



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

ORDER MO-1375

Appeal MA-000056-1

Niagara Regional Police Service



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NATURE OF THE APPEAL:

The Niagara Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the police report prepared following an investigation into the sudden death of a woman. The requester is an Investigator retained by the Insurer of the deceased woman's life. Attached to the request was an authorization executed by the deceased's foster mother authorizing the Police to disclose any information relating to herself to the Investigator.

The Police located the responsive records and denied access to them, in their entirety, claiming the application of the invasion of privacy exemption contained in section 14(1) of the *Act*, with reference to the presumption against disclosure in section 14(3)(b) (records compiled as part of an investigation into a possible violation of law). The Police also advised the requester that access to the requested information would not be granted unless he was able to demonstrate that the request fell within the ambit of section 54(a) of the *Act* which allows for a requester to have access to personal information relating to a deceased individual only if the requester is the "personal representative of the deceased" and the exercise of the right of access "relates to the administration of the individual's estate."

The requester, now the appellant, appealed the decision of the Police to deny access to the records.

During the mediation stage of the appeal, the Police obtained consent to the partial disclosure of a statement made by a witness. In accordance with that consent and pursuant to section 14(1)(a), a portion of this individual's statement to the Police was disclosed to the appellant.

Initially, I decided to seek the representations of the appellant with respect to the application of sections 14(1) and 54(a) to the records. In addition, as some of the information contained in the records appears to relate to the deceased's sister, who also provided the appellant with an authorization allowing the disclosure of her personal information to him, I asked the appellant to address the possible application of section 38(b) of the *Act* to the records.

I received the representations of the appellant, which were then shared, in their entirety, with the Police. As noted above, the appellant also provided an authorization from the deceased's sister which purports to grant the appellant the right of access to any personal information of the deceased which may be contained in the records. I will address the impact of that authorization below. In response to the Notice of Inquiry, the Police also provided me with representations.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Having reviewed the records, I find that they all contain information which is primarily about the deceased and the circumstances surrounding her death. Section 2(2) provides that personal information does not include information about an individual who has been dead for more than thirty years. Because the deceased has been dead for less than 30 years, the information in the records

which is about her continues to qualify as her personal information. The records also contain the personal information of a number of other identifiable individuals, such as witnesses interviewed by the Police, and including the deceased's sister and foster mother. The records do not contain any personal information relating to the appellant.

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Section 54(a) of the *Act* 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 section 54(a), the appellant would be able to stand in the place of the deceased and exercise her right to request access to her personal information if he is able to:

1. demonstrate that he is the deceased's "personal representative"; and
2. demonstrate that his request for access "relates to the administration of the deceased's estate".

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.

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

... I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the *Act* if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased person retains the right to personal privacy except insofar as the administration of his or her estate is concerned.

In Order M-1075, it was established that in order to give effect to the rights established by section 54(a), the phrase "relates to the administration of the individual's estate" should be interpreted narrowly to include

only records which the personal representative requires in order to wind up the estate. Therefore, the appellant in this case must establish not only that he or the deceased's sister is the deceased's personal representative, for the purposes of section 54(a), but also that he needs access to the records for the purposes of exercising his or the deceased's sister's duties as a personal representative. To do this, the appellant must first provide evidence of his or the sister's authority to deal with the estate of the deceased. As set out in the Notice of Inquiry, the production by the appellant of letters probate, certificate of appointment of estate trustee, letters of administration or ancillary letters probate under the seal of the proper court would be necessary to establish that either he or the deceased's sister has the requisite authority.

The Police state that the appellant did not provide them with evidence to establish that he, or anyone else, was the personal representative of the deceased's estate, and that without this evidence, her personal information cannot be released to him.

The appellant states that the deceased died without a will, and that her sister acted as the administrator of her estate without the necessity of obtaining Letters Probate or Letters of Administration. In the authorization executed by the deceased's sister, in her capacity as next-of-kin to the deceased, she granted the appellant the right to obtain access to the personal information of the deceased.

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

Although there is no definition of "personal representative" in the *Act*, when that phrase is used in connection with a deceased and the administration of a deceased's estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s.1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1:

1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.

...

... I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the *Act* if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

Because the deceased's sister does not qualify as the deceased's "personal representative" for the purposes of section 54(a), she could not grant to the appellant an authorization allowing for the disclosure of the deceased's personal information to him. I find that the authorization purporting to grant to the appellant a right of access to the deceased's personal information to be of no effect insofar as his request under the *Act* is concerned since the deceased's sister did not have the requisite authority under the *Act* to do so.

In addition, I find that the records at issue in this appeal, which consist of the documents compiled by the Police in the course of their investigation into the deceased's death, do not relate to the administration of the estate. In my view, the right of access being asserted by the appellant does not relate to a claim for financial entitlements being denied to the estate. As such, I am not satisfied that the request relates to the administration of the deceased's estate as this term has been applied in previous orders.

Therefore, section 54(a) does not apply and I am precluded from allowing the appellant to stand in the place of the deceased person for the purposes of making a request for access to her personal information. In the circumstances, I will treat this request and the subsequent appeal as a request by an individual for the personal information of another individual under Part I of the *Act*.

INVASION OF PRIVACY

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

As noted above, the deceased's foster mother has consented to the disclosure of her personal information to the appellant. However, because the personal information of the foster mother is intertwined with the personal information of the deceased, the records containing the foster mother's personal information must be considered under section 14(1)(f) (Order MO-1244).

Sections 14(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 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.

In this case, the only exception to the section 14(1) exemption which could apply is section 14(1)(f). The Police have cited the presumption of an unjustified invasion of privacy at section 14(3)(b) to support its position that section 14(1)(f) does not apply. Those sections read:

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

The appellant submits:

. . . the police thoroughly investigated the death of [the deceased] and reached the conclusion there was no foul play involved that would result in criminal proceedings against any individual. The investigation was inconclusive in as far as determining if the death was the result of suicide or accidental. If the cause or means of death was not determined during the course of the police investigation but no subsequent or ongoing police investigation is underway, the investigating police service should not be in a position to withhold police reports for an indefinite period of time without establishing the cause of death.

The Police state that all of the information was recorded as a result of an investigation into the circumstances of the deceased's death, "in order to rule out the possibility of its being a homicide". The Police submit, therefore, that the presumption in section 14(3)(b) applies to the records.

The fact that no criminal proceedings were commenced by the Police following their investigation does not negate the applicability of section 14(3)(b). This section only requires that there be an investigation into a possible violation of law [Orders M-198 and P-237].

In Order MO-1192, Adjudicator Laurel Cropley stated, in the context of a request for police records concerning an alleged assault:

The appellant submits that since the Police made a judgment call not to lay charges against the suspect, they have not established the application of the presumption in section 14(3)(b).

I am satisfied that the Police investigated an alleged assault on the appellant at the named high school and that the investigation was conducted with a view to determining whether criminal charges were warranted. Accordingly, 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. The presumption may still apply, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225). As I indicated above, once a determination has been made that the presumption in section 14(3)(b) applies, it cannot be rebutted by factors in section 14(2). Therefore, even if I were to find that section 14(2)(d) applies in the circumstances, it would not be sufficient to rebut the presumption in section 14(3)(b). I have considered section 14(4) and find that it does not apply in the circumstances of this appeal.

In my view, the principles articulated by Adjudicator Cropley in Order MO-1192, and in other previous orders, are also applicable in the circumstances of this case. The information contained in the records was clearly compiled and is identifiable as part of an investigation into a possible violation of law; specifically the *Criminal Code*. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies to the requested information. Because none of the exceptions under section 14(4) applies, the information is exempt under section 14(1). As the appellant has not raised any of the considerations listed in section 14(2), it is not necessary for me to consider the application of any of these factors weighing either for or against disclosure.

Accordingly, I find that the records pertaining to the circumstances of the deceased's death qualify for exemption from disclosure under section 14(1).

ORDER:

I uphold the decision of the Police.

Original Signed By: _____ December 7, 2000

Donald Hale
Adjudicator