



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1525

Appeal MA-010224-1

City of Toronto



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NATURE OF THE APPEAL:

This is an appeal from a decision of the City of Toronto (the City), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). As background, the requester (now the appellant) made a request to the City for personal information relating to his deceased mother, who resided in a City-operated nursing home. Specifically, the appellant requested information indicating the date of his mother's admission into the nursing home as well as copies of all health records that were provided to and/or generated by the nursing home staff.

In its decision, the City denied access to the records, relying on sections 14(1) (unjustified invasion of personal privacy) and 38(b) (discretion to refuse requester's own information) of the *Act*.

During mediation through this office, a number of issues were resolved. The appellant narrowed the request, thus reducing the number of records at issue. The appellant also satisfied the City that he was a personal representative within the meaning of section 54(a) of the *Act*. The City, however, was not satisfied that the records were required for the administration of the estate. The City takes the position, accordingly, that section 54(a) does not apply to this access request.

Through a Notice of Inquiry, I sought the submissions of the appellant initially. I then provided his submissions to the City and invited it to provide representations in response, which it has.

The issues to be decided in this appeal are:

- whether the appellant is entitled to exercise the rights of the deceased pursuant to section 54(a) of the *Act*;
- whether the records are exempt under section 14(1) or section 38(b) of the *Act*.

If section 54(a) applies, the appellant stands in the place of the deceased for the purpose of making his request for access under the *Act*.

RECORDS:

The records consist of various documents relating to the health and care of the appellant's deceased mother, located in her nursing home file and organized into seven groups. The records include the nursing home's admission and discharge records, resident plans, assessments, medical administration records, medical orders, progress notes, consultation notes, resident incident reports and medical tests. The records remaining in dispute are as follows:

1. Group 1, pages 1-42, 49, 50 and 52-80
2. Group 2, pages 1-162, 165-167, 171 and 178-186
3. Group 3, pages 1-102
4. Group 4, pages 1-17
5. Group 5, pages 1-43

6. Group 6, pages 107-140
7. Group 7, pages 1-113

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Introduction

I will first consider whether, under section 54(a) of the *Act*, the appellant is entitled to exercise the rights of his deceased mother under the *Act*.

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...

Under this section, the appellant can exercise the rights of the deceased under the *Act* if he can demonstrate that (a) he is the personal representative of the deceased, and (b) the rights he wishes to exercise relate to the administration of the deceased's estate. If the appellant meets the requirements of this section, then he is entitled to have the same access to the personal information of the deceased as the deceased would have had; his request for access to the personal information of the deceased will be treated as though the request came from the deceased himself under section 36(1) of the *Act* (see, for instance, Orders M-927 and MO-1315).

As I have indicated, the City is satisfied that the appellant is the personal representative of his deceased mother; however, it is not convinced that access to the records is related to the administration of her estate.

Personal Representative

In Order M-919, former Inquiry Officer 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.

Based on the court’s analysis set out above, 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 adopt the analysis of former Inquiry Officer Fineberg for the purposes of this appeal. Based on the copy of the last will and testament of the deceased before me, which names the appellant and his brother as executors and trustees, I am satisfied that the appellant is a “personal representative” within the meaning of section 54(a) of the *Act*.

Relates to the Administration of the Individual’s Estate

In Order M-1075, Assistant Commissioner Tom Mitchinson reviewed the scope of the access rights of a personal representative under 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.

In that order, Assistant Commissioner Mitchinson accepted the argument of a personal representative that access to certain police records was required in order to determine whether the major beneficiary of the estate was disentitled from benefiting under the will by contributing to the death of the testator. It was found that access to the records was required in order for the personal representative to make an informed decision about matters relating to the beneficiary’s entitlement to assets of the estate, and met the second requirement under section 54(a).

Other orders have applied section 54(a) in circumstances where access to the records was required in order to defend a claim being made against an estate (Order M-919), to exert a right to financial entitlements being denied to the estate or said to be due to the estate (Orders M-934 and MO-1315) or to investigate allegations of fraud which might affect the size of the estate (MO-1301). Section 54(a) has been held not applicable in cases where the only monetary claim being investigated was one the estate was clearly not entitled to pursue (see Order MO-1256).

In this case, the appellant has made a claim to the Saskatchewan Workers' Compensation Board (the Board), in his capacity as estate trustee. The claim appears to be for any benefits that might have been available to his mother in her lifetime, as a result of alleged occupational exposure to toxic chemicals, or benefits resulting from her death by the same alleged cause. The appellant believes, among other things, that his mother's long-term severe bipolar disorder is related to this exposure.

The Board has acknowledged the appellant's claim and is in the process of investigating it. It has requested certain information from the appellant, specifically, a death certificate, names of medical professions to contact for confirmation of exposure and the symptoms resulting in his mother's death, and information about dependent children.

The City submits that the information required by the Board is not the specific and detailed information contained in the deceased's extensive medical records that are at issue in this appeal. Further, the appellant was able to respond to the Board and provide it with the requested information. There is no indication that the Board has since asked for any additional information from the appellant or that a decision has been rendered by the Board to deny compensation because it does not have the records at issue. Therefore, it cannot be said that these particular records are required to "exert a right to financial entitlements being denied to the estate" (as stated in Order M-934).

I find that the appellant's request for access to the records "relates to the administration" of his deceased mother's estate, within the meaning of section 54(a).

In my view, the City's interpretation of section 54(a) is unduly restrictive. I have found that the estate has made a claim to the Board based on the deceased's medical/psychiatric condition preceding her death and arguably leading to her death. The records at issue relate to that condition. Section 54(a) does not require the appellant to demonstrate that without access to those records, his claim will be rejected. Its application also does not depend on whether the authority that will decide that claim has made a specific demand for the information in these records. It may be difficult to determine at this stage how important (or not) the information in those records may be to the claim. However, they are certainly relevant, and the appellant is entitled to have access to them under section 54(a) in order to make his own determinations on their significance to the claim.

It is important to note that the City does not suggest that an estate is not entitled to make the claim the appellant has put forward to the Board. Further, the Board has not itself rejected the claim at the outset on the basis that it is not available to the estate to make. Despite being invited to provide me with any "statute, regulation, order, policy, rule" or other evidence establishing

whether such a claim for benefits may be made by an estate to the Board, the parties have not sent me any authority which touches on this issue. Accordingly, at the moment it can simply be said that the estate has made a claim to the entity which has the authority over it, and that a decision on the validity of the claim is outstanding.

The circumstances of this case are therefore distinguishable from those where a personal representative is not entitled to have access to records under section 54(a) of the *Act*, because the claim being investigated is clearly not one that the estate is entitled to pursue (see, for instance, Order MO-1256).

I have considered the City's representations about what it believes to be the primary reason for the request for access. It may be that there are additional reasons for the request for access, apart from the estate's claim to the Board, although it should be noted that the evidence does not support the City's belief that these additional reasons are "primary". In any event, I am satisfied, as I have indicated above, that the appellant has made a genuine claim to the Board on behalf of the estate, the records are relevant to that claim, and the appellant seeks the records for the purpose of advancing that claim.

I therefore find that the appellant has met the requirements of section 54(a), and he is entitled to have the same access to the information in the records as the deceased would have had. It remains to determine whether any exemptions under the *Act* restrict that access.

PERSONAL INFORMATION/INVASION OF PRIVACY

As I have indicated, the City has relied on sections 14(1) and 38(b) in denying access to the information in the records. In order to assess whether these provisions apply it is necessary to determine whether the records contain personal information, and to whom that personal information relates.

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

Based on my review of the records, there is no doubt that they contain the personal information of the deceased, as they relate to her health and care, and include the nursing home's admission and discharge records, resident plans, assessments, medical administration records, medical orders, progress notes, consultation notes, resident incident reports and medical tests.

I also find that there is personal information in the records about individuals other than the deceased. Most of this consists of the names of persons identified as the next-of-kin of the deceased, along with information such as addresses and relationship to the deceased. Some of this type of information is about the appellant, and some of it is about other family members. Some of the information about individuals other than the deceased and the appellant goes beyond "contact information" and also contains information about a psychological state, medical condition, prescriptions or finances.

Section 36(1) of the *Act* gives individuals a right of access to their own personal information. Since I have found that the appellant is entitled to exercise the rights of his deceased mother, the appellant is accordingly entitled to any personal information about her in the records. He is also entitled to any information relating to him.

Section 38, however, provides certain exceptions to the section 36(1) right of access. Under section 38(b) of the *Act*, where a record contains the personal information of both the deceased (or the appellant) and of other individuals, the City has the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Sections 14(2) and (3) 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 consideration in making this determination. Section 14(3) lists types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The City accepts that the disclosure of the "contact information" in the records (i.e. identity of next of kin and address) would not be an unjustified invasion of the personal privacy of these individuals. I am also satisfied that the disclosure of this information to the appellant would not constitute an unjustified invasion of the personal privacy of these family members. The information does not fall under any of the presumptions in section 14(3), and the application of the criteria in section 14(2) does not lead to the conclusion that its disclosure would constitute an unjustified invasion of personal privacy.

The City submits that other personal information in the records of individuals other than the appellant or the deceased falls under the presumption in section 14(3)(a). On my review, I find that information in the following records relating to a psychological state, medical condition or prescriptions of other individuals falls under this presumption, and its disclosure is accordingly presumed to constitute an unjustified invasion of personal privacy:

- Group 1, page 38
- Group 3, page 101
- Group 5, page 52

Certain information in Group 1, page 59 falls under the section 14(3)(f) presumption (finances, income, etc.)

I also find that the information on these pages can be readily severed from the rest of the records. I do not agree with the City's characterization of the information on page 37 of Group 1 of the records as relating to a "medical evaluation" of the deceased's spouse. I find that this information does not fall under the section 14(3)(a) presumption, and the application of the criteria in section 14(2) does not lead to a conclusion that its disclosure would constitute an unjustified invasion of personal privacy. This record therefore does not qualify for exemption.

I am satisfied that the City has exercised its discretion section 38(b) appropriately in refusing access to the information which I have found falls within one of the presumptions in section 14(3).

Finally, I note that the record at Group 7, page 1 is not about the deceased, but about another resident of the nursing home, and appears to have been inadvertently included in the records provided by the City. Since it is clearly not related to the appellant's request, I am satisfied that it is not at issue in this appeal.

In the result, I am satisfied that the appellant is entitled to have access to the information in the records, with the exception of the information I have identified above, which can be severed.

ORDER:

1. I order the City to release the records to the appellant in their entirety, with the exception of portions in Group 1 (pages 38 and 59), Group 3 (page 101) and Group 5 (page 52), and with the exception of Group 7 (page 1). For greater certainty, I have enclosed with the copy of my order to the City the relevant pages highlighting the portions to be severed.
2. I order disclosure to be made by sending the appellant a copy of the records, severed according to my directions, by no later than **May 7, 2002**.
3. In order to verify compliance with my directions, I reserve the right to require the City to provide me with a copy of the records sent to the appellant.

Original signed by: _____
Sherry Liang
Adjudicator

_____ March 28, 2002