



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2354**

**Appeal PA-040170-1**

**Ministry of Health and Long-Term Care**



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/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of Health and Long-Term Care (the Ministry) received a request from a lawyer, on behalf of a beneficiary of an estate, under the *Freedom of Information and Protection of Privacy Act (the Act)* for a summary of all the health care providers who rendered care to an identified deceased individual, together with a chronological printout of the dates of treatment and the nature of the treatment.

The Ministry denied access to the information on the basis of the mandatory exemption set out at section 21(1) of the *Act* (personal privacy) and took the position that the request failed to satisfy the requirements of section 66(a) of the *Act* (exercise of rights of deceased). This section grants to the “personal representative” of a deceased person certain rights to access information about the deceased person under the *Act* so long as the exercise of these rights “relates to the administration of the individual’s estate”.

The requester (now the appellant) appealed the denial. In the appeal the appellant’s representative states that the requested information is required “to satisfy the estate trustee and the beneficiaries as to whether the testator had testamentary capacity when the Will was executed. This information is absolutely necessary in order to determine who is to control the financial affairs of the estate...”.

Mediation was not successful and the matter moved to the adjudication stage.

## **RECORDS:**

The records at issue consist of OHIP billing records relating to the identified deceased individual.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

The personal privacy exemption in section 21(1) of the *Act* applies only to information that qualifies as “personal information”. 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 records consist of the list of billing codes, type of treatment and the names of health care practitioners for various medical care provided to the deceased person from May 12, 1997 to December 30, 2003. I find that the information contained in the records falls within the ambit of the definition of "personal information" found at section 2(1) of the *Act* and in particular paragraph (b) (information relating to the medical history of an individual) and (c) (any identifying number assigned to the individual - in this case the deceased's OHIP number), thereof, and that the records contain only the personal information of the deceased person.

#### **RIGHT OF ACCESS UNDER SECTION 66(a)**

Section 66(a) of the *Act* states:

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

where 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.

### ***The Request for Access***

The initial request for access set out that the lawyer acts for a named individual, who is the beneficiary of the estate of the deceased. Attached to the request was what the lawyer asserted was a notarial copy of a will of the deceased dated May 13, 2003. The request for access also included an authorization signed by another individual, identified by the lawyer as the estate trustee. A review of the copy of the will provided indicates that the same individual is named as estate trustee in the body of the will, and that yet another individual is to act as substitute estate trustee, if required.

### ***The Representations of the Ministry***

In their representations the Ministry took the position that the lawyer has not established that he acts for the “personal representative” of the estate. Relying on the ruling of the Ontario Divisional Court in *Adams v Ontario (Information and Privacy Commissioner)* (1996) 136 D.L.R. (4<sup>th</sup>) 12 (*Adams*), they submit that the term has been interpreted restrictively to mean, “...an executor, administrator or an administrator with the will annexed”, and that the appellant in this appeal does not fall into any of those categories. The Ministry points to Order MO-1365 as an example of where a notarized will was held to be insufficient to establish that an individual was a deceased’s “personal representative”.

The Ministry submits that the client of the lawyer (the estate beneficiary/appellant) is not the estate trustee named in the will dated May 13, 2003, and although the individual named in the consent discussed above consents to the disclosure of the records, the will that names the individual is being challenged.

### ***The Representations of the Appellant***

In response, the lawyer for the estate beneficiary/appellant advises that their client is the brother of the deceased and should the will dated May 13, 2003 be declared invalid, under a prior will dated March 7, 2001 (a purported copy of which was enclosed) the estate beneficiary/appellant and another named individual, or the survivor of them, would be estate trustees. It is submitted that as both these individuals are clients of the lawyer, they would “obviously consent to the records being produced”. The lawyer submits that, should access to the records be denied, “eventually, we will have to go to Court and a judge will most certainly release the records. Unfortunately, that application will result in...a completely unnecessary expense to the estate.”

### ***Analysis***

Under section 66(a), the appellant, or another (which could include the various potential estate trustees that are named in the wills), would be able to exercise the deceased’s right to request access to his own personal information, or, potentially to consent to its disclosure, if they were able to demonstrate that:

1. they are the personal representative of the deceased; and

2. their request for access relates to the administration of the deceased's estate.

The term "personal representative" used in section 66(a) is not defined in the *Act*. However, section 66(a) relates to the administration of an individual's estate and the meaning of the term must be derived from this context.

In accordance with the ruling of the Divisional Court in *Adams*, supra, in Order M-919, Adjudicator Anita Fineberg reviewed the law with respect to section 54(a), the provision in the *Municipal Freedom of Information and Protection of Privacy Act* that is the equivalent to section 66(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 66(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 that the personal representative requires in order to wind up the estate. Therefore, the appellant in this case must establish not only that he is the deceased's personal representative for the purposes of section 66(a), but also that he requires access to the records for the purposes of exercising his duties as a personal representative. To do this, the appellant must first provide evidence of his authority to deal with the estate of the deceased. 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 he has the requisite authority. As set out in Order MO-1365, an order that also dealt with the equivalent provision in the municipal counterpart to the *Act*, a notarial copy of a will is simply not sufficient.

Although I have some sympathy for the position of the appellant, until letters probate, certificate of appointment of estate trustee, letters of administration or ancillary letters of probate under the seal of the proper court are obtained there is no certainty that even the persons named in the wills will be appointed in the capacity of a personal representative of the deceased. Until that time, one can only speculate as to who will ultimately act.

Therefore, although the determination of who is the proper personal representative may well relate to the administration of the deceased's estate, I am not satisfied that the appellant is the personal representative for the purposes of section 66(a) of the *Act*. As a result, I find that he cannot rely on that section of the *Act* in the circumstances of this appeal.

## INVASION OF PRIVACY

Where a record contains only the personal information of an individual other than the requester, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions set out in section 21(1) apply. In my view, the only exception that could have any application is that in section 21(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

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the *Act* applies to the personal information [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.)].

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the *Act*, as well as all other considerations that are relevant in the circumstances of the appeal.

In the present appeal, I find that the information clearly falls within the ambit of the presumption in section 21(3)(a), which reads:

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

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

The record sets out in detail all of the medical treatment provided to the deceased person by OHIP-funded health care practitioners for the period from May 12, 1997 to December 30, 2003. I find that this information falls entirely within the scope of the presumption in section 21(3)(a). The disclosure of the information in the record is, therefore, presumed to constitute an unjustified invasion of the personal privacy of the individual to whom it relates. The appellant did not raise the possible application of section 23 and none of the exceptions in section 21(4) apply to this information. As a result, I find that the record qualifies for exemption under section 21(1).

**ORDER:**

I uphold the Ministry's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

December 23, 2004 \_\_\_\_\_