



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

ORDER PO-2855

Appeal PA09-110-2

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to personally examine the original death investigation file held by the Office of the Chief Coroner regarding the death of the requester's mother. The request specifically stated:

As per our telephone conversation, I have been referred to you through the Freedom of Information and Privacy Commission, [named employee], in terms of obtaining access to the death investigation file of my mother [name of the requester's mother] – DOD April 9, 2006 held in the office of the Chief Coroner under the *Freedom of Information and Protection of Privacy Act*. As you can see from the attached, I am also the court appointed Estate Trustee for the Estate of [name of the requester's mother] - Deceased.

The access I have been requesting through [named individual] and [named individual] and have been refused is the opportunity to review the death investigation file and determine if I need copies of any materials that are in the file. They were first required to ensure completeness in terms of why the family believe an inquest should be held and now to ensure there is a just determination of the matter before the courts that is looking to obtain a judicial review of the decision of [named individual] that there be no inquest and a finding his decision is an unreasonable one. The review of the death investigation file is to ensure that the court is able to make a just determination taking into consideration all the facts available to the Chief Coroner.

Pursuant to section 27(1) of the *Act*, the Ministry advised that it required an extension of time to respond to the request. The Ministry stated that the time extension was required because the request was for a large number of records and consultation with individuals outside the institution was necessary to comply with the request. As a result, the Ministry advised that the search could not reasonably be completed within the 30 day time limit outlined in section 26 of the *Act*.

The requester (now the appellant), appealed the Ministry's decision to apply a time extension to this office and Appeal PA09-110 was opened.

The sole issue in Appeal PA09-110 was whether the extension of time claimed by the Ministry was reasonable in the circumstances of the request and in accordance with section 27(1) of the *Act*.

During the processing of Appeal PA09-110, the Ministry issued its decision in response to the appellant's request. In view of the fact that a decision on access was issued by the Ministry, the issue of the reasonableness of the time extension was resolved. Consequently, Appeal PA09-110, the sole issue time-extension file, was closed by this office.

In its decision, the Ministry granted partial access to the responsive records. The Ministry stated that it had considered the compassionate grounds exception in section 21(4)(d) as the basis for this request. Parts of the records were withheld from disclosure pursuant to the exemptions at section 49(a) (discretion to refuse a requester's own information), read in conjunction with section 19 (solicitor-client privilege), and section 49(b) (personal privacy), read in conjunction with the factor listed at section 21(2)(f) (highly sensitive) and the presumptions at sections 21(3)(a) (medical history), 21(3)(d) (employment or educational history) of the *Act*. The Ministry also relied on the exclusion listed at section 65(6) (labour relations) of the *Act*. The Ministry indicated that the fee for photocopying the responsive pages, to which partial access would be granted, was \$512.20. The Ministry denied the appellant the opportunity to review the original documents in the possession of the Office of the Chief Coroner.

The appellant advised this office that she wished to appeal the Ministry's decision. Appeal PA09-110-2 was opened and was initially assigned to a mediator under section 51 of the *Act*.

The Mediator's Report states:

The appellant advised that she wished to appeal the Ministry's decision, specifically, its decision to deny her the opportunity to review the original records.

...

The appellant confirmed that, *at this time*, she wished only to appeal the Ministry's decision to deny her the opportunity to review the original records. [emphasis added]

The file was then referred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Based on the Mediator's Report, the only issue to be addressed in the inquiry is whether the appellant should be able to review the original records. As a result, in this order I will not be deciding on the appropriateness or applicability of the exemptions claimed.

I began my inquiry into this appeal by sending a Notice of Inquiry to the Ministry, initially. The Ministry responded with representations. I then sent a copy of the Notice of Inquiry, together with a complete copy of the Ministry's representations, to the appellant, inviting her to submit representations. The appellant provided representations in response.

DISCUSSION:

REQUEST TO VIEW ORIGINAL RECORDS

Section 48(3) of the *Act* addresses the manner in which access to records containing personal information is to take place. Section 48(3) states:

Subject to the regulations, where an individual is to be given access to personal information requested under subsection (1), the head shall,

- (a) permit the individual to examine the personal information ; or
- (b) provide the individual with a copy thereof.

This section indicates that there are two ways in which access to a record may be given: by allowing inspection of the record or by providing a copy of the record.

Section 30(2) of the *Act* specifically addresses how access to original records is to be facilitated. Section 30(2) states:

Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

This section indicates an institution may decline to accept the requester's preference to examine the records if it would not be reasonably practicable to comply with it. In Order P-485, Adjudicator Anita Fineberg found that it was not reasonably practicable to provide the requester with an opportunity to view the original records because only part of the record was subject to disclosure and it was not feasible to allow inspection without disclosing the parts of the record that were subject to exemption under the *Act*.

Section 30(2) is a mandatory provision, subject only to the requirement of reasonable practicability. In other words, unless an institution has determined that it is not reasonably practicable to give the requester the opportunity to examine an original record, the head *must* do so, upon request [Order PO-1679].

Representations

In the Ministry's decision letter, it granted the requester partial access to the records. It also advised the appellant that, due to the large volume of records involved (3292 pages), and the need for the Office of the Chief Coroner to safeguard and maintain the integrity of the original records, viewing the original records is not appropriate in the circumstances of this case.

In its representations, the Ministry submits that it is not reasonably practicable to permit the appellant to view the original Office of the Chief Coroner investigation records regarding the death of her mother. The Ministry explains:

As noted previously, the records are very voluminous consisting of almost 3300 pages of documents and redaction is required in relation to a number of documents which are being partially disclosed.

The records maintained by the Office of the Chief Coroner are the official records in relation to death investigations that are conducted pursuant to the *Coroners Act*.

As such, it is imperative that these records be securely maintained at all times and safeguarded against inadvertent or deliberate harm.

It should be noted that the records at issue in this appeal are relevant in relation to litigation that the appellant has commenced including:

- a complaint currently before the Human Rights Tribunal of Ontario;
- matters currently before the Health Professions Appeal and Review board;
- an application for judicial review recently filed with the Divisional Court.

The Office of the Chief Coroner has a responsibility to ensure that the integrity and continuity of the records is maintained in light of these ongoing legal proceedings.

For the above reasons, the Ministry remains of the view that it is not reasonably practicable in the circumstances to permit the appellant to view the original records that comprise the Office of the Chief Coroner investigation file relating to the appellant's mother.

The Ministry concludes its representations by reiterating that the appellant has been granted partial access to the portions of the requested records which are not subject to any of the exemptions in the *Act*.

In her representations, the appellant describes her experience in health care and her very specific knowledge of her deceased mother's medical history. She explains that this knowledge and experience would permit her to audit the integrity of the death investigation of her mother. The appellant takes the position that not all of the information that should have been provided to her pursuant to section 18(4) of the *Coroners Act* was disclosed and until she is able to examine the original records she cannot be assured that further information that she is entitled to receive under that Act is not being withheld. As a result, she submitted a freedom of information request for access to view the original records. The appellant also submits that pursuant to section 18(4) of the *Coroners Act*, she is entitled to have access to the original coroner's files. That section requires that the record of a coroner's investigation shall be made available to identified family members, including a daughter, upon request, where an inquest has been deemed to be unnecessary.

With respect to the Ministry's position that it is not reasonably practicable to provide her with an opportunity to review the original records, the appellant submits:

The position of the Ministry['s] decision letter of June 5, 2009, that access to the original file cannot be provided due to the large volume of records involved and

the requirement of the Office of the Chief Coroner to safeguard and maintain the integrity of the original records is not a tenable position given:

1. The request is for access to the Coroner's original records i.e. those of [five named coroners] in the possession of the OCCO [Office of the Chief Coroner for Ontario] solely as a result of the death investigation of [appellant's mother] that were utilized by [named coroner] 1. to render *Coroner's Act* decisions and 2. fulfill his *Coroners Act* responsibility related to the submission of the final Coroner's Investigation Statement to the Crown Attorney for Halton in March 2008 and for [named coroner] to complete a report on the death investigation for [appellant's mother]. These files constitute less than 200 pages according to the information provided by the OCCO to the appellant.
2. The Coroner's office has no more responsibility for the security and integrity of records for which it is custodian than does a hospital or a long term care centre. The appellant has been given access to the original files contained in several Long Term Care Centres and Acute Care hospitals on numerous occasions without compromising or bringing harm to the integrity and security of the files. It is the responsibility of the Ministry to ensure policies and procedures are in place to protect the security and integrity of the records during review of the original files by any person, including Ministry employees and counsel for these employees.

The appellant submits that the Human Rights Tribunal of Ontario ordered the Chief Coroner's Office to provide her with information that was contained in the original coroner's files and a contempt motion is presently under review by the Tribunal with respect to that order. The appellant also refers to information that she submits was provided to her by the Health Professionals Appeal Review Board in the course of an investigation into "College of Physicians and Surgeons of Ontario complaints." Her submissions suggest that this investigation is ongoing. The appellant did not provide any documentary evidence to support her submissions regarding either of these two matters.

Analysis and findings

I acknowledge that the appellant believes that she has a right of access to the original coroner's records pursuant to section 18(4) of the *Coroners Act*. That section reads:

Every coroner shall keep a record of the cases reported in which an inquest has been determined to be unnecessary, showing for each case the coroner's findings of fact to determine the answers to the questions set out in subsection 31(1), and such findings including the relevant findings of the *post mortem* examination and of any other examinations or analyses of the body carried out, shall be available to the spouse, parents, children, brothers and sisters of the deceased and to his or her personal representative, upon request.

Subsection 31(1) of the *Coroners Act* reads:

Where an inquest is held, it shall inquire into the circumstances of the death and determine,

- (a) who the deceased was;
- (b) how the deceased came to his or her death;
- (c) when the deceased came to his or her death;
- (d) where the deceased came to his or her death;
- (e) by what means the deceased came to his or her death.

In the circumstances of this appeal, the issue before me is whether or not the appellant is entitled, under the *Freedom of Information and Protection of Privacy Act*, to view the *original* copies of the records that comprise the investigation file into her mother's death. In my view, that is different from access to the "record" which is referred to in section 18(4) of the *Coroners Act*.

Under the *Act*, the Ministry has granted the appellant partial access to the responsive records, subject to the exemptions outlined in its decision letter. As noted above, during mediation the appellant clearly advised that she did not wish to appeal the exemption claims and that the sole issue in this appeal was the appropriateness of her request to view the original records. In addition, the appellant did not indicate in her representations that she wished to appeal any of the exemptions.

As the Ministry has claimed exemptions for portions of many of the responsive records, requiring many redactions, it would not be reasonably practicable for the Ministry to grant access to the originals while ensuring that the exempt information contained in these records is not disclosed. Therefore, I find that it is not reasonably practicable to provide the appellant with the opportunity to view the original records (see Order P-485). Further, the Ministry has claimed the application of various exemptions to many of the records in their entirety. Clearly, the appellant cannot access records which are subject to an exemption claim, as to do so would render the application of the exemption moot.

As I have found that it is not reasonably practicable to give the appellant the opportunity to view the original records, I uphold the Ministry's decision to refuse her request to view them.

As noted, the appellant confirmed during mediation that, *at this time*, she did not wish to proceed with an appeal of any issue other than the Ministry's decision to deny her the opportunity to review the original records. In light of the decision I have made in this order, the appellant may decide that she now wishes to proceed with an appeal of the Ministry's exemption claims, and in my view, it would be fair and equitable to permit her to do so, provided that she advises the Ministry and this office of her intention, within 30 days of the date of this order.

ORDER:

1. I uphold the Ministry's decision not to allow the appellant to view the original records and dismiss the appeal.
2. Should the appellant decide that she wishes to appeal the Ministry's exemption claims, she must advise the Ministry and this office of her intention within 30 days of the date of this order.

Original signed by: _____
Catherine Corban
Adjudicator

December 15, 2009