



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

ORDER MO-1762

Appeal MA-030261-1

Peel Regional Police



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NATURE OF THE APPEAL:

The Peel 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 specific report prepared as a result of an incident that occurred on June 17, 2003. The Police located the requested record and denied access to portions of it, claiming the application of the invasion of privacy exemptions in sections 14(1) and 38(b) of the *Act*. In their decision letter to the requester, the Police indicated that although the requester represents the family of the deceased person who is the subject of the record, he is not entitled to access to the record unless he satisfies the requirements of section 54(a) of the *Act*.

The requester, now the appellant, appealed this decision. The requester is counsel to the surviving members of the deceased person's family in various actions. For ease of reference, I will refer to the deceased's wife, the requester's client, as the appellant.

During the mediation stage of the appeal, the appellant provided the Police and this office with a copy of a Certificate of Appointment of Estate Trustee Without a Will appointing the appellant's client as the Estate Trustee of the deceased person. As further mediation was not possible, the matter was moved to the adjudication stage of the appeals process. I initially sought and received the representations of the Police, which were shared, in their entirety, with the appellant, along with a Notice of Inquiry setting out the facts and issues in the appeal. The appellant also provided representations.

RECORDS:

The sole record at issue consists of the undisclosed portions of a police occurrence report into the death of the appellant's husband.

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Introduction

I will first consider whether, under section 54(a) of the *Act*, the appellant, who was the deceased's spouse, is entitled to exercise the rights of the deceased person 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 she can demonstrate that (a) she is the personal representative of the deceased, and (b) the rights she wishes to exercise relate to the administration of the deceased's estate. If the appellant meets the requirements of this section, then she is entitled to have the same access to the personal information of the deceased as the deceased would have had; her 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* (Orders M-927, MO-1315 and MO-1538).

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".

The Police have accepted that the deceased's wife is a personal representative of the deceased.

Based on the court order issued August 26, 2003, appointing the deceased's wife the Estate Trustee of the deceased's estate, I am also satisfied that she 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).

Representations of the parties

In the present appeal, the appellant maintains that she requires access to the personal information contained in the record in order to pursue claims on behalf of herself and her children before the Workplace Safety and Insurance Board (WSIB), the Workplace Safety and Insurance Appeals Tribunal (WSIAT) and the Criminal Injuries Compensation Board (the CICB). The appellant was the victim of a serious assault some thirteen months prior to his death that left his health severely impaired. In addition to the claims advanced by the surviving spouse and her children, a claim is also being pursued seeking WSIB benefits on behalf of the estate arising out of the assault against the deceased person. The proceedings before the WSIB and WSIAT on behalf of the family members relate to claims for survivor benefits and compensation arising from the assault and the death of the appellant's husband. The claims brought before the CICB relate to the family's entitlement to compensation for "nervous shock" arising from both the assault and the husband's death.

The appellant further submits:

In an attempt to determine the relationship between the assault of May 2, 2002 and the June 17, 2003 fatality, complete police disclosure of all documentation pertaining to the June 17, 2003 records is required.

As the estate trustee's solicitor, it is my obligation in law to determine whether there are any cause or causes of action that the Estate of [the deceased] may have. In order to make an assessment of potential causes of action it is necessary to have the complete records respecting the June 17, 2003 fatality. You will appreciate that the Estate Trustee has the obligation to administer the Estate with a view to maximizing the Estate's assets in order to protect the beneficiaries of the said Estate. The Estate Trustee as a fiduciary, requires the complete records of the June 17, 2003 incident in order to administer the said Estate.

...

It is necessary also to obtain a copy of the complete police report in order to determine whether there is any negligence or gross negligence against the railway involved in this incident as again the estate trustee would have certain obligations on behalf of the estate.

The Police submit that the remaining information contained in the occurrence report is not "required for the purpose of settling the estate" and that the second part of the test under section 54(a) has not been satisfied. The Police submit:

In this case the appellant has received access to the Occurrence Report relating to the deceased's suicide. There is no question as to how he took his life. The personal information of the deceased, to which access has been denied, consists of details relating to the specific actions of the deceased in taking his life, which were provided by witnesses. This information is considered by the Police to be extremely sensitive and disclosure to the deceased's wife would be traumatic. The visual descriptors of how this man took his life in no way lend value to the tragedy of his death. Nor is this information required for settling the estate.

The appellant has stated that he intends to make claims to the Workplace Safety Insurance Board and the Criminal Injuries Compensation Board. It should be noted that it is the position of the appellant that the deceased committed suicide due to his state of mind caused by a workplace injury in 2003 [the injury in fact took place in 2002] which required brain surgery. The Police informed the appellant that he did not require the information to which access had been denied in order to proceed with the claims. In fact, the Police advised the appellant that the Police would share the record with both WSIB and CICB if the record was requested for a law enforcement purpose.

It is the position of the Police that the information to which access was granted is of greater relevance to the central issue than the information to which access was denied which merely depicts the actions of the deceased, prior to his demise, observed by the witnesses.

The Police completed their investigation and determined the cause of death to be "Suicide". The appellant was advised that any family member would be entitled to the Coroner's report which would also show the cause of death to be "Suicide". This is the information which would be required by the appellant for the purpose of settling the estate.

The Police rely on the reasoning contained in the decisions in Orders M-1075, MO-1256 and MO-1260 to support their position.

Findings

In Order MO-1525, Adjudicator Sherry Liang reviewed a situation where the records being sought by a requester related to a possible claim being pursued under workplace safety legislation in the Province of Saskatchewan. Adjudicator Liang found as follows:

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.

I adopt the reasoning expressed in Order MO-1525 for the purposes of the present appeal. The claims being advanced or contemplated on behalf of the appellant and her children before the WSIB, WSIAT, the CICB or the courts for survivor benefits, compensation for the infliction of nervous shock or damages for wrongful death are not proceedings on behalf of the estate. I find that any award which may be derived through these actions would benefit only the surviving spouse and children, as opposed to the estate. As a result, I find that the appellant is not entitled to rely on section 54(a) on the basis that the information sought relates to the administration of the estate.

I note that the appellant has indicated that a claim for WSIB benefits has also been submitted on behalf of the estate of the deceased person. I find that the appellant has “made a genuine claim” for compensation on behalf of the estate to the WSIB arising from the injuries suffered by the deceased as a result of an assault some thirteen months prior to his death. However, I find that the undisclosed portions of the record at issue in this appeal do not have any bearing and are not relevant to the claim being advanced before the WSIB on behalf of the estate. The events described in the occurrence report do not relate to the assault that is the basis for this WSIB claim, unlike the situation present in Order MO-1525. In my view, the appellant does not require access to the remaining information in the record in order to further advance the estate’s claim.

Accordingly, I find that the appellant has not satisfied the second requirement of section 54(a) and is not, therefore, able to pursue a right of access to the record at issue in the same manner as the deceased person would have. I will next determine whether the exemption in section 38(b) of the *Act* applies to the record.

PERSONAL INFORMATION/INVASION OF PRIVACY

The Police maintain that sections 14(1) and 38(b) apply to justify denying access to the undisclosed portions of the record. 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 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 (section 2(1)(h)).

The Police submit that the undisclosed portion of the record contains the personal information of the deceased person and the names, dates of birth (section 2(1)(a)), addresses, telephone numbers (section 2(1)(d)) and other personal information of the witnesses, along with their names (section 2(1)(h)).

I agree with the Police and find that the records contain the personal information of the deceased person and the witnesses to his death. In addition, those portions of the occurrence report which were disclosed to the appellant also include her own personal information, including her name and other personal information about her (section 2(1)(h)) and information relating to her marital status (section 2(1)(a)).

Section 36(1) of the Act gives individuals a right of access to their own personal information. Section 38 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 appellant and of other individuals, the Police have the discretion to deny the appellant access to that information if they determine 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).

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) 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 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 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 14(3) presumption can only 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. [Order PO-1764]

The Police submit that the information contained in the undisclosed portion of the record was compiled as part of an investigation into whether a violation of law had taken place in relation to the deceased person's death. As a result, they submit that the presumption in section 14(3)(b) applies to the information. The Police rely on the findings in Orders PO-1692, PO-1665, M-927 and P-1044 in support of their position that the undisclosed information was compiled as part of a law enforcement investigation and that its disclosure would constitute an unjustified invasion of the personal privacy of the deceased person.

The appellant states that the disclosure of the remaining information contained in the record is relevant to a fair determination of the rights of herself and her children in the proceedings before the WSIB, WSIAT, CICB and the courts under section 14(2)(d).

I find that the information contained in the record was compiled and is identifiable as part of an investigation by the Police into a possible violation of law. As a result, I find that it falls within the ambit of the presumption in section 14(3)(b). As noted above, the decision in *John Doe* indicates that a presumption can only be rebutted if it is found that section 16 or one of the exceptions in section 14(4) apply. The appellant has not raised the possible application of section 16 and the exceptions in section 14(4) do not apply. In addition, the *John Doe* decision held that a section 14(3) presumption cannot be rebutted by either one or a combination of the

factors in section 14(2). The undisclosed information contained in the record is, therefore, exempt from disclosure under section 38(b).

The Police have provided me with evidence as to the manner in which they exercised their discretion not to disclose the remaining portions of the record. I am satisfied that the Police properly considered all of the relevant circumstances in deciding to exercise their discretion in favour of non-disclosure of the remaining information.

ORDER:

I uphold the decision of the Police to deny access to the undisclosed portions of the record.

Original signed by: _____
Donald Hale
Adjudicator

_____ March 5, 2004