified that she was not pursuing access to the information which was identified as non-responsive or the information which the Police stated does not exist. The appellant indicated that she is seeking access to the Police "ten" codes which are noted throughout the records. The Police then issued a second decision claiming the exemption in section 8(1)(l) (law enforcement) for this information.

Also during mediation, the appellant was provided with certain information from the Coroner's office. As a result, pages 1 and 57 to 64 are no longer at issue. As section 9(1)(d) was claimed only for pages 57 - 64, this section is no longer at issue.

I sent a Notice of Inquiry to the Police initially. The Police did not indicate that they were applying section 38(a) to the information for which section 8(1)(l) was claimed. Accordingly, I raised the possible application of this section to this information as well. The Police submitted representations in response to the Notice and I attached the non-confidential portions of them to the Notice which I sent to the appellant. The appellant provided extensive representations in response. I subsequently sent the non-confidential portions of these submissions to the Police and sought reply representations from them on all issues raised in the previous Notice. The Police made representations in reply.

RECORDS:

The records at issue consist of:

- Record 1 (pages 2 - 3) - Sudden Death Supplementary Occurrence Report
- Record 2 (page 4) - Sudden Death Supplementary Occurrence Report
- Record 3 (page 5) - Sudden Death Supplementary Occurrence Report
- Record 4 (page 6) - Sudden Death Supplementary Occurrence Report
- Record 5 (page 7) - Sudden Death Supplementary Occurrence Report
- Record 6 (pages 8 - 17) - Occurrence Report
- Record 7 (pages 63 -69) - police officer's notes (May 9, 1999)
- Record 8 (pages 70 - 74) - police officer's notes (February 6, 1999)
- Record 9 (pages 75 - 82) - police officer's notes (February 6 and 7, 1999)
- Record 10 (pages 83 - 92) - police officer's notes (February 6 and 7, 1999)
- Record 11 (pages 93 - 108) - police officer's notes (May 9 and 10, 1999)
- Record 12 (page 109) - copies of photographs

DISCUSSION:

PERSONAL INFORMATION

Personal information is defined in section 2(1) of the *Act* as "... recorded information about an identifiable individual". In addition, section 2(2) of the *Act* provides that "personal information does not include information about an individual who has been dead for more than thirty years."

The records all relate to the investigation conducted by the Police into the circumstances of the appellant's brother's death. As such, I find that they are "about" the deceased brother. The appellant indicates that her brother passed away on or about February 6, 1999. As he has been dead for less that 30 years, the information about him in the records qualifies as his personal information.

Some of the records also contain information about other identifiable individuals, including other family members as well as witnesses at the scene. This information consists of certain identifying information and their statements and observations which were given to the Police during the investigation and thus qualifies as the personal information of these other individuals.

Records 1, 4, 6, 7, 10 and 11 also contain the appellant's personal information.

PERSONAL REPRESENTATIVE

Section 54(a) of the *Act* provides:

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

> (a) 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;

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.

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.)).

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

> 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*, 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 agree with this analysis. The appellant has provided a copy of the Certificate of Appointment of Estate Trustee Without a Will which appoints her as the "Estate Trustee Without a Will" for her brother's estate. In my view, this appointment is comparable at law to the positions listed under the definition of "personal representative" in the statutes referred to by the Court in *Adams*, and I find that the appellant has established that she is the "personal representative" of her brother's estate, for the purposes of section 54(a). (See also Order MO-1196).

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 appellant's position

The appellant states generally that the decision in *Adams* and previous orders of this office have found that the phrase "in relation to the administration of the individual's estate" is not limited to only financial considerations and that both financial and non-financial documents may be required by a personal representative for the purpose of administration of the estate. The appellant refers to previous orders of this office in support of her position that the specific powers and duties of the personal representative must be considered in determining whether the requested records relate to the administration of the estate (Orders M-919 and M-1075).

In Order M-919, former Adjudicator Fineberg reviewed the definition of the term "administration of estates" and the various activities that fall within the broad category of estate administration in order to first determine whether the appellant in that case qualified as "an administrator with the power and authority to administer the deceased's estate":

> *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990), p.44 defines the term "administration of estates" as follows:
>
> > **Administration of estates.** The management and settlement of the estate of an intestate decedent, or of a testator who has no executor, performed under the supervision of the court, by a person duly qualified and legally appointed, and usually involving: (1) the collection of the decedent's assets; (2) payment of debts and claims against the estate; (3) payment of estate taxes; and (4) distribution of the remainder of the estate among those entitled thereto. The administration of an estate runs from the date of an individual's

> death until all the assets have been distributed and liabilities paid. Such administration is conducted by an administrator or an executor.

The *Black's* definition goes on (at p.45) to list 13 different types of estate administration. Included in the list are the following:

> *Ad prosequendum*. An Administrator appointed to prosecute or defend a certain action ... or actions in which the estate is concerned.
>
> *General administration.* The grant of authority to administer upon the entire estate of a decedent, without restriction or limitation, whether under the intestate laws or with will annexed.
>
> *Special administration.* Authority to administer upon a few particular effects of a decedent, as opposed to authority to administer his whole estate.

Thus, at law there are various types of administrators of an estate. It is clear that there may be more than one administrator of an estate, and that there are a wide variety of powers and responsibilities that may be given to an administrator. It seems that the typical administrator would be referred to as the "general administrator", and would have an unlimited authority to "administer upon the entire estate". On the other hand, some administrators, such as the special administrator, have a limited power to deal only with certain matters respecting the estate.

In my view, each of these various types of administrators can be considered, in their particular roles, to be "administering" the estate. Thus, for example, the administrator *ad prosequendum*, as defined above, (the equivalent of the "litigation administrator" in the Ontario context) can be said to be "administering the estate", albeit in a limited fashion, to the extent that he or she is defending or prosecuting an action on behalf of the estate.

In my opinion, this interpretation is consistent with the Divisional Court decision in *Adams*, since the court in effect acknowledged that pursuing an action on behalf of an estate constituted part of the administration of an estate. At p.19 the court stated:

> The executor may require certain financial information for the administration of the estate, or even personal information in order to pursue a lawsuit on behalf of an estate.

As indicated, in this case the appellant is defending, rather than pursuing an action on behalf of the estate of the deceased. However, in my opinion, there is no substantive distinction to be made between the role of a litigation administrator as

> plaintiff or defendant in an action. Both roles involve an individual taking actions and making decisions in the best interests of the estate for the purpose of ensuring that the assets are either increased or not decreased as a result of the litigation.
> Based on the aforementioned analysis, I find that the appellant, in her capacity as litigation administrator of the estate of the deceased, is "an administrator with the power and authority to administer the deceased's estate" for the limited purpose of defending the action in question. Accordingly, the first part of the section 54(a) test has been satisfied.

"Relates to the Administration of the Individual's Estate"

> Given that a personal representative, in this case an administrator, may have a wide range of different powers and/or duties, one must take into account the precise powers and duties vested in the particular administrator in order to determine the meaning of the phrase "administration of the estate".
>
> In this case, I have determined that the appellant is a personal representative only to the extent that she has been appointed litigation administrator by the court. Thus, in my view, the appellant must establish that she is seeking the records at issue in relation to the defence of the court action.

As far as the powers and duties of an estate trustee are concerned, the appellant submits that they extend well beyond purely financial matters and encompass the fiduciary obligation of the estate trustee to the deceased and the beneficiaries of the estate. The appellant states further that:

> while these powers relate primarily to financial matters, the process of winding up an estate often requires the exercise of personal discretion on non-financial matters"... [I]n considering a request by an estate Trustee under s. 54(a), the Commission is bound by the statutory and judicial interpretation of the roles and powers of the office. Accordingly, the Commission, in considering a request under s. 54(a), should be very reluctant to interfere with the broad discretion afforded an Estate Trustee at law.

The appellant reiterates her reason for requesting the records as set out in her access request letter to the Police:

> [The appellant], in her capacity as her brother's Estate Trustee, is considering the options available to the estate in inquiring into the cause of [her brother's] death and the surrounding circumstances. In order to make an informed decision about how to proceed in this respect, she requires access to all of the information in the possession of the [Police] relating to their investigation into [her brother's] death.

She submits that her request for disclosure relates to the administration of her brother's estate in six ways.

First, she argues that the Estate Trustee has a right and a duty to access the information about the circumstances of the death and, in fact, "to aggressively obtain information about the deceased's

personal life in order to ensure that no stone has been left unturned by the Estate Trustee in the exercise [of] his or her authority". The appellant suggests that in the circumstances of this appeal, it is particularly of importance and relevant to the issue that the "cause of death is unknown, there is a realistic possibility of foul play not discovered by the police, and there is evidence of a financial transaction involving the deceased's assets just prior to his death".

Second, the appellant submits that the Estate Trustee should be able to obtain this information in order to decide whether or not to disclose it to the family of the deceased for compassionate reasons. She submits that the following passage from the court's decision in *Adams* suggests that compassionate grounds are appropriate considerations in deciding whether the terms of section 54(a) have been met:

> The Inquiry Officer clearly felt that it was right and appropriate that the husband of the deceased have access to information concerning her health to which she would have had access, and that he have it on compassionate grounds, for example, for the husband's own satisfaction. *These considerations may be appropriate if the information were being disclosed to the deceased's personal representative in relation to the administration of her estate*. [emphasis added by appellant]

The appellant's third basis relates to the ability of the Estate Trustee to determine whether to pursue an independent investigation into the circumstances surrounding the death. The appellant asserts that there are a number of unexplained events leading up to her brother's death and that he may have been a victim of foul play. She believes that the requested records will allow her (as Estate Trustee) to assess the information in the possession of the Police and to make an "informed decision" as to whether or not to pursue an independent investigation into her brother's death. Although she may have other options in pursuing independent investigation into the circumstances of her brother's death, the appellant states that they would be costly to the estate and thus "have a financial effect on the estate".

Fourthly, the appellant submits that the Estate Trustee requires the information in order to determine whether she will pursue a wrongful death action against as of yet unknown third parties. The appellant states that pursuant to section 38 of the *Trustee Act*, she retains "all rights and remedies" of the deceased in respect of potential causes of action. She indicates that she requires the requested records in order to make an informed decision about whether or not to attempt to pursue a wrongful death action.

In this regard, the appellant refers to Assistant Commissioner Mitchinson's decision in Order MO-1256 and submits that it was wrongly decided. In this case, the Assistant Commissioner concluded:

> 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.)).

The appellant submits that the decision in *Adams* must be confined to the fact that the court found that the husband of the deceased was not her personal representative within the meaning of section 54(a) of the *Act*. She states further:

> There was no claim made by the estate itself. The Court noted that s. 38(1) of the *Trustee Act* prevented a deceased's estate from recovering damages in a wrongful death action, because the husband's wrongful death action could not benefit the estate. Essentially the Court is saying that just because the friends or family of a deceased may need or want information about the deceased, the commission is only entitled to release this information to the personal representative. But nothing in the Court's decision suggests that the estate is not entitled to information if it pursues litigation. In fact the Court expressly states the decision whether or not to pursue litigation is part of the Estate Trustee's duties:
>
> > ... The executor may require certain financial information for the administration of the estate, or even certain personal information in order to pursue a lawsuit on behalf of the estate ....
>
> Accordingly, if an Estate Trustee requests information in order to pursue litigation on behalf of the estate, he or she is clearly acting in relation to the administration of the estate.
>
> It should be noted by the commission that s. 38(1) of the *Trustee's Act* expressly gives to the Estate Trustee the very broad right to maintain an action of "all torts or injuries to the person or to the property of the deceased in the same manner and with the same right and remedies as the deceased would". The only limitation is that the estate cannot receive damages for death or loss of the expectation of life. This does not prevent the estate from bringing a wrongful death motion, it only limits the damages that can be awarded. Damages of course are only one of the many remedies available to a plaintiff in a civil action according to the term of Rule 14(3) of the rules of civil procedure. It is not uncommon for an estate to bring a wrongful death action and to seek, *inter alia*, a declaration from the court of the liability of the third party. See for example, *Smith Estate v. College of Physicians and surgeons of Ontario* (1998) 41 O.R. (3rd) 481 (Ont. C.A.) and *Ordon Estate v. Grail* (1996) 30 O.R. (3rd) 643 (Ont. C.A.) and 40 O.R. (3rd) 639 (SCC).

The appellant states that she is considering pursuing a wrongful death action in which a declaration would be one of the desired remedies. She submits that since the requested records are necessary in order to ensure that the decision to proceed is an informed one, the request is made in relation to the administration of the estate.

The fifth and sixth uses to which the appellant wishes to put the requested records are to locate an amount of money that was removed from the deceased and not returned and to pursue a claim

in relation to damage to the deceased's car. The appellant submits that these activities relate to the location of or recovery of damages for the deceased's assets in order to wind up the estate. On this basis, the appellant argues that her request relates to the administration of the deceased's estate.

The Police response

In response, the Police state:

> Although an Estate Trustee is guided in their powers and/or duties by the *Estates Act* and the *Trustees Act*, access to personal information of the deceased held by an "institution" is governed by the [*Act*]. Neither the *Estates Act* nor the *Trustees Act* has a specific provision which supersedes the privacy protection afforded an individual under [the *Act*] in regulating the disclosure of personal information.
>
> Therefore the application of the provisions under [the *Act*] cannot be described as "interference" with an Estate Trustee's role. Rather, [the *Act*] provides further clarity as to the rights of access to the deceased's personal information by establishing limits on that access.
>
> Under [the *Act*], a "personal representative" is not given carte blanche access to the personal information of a deceased. Section 54(a) was specifically enacted by the Legislature to limit access to a deceased's personal information to specific individuals and only then for a specific purpose; the administration of the estate.
>
> [The *Act*] does not preclude an Estate Trustee from performing their lawful duties and obligations, but does recognize a very important fact, that a deceased person retains the right to privacy, thereby limiting the extent to which a "personal representative" may access the deceased's personal information.
>
> ...
>
> Absent any information detailing the extent of the appellant's powers and/or duties, or any confirmation that the information is required for litigation purposes against/for the estate prohibits the [Police] from determining that the requested information relates to the "administration of the estate" for which the appellant has the legal right to act.

The Police point out that the appellant's submissions rely upon her interpretation that an Estate Trustee has unlimited powers and therefore should be able to receive unfettered access to the deceased's personal information. The Police submit that the *Act* does not recognize such broad powers, but rather limits a personal representative's right of access.

The Police state that the *Estates Act* and the *Trustee Act* both provide detailed guidance to a personal representative with respect to their duties as it relates to specific areas of a deceased's estate. The Police submit that the appellant has not established that the requested records are sufficiently connected to her perceived powers and duties.

The Police also note that the decision in *Adams* upheld the principle that a personal representative does not have unfettered access to a deceased's personal information. Commenting on the appellant's views relating to the extent of a trustee's obligations in winding up an estate, the Police state:

> Had that been the case, the authors of the legislation would have concluded section 54(a) at that point; however, they continued by including the provision that access to the information must "relate to the administration of the individual's estate".

Finally, the Police refer to the records at issue and state that, in their view, they do not relate to the issues which have been identified by the appellant in any event.

Findings

I accept that a trustee may require both financial and non-financial information in order to wind up an estate. However, I also agree with Assistant Commissioner Mitchinson's comments in Order PO-1075, and find that the phrase "relates to the administration of the estate" within the context of the *Act* must be read narrowly. Applying these principles here, I do not accept the appellant's arguments that this section should be construed so broadly as to contemplate that as part of the process of winding up the estate, the "fiduciary obligation" of the trustee would require that the appellant be able to access all information in the custody of the Police relating to her deceased brother (points one and two above).

In this regard, I agree with the Police. Had the *Act* intended that a personal representative have full and unfettered access to information about the deceased, it would have indicated as much. Rather, as many previous orders have noted, a combined reading of section 2(2) and the wording of section 54(a) indicates that a deceased individual retains his or her privacy rights, except insofar as the personal information is required in order to wind up the estate.

The appellant indicates that she is "contemplating" various options that might be available to her, but that she requires the information in order to decide (points three, four, five and six above). The appellant also believes that the decision in Order MO-1256 was wrongly decided. In Order M-919, former Adjudicator Fineberg clearly recognized that an estate trustee may pursue or defend an action on behalf of the estate, as recognized by the court in *Adams* and that records relating to these actions may be accessible under the *Act* since completion of the action is connected to the winding up of the estate.

Previous orders of this office have considered a number of different situations where a personal representative has sought records for the purpose of pursuing some kind of action connected to the death of an individual (see, for example, Orders M-400, MO-1256, MO-1260, MO-1271 and *Adams* (referred to above)). In Order MO-1256, Assistant Commissioner Mitchinson found:

> 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.)).

In my view, Assistant Commissioner Mitchinson's decision is not inconsistent with these earlier decisions. Rather, he is not persuaded that the particular action relates to the administration of the estate. Subsequent orders have consistently taken a similar approach to the issue. For example, in Order MO-1424, referring to Order MO-1256, I came to similar conclusions:

> I agree with this approach in determining whether the records relate to the administration of the deceased's estate. The record relates exclusively to the information provided by a nurse to the 911 operator. There is nothing in the record that remotely relates to financial matters or any other matters that would normally be associated with the appellant's right or power to "wind up" the deceased's estate. Similar to the circumstances in Order MO-1256, the record is not required to defend a claim against the estate, nor is it required in order to exert a right to financial entitlements being denied to the estate.

Similarly, in the current appeal, I am not persuaded that such contemplated actions as referenced by the appellant are either available to the appellant or that the records at issue are necessary or even related to these various options. Even if a cause of action were available, in my view, the mere possibility that a trustee might consider taking action in regard to issues relating to the deceased is too remote to be considered sufficiently relevant to her role in winding up the estate as contemplated by section 54(a) of the *Act*.

Finally, taken to its logical conclusion, the appellant's arguments relating to this issue generally suggest that in any case involving a personal representative, the deceased's privacy rights are superceded by the trustee's "fiduciary" or other obligations to the estate, the beneficiaries or some other 'just cause'. In my view, the trustee's "obligations" in this regard are no greater than or different from any other concerned family member such that they should elevate the rights of a trustee to obtain the personal information of a deceased under the *Act* to such a degree as to negate the effect of section 2(2). I recognize that a deceased's privacy rights might need to be abrogated in order to wind up his or her estate, as stated in *Adams*. However, as noted by the Police:

> It would be irresponsible for an institution to release the personal information of a deceased person based on a suggestion that it is a responsibility of an Estate Trustee to obtain that information. The *Act* places a responsibility on an

> institution to establish a sufficient connection to the administration of the estate prior to releasing that information.

Accordingly, I am not persuaded that the requested information relates to the administration of the deceased's estate. As a result, the appellant is in the same position as any other requester for this information.

INVASION OF PRIVACY

I found above that only Records 1, 4, 6, 7, 10 and 11 contain the appellant's personal information. The remaining records all contain the personal information of individuals other than the appellant, including the deceased.

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access. Under section 38(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.

However, where the record only contains the personal information of other individuals, section 14(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies.

I will consider whether the discretionary exemption in section 38(b) applies to Records 1, 4, 6, 7, 10 and 11 and whether the mandatory exemption in section 14(1) applies to the rest.

Exceptions in section 14(1)

The appellant indicates that she is unaware of the identities of any other individuals identified in the records. She states:

> The Respondent has not identified the third parties.
>
> ...
>
> Assuming the personal information of the third-parties in this case relates to the names and statements of witnesses who were interviewed by the police ...
>
> ...
>
> The Respondent has made no effort to contact these witnesses to obtain a consent - the Appellant obviously cannot - ...

Section 14(1)(a) 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,
>
> > upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

There is no requirement under the *Act* that an institution notify an affected party in order to obtain consent, unless it is considering disclosing the personal information in the records (see: third party notice provision in section 21(1)(b)). In any other case, such notification is at the discretion of the head of the institution.

With respect to the identities of the other individuals in the records, I made the following comments in the Notice of Inquiry that was sent to the appellant:

> It is apparent from a review of the records that much, if not all, of the information which was obtained by the Police from the appellant's family members was done so in her presence. In addition, it is apparent that certain portions of the records which the Police intend to disclose are connected to the content of surrounding withheld portions and is information that would have been discussed with the appellant.
>
> The Police are asked to provide representations on this issue generally and with particular reference to the types of information referred to in the above paragraph.
>
> **The appellant is invited to comment on this issue and in particular, on the circumstances under which her communications with the police and the communications of others took place. Please refer to the submissions of the Police in responding to this issue.** [emphasis in the original]

Had the appellant carefully read the Notice of Inquiry, she likely would be aware of the identities of at least some of the other individuals referred to in the records and it was open to her to obtain their consent to the disclosure of their personal information.

In the circumstances, the only exception which could apply is section 14(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 analysing the issues under both sections 38(b) and 14(1), 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 head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an

unjustified invasion of personal privacy. Section 14(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 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.

The Police indicate that all of the records at issue were compiled and are identifiable as part of an investigation into a possible violation of law and their disclosure would, therefore, constitute a presumed unjustified invasion of privacy under section 14(3)(b) of the *Act*. 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.

As I indicated above, the records relate to an investigation conducted by the Police into the circumstances of the appellant's brother's death. The Police state:

> The focus of a law enforcement investigation into a sudden death is twofold: to establish the factual case of the event and to rule out any other possible causes (ie. foul play). Although a decision with respect to the cause of death lies with the Coroner, the police investigation plays a key role in the determination. Additionally, the fact that no criminal proceedings were commenced by the Police 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.
>
> ...
>
> The records at issue in this appeal were created from information obtained <u>during</u> the investigation into the circumstances of the deceased's death. The memorandum book notes were recorded by the individual officers at the time of obtaining the information during the course of the investigation. The photographs were taken to assist the investigation officer in providing a recommendation on the law enforcement investigation. The occurrence report records information obtained during the investigation, and it concludes with the investigating officer's advice and recommendation to the Coroner as to the cause of death.

The appellant argues, initially, that any records compiled after May 9, 1999 (which is the date a named police officer allegedly told the appellant that no violation of law had occurred) would

not fall within the presumption as being compiled "during an investigation". The appellant submits that disclosure of the information in the occurrence report, therefore, would not constitute a presumed unjustified invasion of privacy. In this regard, the appellant states that:

> It was obviously created after it was determined that no violation of the law occurred. The fact that it refers back to other information is of no moment to this determination because it has been determined that no law was broken.

I am not persuaded by the appellant's arguments in this regard. I am satisfied that all of the records at issue in this appeal were compiled by the Police **as part of** their investigation into the circumstances of the appellant's brother's death. This includes the occurrence report, which is a document whose very purpose is to document the investigation, including the conclusions reached by the Police, if that is the case. The fact that a police officer might have expressed his conclusions verbally to the appellant prior to actually writing them down does not alter this finding. In this case, the "police investigation" was concluded when the police officer completed the documentation relating to that investigation, in particular, the occurrence report.

Many previous orders of this office have considered the application of the presumption in section 14(3)(b) or its provincial equivalent in appeals concerning the sudden death of an individual, in many cases, of a family member (Orders M-1039, M-1072, M-1079, MO-1196, MO-1256, PO-1692, PO-1715, for example) . These orders have recognized that when there is a "sudden death", the police are called in to determine whether there was any "foul play". Further, these orders have consistently found that the presumption in section 14(3)(b) or its provincial equivalent applies to information recorded by the investigating police force during their investigation into the circumstances of the death.

The appellant states:

> Section 14(3)(b) does not apply to the facts of this case. Section 14(3)(b) does not apply "to the extent disclosure is necessary to prosecute the violation or to continue the investigation". The Appellant intends to continue the investigation into possible violation of the law leading up to or surround [the deceased's] death. As this is the very reason for which this material was compiled in the first place, the Appellant submits that the exception within s. 14(3)(b) applies. See: Orders M-249; M-718 and MO-1356.

She also indicates that:

> As noted above, one of the purposes for which the Appellant requests this information is to decide whether to request that the Coroner's office conduct an inquest that would inquire into, *inter alia*, the police investigation itself.

In Order MO-1410, Adjudicator Dora Nipp addressed an appellant's assertion that she also wished to access personal information in order to continue the investigation into her husband's death as follows:

> 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).

I agree with this approach. One of the fundamental purposes of the *Act*, as set out in section 1, is the protection of personal privacy. The extent to which privacy should be protected under the *Act* was discussed in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) at page 326:

> Ultimately, then, we have concluded that a "balancing" test of some kind must be embodied in the privacy exemption. In order to provide clearer guidance than is afforded by the "unwarranted invasion of privacy" test, we propose that the test adopted in the statute meet these requirements:
>
> - the statute should, to the greatest extent possible, identify clearly situations in which there is an undeniably compelling interest in access;
>
> - for those cases not resolved by such explicit provisions, a general balancing test should be stated with some indication of the factors to be weighed in an application of the test to a particular document;
>
> - as part of the criteria set forth for the application of the balancing test, personal information which is generally regarded as particularly sensitive should be identified in the statute and made the subject of a presumption of confidentiality.

The Legislature has determined that the disclosure of personal information compiled as part of an investigation into a possible violation of law would constitute a presumed unjustified invasion of personal privacy. In doing so, it has recognized the importance of the privacy rights of individuals, including the deceased, in this context.

In my view, to take a broader view of the exception in section 14(3)(b) would result in an erosion of the privacy protection intended by this provision which is contrary to one of the fundamental purposes of the *Act*.

In the circumstances of this appeal, the investigation conducted by the Police was concluded. Therefore, the disclosure of the personal information in the records is not necessary to continue that investigation. The appellant is essentially interested in commencing a new investigation into, not only the circumstances of her brother's death, but, apparently, into the actions of the Police with respect to the manner in which they conducted their investigation. Accordingly, similar to the findings in Order MO-1410, I find that the exception to section 14(3)(b) does not apply.

I am satisfied, based on my review of the records in their entirety, that, consistent with routine police practices in relation to sudden deaths, the purpose of the Police investigation was conducted with a view to determining whether there was a possible violation of law. Therefore, I find that the personal information in the records 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 personal privacy under section 14(3)(b). Further, this presumption applies, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225).

Absurd Result

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).

The Police express a general concern regarding the application of this principle. They submit:

> To broadly apply the statutory interpretation of "absurd result" to include "information which would clearly have been known" would render the privacy protection rights under MFIPPA superfluous.
>
> To agree that information about a person, regardless of its veracity or invasiveness, must be given to another individual, purely because that individual may know or have discussed such information with police in the context of the law enforcement investigation, is in itself absurd.
>
> Is it the contention of the IPC that, if the victim of an offence submits a request upon conclusion of the trial, that he/she would be privy to the personal information (such as the Criminal Record, psychiatric evaluation, etc.) of the accused which was given at the trial? In the instance of a domestic incident, would the requester then be presumed to already have known their partner's personal information an therefore be provided access?
>
> ...
>
> Where then is the line drawn between what an appellant "knows", from whatever source the information comes, and what the appellant "directly provided"? If one were to take this question to the extreme, a great number of people would lost their right to privacy simply because someone "knows" information about them.

In response to these comments, I note that the Police are a very experienced institution in responding to the issues relating to the application of the presumption in section 14(3)(b) and

have been the subject institution in many orders that have applied the absurd result principle. To argue such an extreme application of this principle, in my view, reflects a lack of understanding of the many explanations in previous orders, many of which have been specifically directed to it, as to the manner in which this principle has and will be applied.

In Order MO-1323 (which pertained to a different police force), I had occasion to consider the rationale for the application of the absurd result:

> As noted above, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.
>
> In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

I stated further in that order:

> In Order M-444, former Adjudicator Higgins also noted that it is possible that, in some cases, the circumstances would dictate that the "absurd result" principle should not be applied even where the information was supplied by the requester to a government organization. I agree and find that all of the circumstances of a particular case must be considered before concluding that withholding information to which an exemption would otherwise apply would lead to an absurd result.

In Order MO-1323, I considered whether this principle should be applied in circumstances where the appellant provided a cassette tape from her son's answering machine to the police during their investigation into his death. The appellant in that case submitted that she knew what was on the tape although she had not actually heard it herself. I found that the cassette tape did not

contain her personal information. After considering the rationale for the application of the absurd result principle, I concluded:

> In all cases, the "absurd result" has been applied **only** where the record contains the appellant's personal information. In these cases, it is the contradiction of this higher right of access which results from the application of an exemption to the information. In my view, to expand the application of the "absurd result" in personal information appeals beyond the clearest of cases risks contradicting an equally fundamental principle of the *Act*, the protection of personal privacy. In general, I find that the fact that a record does not contain the appellant's personal information weighs significantly against the application of the "absurd result" to the record. However, as I indicated above, all of the circumstances must be considered in determining whether this is one of those "clear cases" in which the absurdity outweighs the privacy protection principles.

In the circumstances of that appeal, I found that having indirect knowledge about the contents of the cassette tape was very different from having listened to it first hand. Consequently I did not apply the principle in that case.

The privacy rights of individuals other than the appellant are without question of fundamental importance. However, the withholding of personal information of others in certain circumstances, particularly where it is intertwined with that of the requesting party, would also be contrary to another of the fundamental principles of the *Act*: the right of access to information about oneself. Each case must be considered on its own facts and all of the circumstances carefully weighed in order to arrive at a conclusion that, in these circumstances, withholding the personal information would result in an absurdity.

In asking the parties to address this issue in the Notice of Inquiry, I indicated that the circumstances of this appeal raised the possibility that the principle might be considered. As a result, I inquired as to the circumstances under which the information was obtained/provided.

The appellant submits that withholding the requested records from disclosure would result in an absurdity. In this regard, she states:

> The risk of absurdity in this case is extreme. The Commission is asked to note the following factors:
>
> - the Appellant provided most of the information (or was present when it was provided) to the police in the first place;
> - she provided the information in good faith after being advised that the occurrence report would be provided to her;
> - the police have already read large portions of the occurrence report to her and to her counsel;
> - as the Appellant [is] Estate Trustee the entire Bulk of the deceased's records and personal information came into her care and custody.

Finally, the appellant notes that:

> As [the deceased's] personal representative, the Appellant is privy to all of his banking records by necessity. That the Respondent would attempt to deny the absurdity of providing these records, especially considering that they were given to the police by the Appellant in the first place, is disheartening.

The Police acknowledge that the records indicate that the appellant was present in the room during one of the interviews, but note that there is only one specific reference to this fact. The Police state that the records do not indicate that she was involved in the interview, that she was close enough to hear or that she wasn't otherwise occupied at that time. The Police note further that another family member was interviewed in another room at the same time and it would, therefore, not be possible for her to participate (or even hear) both conversations.

The Police indicate that much of the information contained in the occurrence report or in the memorandum books was recorded by the police officers in a generalized synopsis format and it would be difficult to determine who provided what information.

As well, the Police note that although the appellant supplied records to the police from the deceased's personal papers, there is nothing to substantiate that she personally reviewed each and every entry or record. The Police submit that to release information of this nature to the appellant may reveal personal information of the deceased that she may not have known. Further, the Police point out that these records would have been created by the deceased and do not contain the appellant's personal information.

The Police state that the release of records to an individual who provided that information should be based on clear identification of which information they provided in order to protect the privacy of personal information which was obtained from other individuals. It should not be based on a presumption that the appellant is aware of this information. The Police conclude:

> It is the position of this institution that the application of "absurd result" should not be extended to what an appellant knows, and further that it should not be extended to what an appellant "might know" or "is likely to know".

The appellant indicates that hers is a reasonably close family and that much of the information in the records would be known to her. The records would tend to support her. Further, she indicates that during the police investigation she was in contact with and was provided information by the investigating officers, suggesting that she already knows what is in the records. I do not find this surprising. The circumstances of her brother's death are such that in order to fully investigate the matter, it is only to be expected that there would be communications, perhaps to a considerable degree, between the police and the family. However, I will not speculate as to what is known or not known by the appellant.

To a certain extent, I agree with the Police in that there should be a clear basis for a finding that the absurd result principle applies in any given situation. With respect to her presence at the time the statements were taken from other family members, the appellant was provided with the submissions of the Police as well as my own observations of the nature of the information in the records. Although I asked the appellant to comment on the circumstances under which her communications with the police and the communications of others took place, her

representations fall short of establishing that she was involved in any way during the interviews. She essentially reiterates the comments I made in the Notice of Inquiry, but does not provide any particulars. It is entirely possible that she was somehow involved. However, after carefully reading the police officers' notes of these interviews, I find that it is equally possible that she was not. While the appellant may well know what other family members said because they perhaps spoke about it or she surmised what they said, that is not sufficient for this purpose. In my view, the appellant has failed to provide sufficient evidence to establish that the application of the presumption in section 14(3)(b) would result in an absurdity with respect to this information.

There is a considerable amount of information in the records that can best be described as the observations/assessment of evidence by the investigating officers. In addition, there is information about other witnesses (apart from family). This information is all about other individuals as well as, in some cases, the appellant and was obtained independently of her knowledge and participation. I have no difficulty finding that the absurd result principle does not apply to this information.

There are other pieces of information in the records, however, which are more clearly and directly linked to the appellant and her knowledge. Contrary to the assertion of the Police, I find that there is clear evidence in the records that the appellant provided certain information to the Police and that she knows the contents of certain documents that she provided to them. In particular:

- page 13 contains references to certain banking information. It is clear from the face of the record that the appellant had viewed and fully appreciated their content. The references in this part of the occurrence report are to records that she would have been routinely entitled to have access to in her capacity as the Estate Trustee (had they not been part of the police investigation). This information is referred to again on page 100 which clearly notes that the information was obtained and discussed during a conversation with the appellant;

- pages 14, 15, 16 and 103 refer to information provided by the appellant and/or clearly reflects discussions between the Police and the appellant. In some cases, the Police have severed out portions of the content of these conversations while disclosing other portions. I acknowledge that these references are not prefaced by a statement "the appellant said", but their content must be viewed in context. In my view, it makes no sense to sever the information provided by the appellant in this fashion and to do so results in an absurd application of the privacy protection exemptions;

- pages 90 and 91 contain a reference to a message left by the police officer for the appellant, that was clearly intended to be received by her. It appears from other information in the records that it was received by her; and

- page 94 lists the people who were present with the appellant when the police arrived to speak with them. This information is clearly known to the appellant.

I have highlighted this information on the copies of the records that I am sending to the Freedom of Information and Privacy Co-ordinator for the Police. None of the information that I have referred to above relates to medical, psychiatric or psychological history, diagnosis, condition treatment or evaluation within the meaning of section 14(3)(a). Nor, in my view, do any of the factors in section 14(2) apply to this information. Based on my review of the context in which the highlighted information was provided, I conclude that withholding this information in the circumstances of this appeal would result in an absurdity. Therefore, I find that its disclosure would not constitute an unjustified invasion of privacy.

I find that the remaining personal information in the records 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 has asked that subsections 14(2)(a) and (d) 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. I find that section 14(4) does not apply to this information.

Public interest in disclosure

The appellant has raised the application of the so-called "public interest override" in section 16 of the *Act*. In this regard, she states:

> The Appellant submits that even if s. 14(3)(b) does apply in this case, the public interest in determining the deceased's cause of death outweighs the purpose of the exemption as per s. 16. The Appellant is concerned that a very serious criminal act may have gone undiscovered and unpunished because of a flawed police investigation that came to a close in part because of stereotypical and racist reasoning. The public interest in allowing the matter to be inquired into further outweighs the privacy interests of the third-party's in this case.

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.

Accordingly, I find that the personal information in Records 2, 3, 5, 8, 9 and 12 is exempt under section 14(1).

I have considered the submissions of the Police regarding their exercise of discretion under section 38(b). In my view, the Police have based their exercise of discretion on appropriate considerations. Accordingly, with the exception of the information that I have highlighted, the personal information in Records 1, 4, 6, 7, 10 and 11 is properly exempt under section 38(b) of the *Act*.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

The Police have claimed the application of section 8(1)(l) of the *Act* to withhold the "ten" codes which are contained in the police officers' notes from disclosure. These codes are found on Records 7 (pages 63, 68 and 69), 9 (pages 81 and 82), 10 (pages 83 and 86) and 11 (page 93). I found above that Records 7, 10 and 11 contain the appellant's personal information.

As stated above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution, while section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, **8**, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that information.

I will consider whether the discretionary exemption in section 38(a) applies to the "ten" codes in Records 7, 10 and 11 in conjunction with section 8(1)(l) and whether section 8(1)(l) applies to this information in Record 9.

Section 8(1)(l): facilitate the commission of a crime

Section 8(1)(l) reads:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

The appellant submits that the Police have not established sufficient evidence to support a finding that this section applies to the "ten" codes. The appellant states:

> The 10-codes indicate that purpose for which an officer attends on the scene or takes a further action. The Appellant is seeking to determine the cause of death of [the deceased] and to inquire into the circumstances surrounding his death for the reasons addressed above. There is no suggestion that she intends to engage in a criminal act. Nor would any suggestion of this nature be reasonable.
>
> The 10-codes are routinely disclosed to people accused of criminal offences [during] the criminal disclosure process. The Respondent's suggestion that also releasing this information to a law-abiding member of the public would jeopardize the [Police] does not make sense.
>
> To the extent that it will assist the Commission the Appellant is willing to consider undertaking to not disclose the 10-codes. The important issues is that she be able to review them in order to get a fuller sense of the police activity in this case.

The Police submit that:

> The use of ten-codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning...
>
> By encoding a particular meaning within a ten-code, the police seek to reduce the ability of those involved in criminal activity from using such knowledge to circumvent detection by police while committing criminal activities. This information could also be used to counter the actions of police personnel responding to situations. This could result in the risk of harm to either police personnel or members of the public with whom the police are involved; i.e., victims and witnesses.
>
> Should the ten-codes and their meanings become known to the public at large, including those who have a criminal intent, their effectiveness would be compromised.
>
> Should those engaged in criminal activity become aware of the meaning of certain ten-codes, this information could be used to determine the availability of police to respond to calls. Combining this information with the criminal intent of those individuals, they could cause a number of events to occur resulting in police attendance. By monitoring police radio transmissions, they could determine at what point the police no longer had any available officers, and thus commit the criminal activity from which they seek to evade detection, thus hampering the control of crime.

> In fact, not all ten-codes are consistent from one police service to another. This is another factor which shows that ten-codes is information intended for use within a limited sphere.

With respect to the appellant's argument that the "ten" codes are disclosed to individuals accused of criminal activity, the Police state:

> Separate legislation exists which requires that persons accused of a criminal act are entitled to Disclosure of information concerning the charges they are facing. Disclosure could include the personal information of victims and witness, as well as coded information such as the 10-codes. It is the Crown Attorney's Office who decides on what information should be disclosed ...
>
> However, different considerations apply should a request be made by that same accused for that same information at a point in the future. Although information is at one time available within the legal framework of disclosure, that does not preclude the right to privacy of the victim and witnesses at a subsequent time.
> The same reasoning should apply to the 10-codes. It may be lawful to provide that information during the Disclosure process, but different considerations should also apply for future applications of the same information.

With respect to the ability of accused individuals to obtain the "ten" codes through disclosure, section 51(1) of the *Act* provides:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

This section of the *Act* has been considered in a number of previous orders (see, for example: Orders P-609, M-852, MO-1109 and MO-1192). In Order MO-1109, Assistant Commissioner Mitchinson commented on this section as follows:

> Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).
>
> Former Commissioner Sidney B. Linden held in Order 48 that the Act operates independently of the rules for court disclosure:
>
> > This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining

> documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

With respect to the obligations of an institution under the *Act*, he stated:

> The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.
>
> The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

I agree with the above comments. In my view, the two schemes work independently. The fact that information may be obtainable through discovery or disclosure is not determinative of whether access should be granted under the *Act*. Although some individuals may have knowledge of certain codes because they have been disclosed to them through the disclosure process, I am satisfied that the Police take care not to make this information available to the public generally.

In Order M-757, former Adjudicator Fineberg stated:

> The Police have applied section 8(1)(l) of the *Act* to exempt from disclosure their operational "ten" codes . . .
>
> The Police have indicated that they use the "ten" codes to shorten radio transmissions, to standardize radio responses and, most importantly, to reduce the ability of those involved in criminal activity from easily tracking the activities of police officers. They submit that they applied section 8(1)(l) on the basis of this last concern.
>
> The Police have explained the meaning of the five codes which have not been disclosed. They have provided, as part of their representations, an example of a case in which those involved in criminal activities acquired a list of the police codes and how it undermined the effectiveness of the Police in their attempt to control these activities.
>
> The purpose of the exemption in section 8(1)(l) is to provide the Police with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to result in the harm set out in this section. I am satisfied that, in this case, the Police have provided sufficient evidence to establish that

> disclosure of the "ten" codes . . . could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that the requirements for exemption under section 8(1)(l) have been met with respect to this information.

In my view, former Adjudicator Fineberg's findings are equally applicable here, and I find that section 8(1)(l) applies to the "ten" codes on pages 63, 68, 69, 81, 82, 83, 86 and 93 of the records.

The appellant has offered to undertake not to disclose this information to anyone else. While this offer does not, in my view, assist in determining whether the exemption applies to the information at issue, it may have some bearing on the Police's exercise of discretion in claiming the exemption. In their reply submissions the Police acknowledge the offer but simply refer to previous orders in support of their decision to withhold the "ten" codes. In my view, this is not a proper exercise of discretion as it does not appear to reflect on the impact of such an undertaking on the more general concerns they express regarding disclosure of the information. It appears, however, that this offer is first made in the appellant's representations. Had it been made earlier in the process, the Police would have been able to consider it in the exercise of their discretion. In my view, it is too late to now require them to do so. I have reviewed their exercise of discretion relating to this issue and find that it is based on proper principles and should not be disturbed.

Accordingly, I find that the "ten" codes in Records 7, 10 and 11 are exempt under section 38(a) and the "ten" codes in Record 9 are exempt under section 8(1)(l).

I am sympathetic to the appellant's desire to know more about the circumstances of her brother's death and the police investigation into it. This sentiment has been expressed many times in orders concerning deceased family members. 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 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.

Because I have upheld the portion of the records for which the Police have claimed the application of section 7(1), it is not necessary for me to consider this exemption.

ORDER:

1. I order the Police to disclose the information that has been highlighted on the copies of the records that I am sending to their Freedom of Information and Privacy Co-ordinator along with a copy of this order by providing her with a copy of this information on or before **July 20, 2001.**

2. I uphold the decision of the Police to withhold the remaining portions of the records from disclosure.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: June 29, 2001
Laurel Cropley
Adjudicator