



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1803**

**Appeal MA-030432-1**

**Niagara Regional Police Services Board**



Tribunal Service Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **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 an incident report and “all notes and reports of the investigating officers” relating to the death of a named individual. The requester indicated that she is the widow and the Executor of the Estate of the named individual and that access to the requested information is “necessary for the administration of the estate”. As a result, she argues that she should be entitled to exercise the deceased person’s right of access to his personal information under section 54(a) of the *Act*.

The Police located the requested information and denied access to it, claiming the application of the invasion of privacy exemptions in sections 14(1) and 38(b) of the *Act*, with reference to the presumptions in sections 14(3)(a) (the information relates to the deceased person’s medical history) and 14(3)(b) (the information was compiled as part of an investigation into a possible violation of law). In addition, the Police took the position that the requester did not qualify under section 54(a) to exercise the same right of access as the deceased, as she had not met the second requirement of the two-part test established under section 54(a). Although the Police concluded that the requester was the deceased’s “personal representative” for the purposes of section 54(a), they were of the view that the request for access to the records did not relate to the administration of the deceased’s estate.

The requester (now the appellant) appealed the Police decision to deny access under the *Act*. With her appeal letter, the appellant provided the Commissioner’s office with an Amended Statement of Claim as evidence to substantiate her position that all of the requirements of section 54(a) had been satisfied.

During the mediation stage of the appeal, the appellant agreed to share the Amended Statement of Claim with the Police. This was intended to demonstrate that the estate itself was one of the plaintiffs in an action seeking damages on behalf of both the estate and the deceased’s surviving spouse and children. However, the Police continued to maintain their position that the appellant did not meet the requirements of the second part of the test under section 54(a). The appellant also indicated that she was no longer seeking access to certain non-responsive information contained in the police officers’ notes. No further mediation was possible and the appeal was moved to the adjudication stage of the process.

I sought and received the representations of the Police initially, the non-confidential portions of which were then shared with the appellant. I also received submissions from the appellant and shared them with the Police, who chose not to provide additional representations by way of reply.

## **RECORDS:**

The records at issue consist of an Incident Report, a Property Report and several Supplementary Reports, along with the notebook entries of six individual police officers.

## **DISCUSSION:**

### **RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE**

The appellant maintains that she ought to be entitled to exercise the right of access to the records in her capacity as the “personal representative” of the deceased person’s estate under section 54(a), which reads:

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, a requester can exercise the deceased’s right of access under the *Act* if he/she can demonstrate that

- he/she is the personal representative of the deceased, and
- the right he/she wishes to exercise relates to the administration of the deceased’s estate.

If the requester meets the requirements of this section, then he/she is entitled to have the same access to the personal information of the deceased as the deceased would have had. The request for access to the personal information of the deceased will be treated as though the request came from the deceased him or herself [Orders M-927; MO-1315].

#### **Personal representative**

The term “personal representative” means an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased’s estate [*Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.)]. The term “estate trustee” is also used to describe such an individual [Order MO-1449 and rule 74 of the Rules of Civil Procedure under the *Courts of Justice Act*].

Generally, to establish that he/she is the deceased’s personal representative, the requester should provide written evidence of his/her authority to deal with the estate of the deceased, including a certificate of appointment of estate trustee [Order MO-1449]. A will alone may not be sufficient [Order MO-1365].

In the present appeal, there is no dispute that the appellant qualifies as the “personal representative” of the deceased person as she has been appointed Estate Trustee Without a Will by the Ontario Superior Court of Justice.

### **Relates to the administration of the estate**

In order to satisfy this part of the test, the requester must demonstrate that the request “relates to the administration of the estate”. To meet this requirement, the requester must demonstrate that he/she is seeking access to the records for the purpose of administering the estate [Order MO-1315; *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.)].

Requests have been found to “relate to the administration of the estate” where the records are:

- relevant to determining whether the estate should receive benefits under a life insurance policy [Order MO-1315]
- relevant to the deceased financial situation and allegations of fraud or theft of the deceased’s property [Order MO-1301]
- required in order to defend a claim against the estate [Order M-919]

Requests have been found *not* to “relate to the administration of the estate” where the records are:

- sought to support a civil claim by family members under the *Family Law Act*, where any damages would be paid to the family members and not to the estate [Order MO-1256]
- sought for personal reasons, for example, where the requester “wishes to bring some closure to . . . tragic events” [Order MO-1563]

The Police submit that while they recognize that the appellant is the personal representative of the deceased person for the purposes of section 54(a), they are not satisfied that “the information is required to administer the estate”. The Police indicate that the basis for this belief is that “an estate cannot benefit by a civil claim for damages brought about by family members, rather any damages awarded would be paid to the family members and not to the estate”.

The appellant counters this argument by submitting that in fact the action that has been initiated involves a claim for damages for wrongful death by the family, as well as a claim by the estate itself for damages to compensate the deceased for loss sustained prior to his death. It argues that these damages are directly payable to the estate and that the disclosure of the records at issue is required in order to pursue this claim on behalf of the estate. The appellant provided me with a copy of the Statement of Claim filed on behalf of the estate and the surviving family that sets out the nature of the claims for damages made by each of them.

In my view, the appellant has tendered sufficient evidence to demonstrate that the request “relates to the administration of the estate” for the purposes of the second part of the test under section 54(a). I am satisfied that the request was made, at least in part, to assist in the

preparation of an action on behalf of the estate for damages for injuries caused to the deceased person prior to his death and that such damages would be recoverable by the estate, rather than the surviving family members. As such, I find that the appellant is entitled to “step into the shoes” of the deceased person and exercise the same right of access to the requested information under section 36(1) of the *Act* that would have been available to him, subject to any exemptions that may apply to the information.

## **PERSONAL INFORMATION**

### **General principles**

In order to determine whether the personal privacy exemptions claimed by the Police apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and

- (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

### **The meaning of “about” the individual**

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

### **The meaning of “identifiable”**

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

### **Findings**

I have carefully reviewed the records and parts of records remaining undisclosed and make the following findings:

- Pages 3 and 9 of a General Incident Report dated June 10, 2000 contain the personal information of the deceased and other identifiable hospital patients; pages 4 to 8 and 10 contain the personal information of the deceased person, the appellant and other identifiable individuals who are family members of the deceased;
- A two-page Property Report dated June 11, 2000, a one-page Supplementary Report dated June 12, 2000, a five-page Supplementary Report dated June 11, 2000, a two-page Supplementary Report dated June 13, 2000, a two-page notebook entry by Cst Casella, a one-page notebook entry by Sgt Donegan, and an eight-page notebook entry by Cst. Moore contain only the personal information of the deceased person;
- A one-page notebook entry by Sgt Sexton does not contain any personal information for the purposes of section 2(1); and

- A six-page notebook entry by Cst Rung and a seventeen-page entry from Sgt Gamble contain the personal information of the appellant, the deceased person, three other hospital patients and members of the deceased's family.

The information relates mainly to the deceased person and describes the investigation undertaken by the Police into the circumstances surrounding his death. The records also contain the names and other personal information of other individuals who were patients at the hospital where the deceased person died (section 2(1)(h)). Personal information relating to the appellant is also contained in many of the records. This information has been disclosed to her.

The records also contain information relating to the deceased person's family, including their names and other personal information about them (section 2(1)(h)), their addresses (section 2(1)(d)) and their personal views and opinions (section 2(1)(g)). The records also contain references to the views and opinions of the family members about the deceased person that therefore qualifies as his personal information (section 2(1)(g)).

## **INVASION OF PRIVACY**

Because all of the records, except the notebook entry by Sgt Sexton, contain the personal information of either the appellant or the deceased person (in whose shoes she is now standing), along with that of other identifiable individuals, I must determine whether the discretionary exemption in section 38(b) applies to exempt the personal information in the records from disclosure to the appellant.

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. 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 requester 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.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester.

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 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. [See Order PO-1764]

If none of the presumptions in section 14(3) applies, the institution must consider the application of the factors listed in section 14(2), as well as all other considerations that are relevant in the circumstances of the case.

The Police have relied on the "presumed unjustified invasion of personal privacy" in sections 14(3)(a) and (b) of the *Act* which read:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (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;

They submit that the records contain information relating to the psychiatric and medical condition of the deceased person and that they were compiled as part of the investigation undertaken after his death.

The appellant submits that there exists a "compelling public interest" in the disclosure of the information contained in the records within the meaning of section 16 of the *Act*. Owing to the operation of the public interest override provision in section 16, the appellant argues that the presumptions in sections 14(3)(a) and (b) have no application. I will address the possible application of section 16 to the records below.

The appellant also makes reference to the application of the consideration favouring disclosure in section 14(2)(d), which reads:



A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

## **Findings**

As noted above in my discussion of section 54(a), I have found that the appellant is entitled to exercise the same right of access as the deceased person to any personal information in the records that relates to him. As a result, I find that the appellant is entitled to obtain access to much of the information contained in the undisclosed records and portions of records, including all of the records which I have found contain only the personal information of the deceased.

Other records, however, contain the personal information of other patients at the hospital. I find that this information falls within the ambit of the presumption in section 14(3)(a) and that the disclosure of this personal information, contained in pages 3 and 9 of the General Incident Report dated June 10, 2000, in page 1 of Cst Rung's notebook entries and page 2 of Sgt Gamble's notebook entries, is presumed to constitute an unjustified invasion of the personal privacy of these individuals. As such, this information is exempt from disclosure under section 38(b).

In addition, portions of the remaining records also contain the personal information of the deceased person's family members, intertwined with that of the deceased himself. In my view, it is not possible to separate them in such a way as to leave behind a coherent document. I specifically find that the information in these records was compiled by the investigating officers as part of their law enforcement investigation into the death of the deceased person. I find that the personal information of those individuals other than the appellant or the deceased person which is contained in pages 4 to 10 of the June 10, 2000 General Incident Report, pages 4 and 5 of Cst Rung's notebook entries and pages 2, 3, 4, 5, 6, 9 and 10 of Sgt Gamble's notes fall within the ambit of the presumption in section 14(3)(b). Accordingly, I find that the disclosure of this information to the appellant would constitute an unjustified invasion of the personal privacy of these individuals under section 38(b).

As noted above, the considerations listed under section 21(2), including section 21(2)(d), taken either singly or in combination are not sufficient to overcome the operation of one of the presumptions. Accordingly, I find that the factor in section 21(2)(d) relied on by the appellant is not applicable to the information at issue in this appeal.

For further clarity, I have provided the Police with a highlighted version of the General Incident Report dated June 10, 2000 and the notebook entries by Cst Rung and Sgt Gamble. The highlighted portion of these records is exempt from disclosure under section 38(b) and should **not**, therefore, be disclosed.

## **PUBLIC INTEREST IN DISCLOSURE**

As noted above, the appellant takes the position that there exists a public interest in the disclosure of the records as contemplated by section 16. She submits that:

. . . the right of the Estate Trustee to pursue financial entitlements compensable directly to the estate falls squarely within the compelling public interest right contemplated by section 16 of the legislation. The right of Trustees to pursue legal claims on behalf of deceased individuals for losses sustained during their lifetime is one that is commonly exercised. In order to do so, Trustees must be given access to information that will support them in connection with their duties and obligations. If the denial to access for information held by public institutions were taken logically one step further, it would effectively deny the right of all Trustees to assume their role and pursue their responsibilities effectively.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984]. A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439].

In the present case and following the disclosure ordered in this decision, the appellant will receive significant portions of all of the records and will be provided with a great deal of information relating to the circumstances that gave rise to her husband’s death. The remaining undisclosed portions of the records pertain only to other identifiable individuals. In my view, there is no sufficiently compelling interest, public or private, in the disclosure of this information. Therefore, I find that section 16 has no application to the remaining undisclosed information that is exempt under section 38(b).

## **ORDER:**

1. I uphold the decision of the Police to deny access to those portions of the records which I have highlighted on the copies provided to the Police Freedom of Information and Privacy Protection Co-ordinator.
2. I order the Police to give the appellant access to the records which are **not** highlighted by providing her with copies by **July 28, 2004** but not before **July 22, 2004**.

In order to verify compliance with Provision 2, I reserve the right to require the Police to provide me with copies of the records that are disclosed to the appellant.

Original Signed By: \_\_\_\_\_

June 23, 2004 \_\_\_\_\_

Donald Hale  
Adjudicator