



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

ORDER M-205

Appeal M-9200012

Niagara Regional Police Services Board



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ORDER

BACKGROUND:

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 the following records about a now deceased individual (the deceased):

- 1) Copies of documents relating to certain allegations against the deceased.
- 2) Copies of documents relating to the criminal investigation and the subsequent charges laid against the deceased.
- 3) Copies of all investigation reports and notes taken by the investigating officers.
- 4) Copies of any investigation reports or files relating to the death of the deceased.

Attached to the request was a copy of the last will and testament of the deceased appointing his wife as the sole executrix of his will. The requester indicated that he was authorized to request the information on behalf of the executrix. The requester provided the Police with an authorization to that effect signed by the executrix.

Pursuant to section 21 of the Act, the Police notified seven individuals whose interests might be affected by the disclosure of the information at issue. The three individuals who responded to the notice objected to the disclosure of any of their personal information contained in the records.

The Police then issued a decision denying access in total to the requested records on the basis of the exemptions provided by sections 8(2)(a), 14, 38(a) and 38(b) of the Act. The Police indicated that they had considered the application of section 54(a) to the request, but decided that it did not apply because, amongst other reasons, "... there are no terms or conditions in the Will which would require access to the information you have asked for in order to administer the estate as outlined".

The requester appealed the decision of the Police. In the course of mediation, the Police provided the requester with access to some of the responsive records and identified, in a new decision letter, the specific exemptions applied to deny access to the remaining records. In addition to the exemptions cited previously, the Police claimed the application of the exemptions in sections 8(1)(c) and 15 of the Act.

Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Police was sent to the Police and the appellant. Representations were received from both parties. In their representations, the Police indicate that they are no longer relying on the discretionary exemption found in section 8(1)(c) of the Act.

On August 6, 1993, while these representations were being considered, Commissioner Tom Wright issued Order M-170 which interpreted several statutory provisions of the Act in a way which differed from the interpretation in previous orders. Since a new approach to the operation of the Act was being adopted and because the same statutory provisions are at issue in the present appeal, it was determined that copies of Order M-170 should be provided to the parties. The parties were then given the opportunity to state whether the contents of Order M-170 would cause them to change or supplement the representations which they had previously made. Additional representations were received from the Police only.

THE RECORDS:

The records which remain at issue and the exemptions claimed for each are identified as follows:

- 1) Pages 2-12 (Supplementary Report): Sections 8(2)(a), 14, 38(a) and (b)
- 2) Portions of pages 14, 16, 19 and 80 (Notes regarding Incident): Section 14
- 3) Page 27 (Page 1 of a working file folder): Sections 8(2)(a), 14, 38(a) and (b)
- 4) Pages 29-35 (Three witness statements): Section 8(2)(a), 14, 38(a) and (b)
- 5) Pages 36-39 (Notes re: interview with deceased): Sections 8(2)(a), 14, 38(a) and (b)
- 6) Page 45 (Copy of undertaking entered into by the deceased): Section 15(a)

The Police have not claimed that the exemption provided by section 14 of the Act applies to Record 6. However, because the personal information exemption found in this section of the Act is mandatory unless one of the exceptions listed in section 14(1) is applicable, I propose to consider the application of section 14 to Record 6 as well.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

- A: Whether the information contained in Records 1-6 qualifies as "personal information" as defined in section 2(1) of the Act.**
- B: Whether section 54(a) of the Act applies to the records in the circumstances of this [IPC Order M-205/October 26,1993]**

appeal.

- C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applied to Records 1-6.**
- D: Whether the discretionary exemption provided by section 8(2)(a) of the Act applies to Records 1-6.**
- E: Whether the discretionary exemption provided by section 15(a) of the Act applies to Record 6.**

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in Records 1-6 qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, ...

Records 1-6 contain information relating to the allegations made against the deceased as well as statements made by various individuals during the course of the Police investigation into these allegations. These records also contain information relating to the charges laid against the deceased and his death. In my view, the records contain recorded information about the deceased and other identifiable individuals and therefore qualify as personal information as defined in section 2(1) of the Act. As the death occurred within the past 30 years, section 2(2) of the Act does not apply.

The records do not contain any personal information of the appellant.

ISSUE B: Whether section 54(a) of the Act applies to the records in the circumstances of this appeal.

Under Issue A, I have found that the records contain the personal information of the deceased as well as that of other identifiable individuals. Section 36 of the Act gives an individual a general right of access to his or her own personal information. In addition, section 54(a) provides that:

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;

The appellant has taken the position that he is representing the estate of the deceased, and that, pursuant to section 54(a) of the Act, he is therefore entitled to access to any of the records that the deceased would have been entitled to under the Act.

The appellant would be able to exercise the deceased's right to request and be granted access to the deceased's personal information if he is able to demonstrate that he is the deceased's "personal representative" and that his request for access to the information "relates to the administration of the deceased's estate".

The term "personal representative" in section 54(a) of the Act means an executor, an administrator, or an administrator with will annexed (Order P-294). In this case, it is clear that the appellant is the agent of the deceased's personal representative, the executrix, under section 54(a) of the Act. The issue raised by the parties is whether the request constitutes the exercise of a right or power "relating to the administration of the deceased's estate".

The Police have submitted that section 54(a) limits the right to records to which a personal representative is entitled to those "relating to the administration of the estate". The Police also submit that this section places an onus on the appellant to establish to the satisfaction of the Police that the records sought are required for the purpose of administering the estate. The Police maintain that the condition set out in section 54(a) has not been met in the circumstances of this appeal, and that the appellant therefore has no right to the records under section 54(a) of the Act.

The appellant submits that the requested records do relate to the administration of the estate. In that regard, the appellant has taken the position that personal representative of the estate is entitled to review the records requested in order to determine whether there exists any evidence to support various possible legal causes of action. The appellant also describes scenarios where the information might be required in possible court actions.

It is clear from the wording of section 54(a) that for a personal representative of a deceased to exercise a right or power of the deceased, the exercise of that right or power must "relate to the administration of the individual's estate." It is therefore evident that 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 privacy except insofar as the administration of his or her estate is concerned.

Personal privacy rights of deceased individuals are recognized in both the purpose of the Act as set out in section 1(b), and section 2(2) 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 records relating to financial matters to which the personal representative requires access in order to wind up the estate. The records at issue contain precisely the type of sensitive personal information about the deceased which the other sections of

the Act to which I have referred were designed to protect. This personal information does not relate to the administration of the deceased's estate.

Therefore, the appellant is not entitled to access this information under section 54(a) of the Act. Accordingly, the appellant's request for information, as it relates to the deceased's personal information, is subject to the mandatory provisions of section 14 of the Act.

ISSUE C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies to Records 1-6.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of this information, except in certain circumstances. Specifically, section 14(1)(f) of the Act reads as follows:

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 14(2), (3), and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. In Order M-170, Commissioner Wright addressed the interrelationship between sections 14(2), (3), and (4) of the Act in the following way:

... [W]here personal information falls within one of the presumptions found in section 14(3) of the Act, a combination of circumstances set out in section 14(2) of the Act which weigh in favour of disclosure, cannot collectively operate to rebut the presumption.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act or where a compelling public interest exists in disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 14 exemption.

I adopt this approach for the purposes of this order.

The Police submit that section 14(3)(b) applies to Records 1-5. That section states:

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

was compiled and is identifiable as part of an investigation into a possible

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violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In this appeal, the personal information of the deceased and of the other identifiable individuals was compiled by members of the Police during their investigation into allegations that an offence under The Criminal Code had been committed. Accordingly, I am of the view that the presumption contained in section 14(3)(b) applies to all of the personal information contained in Records 1-6.

I have considered section 14(4) of the Act and find that none of the personal information at issue falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 16 of the Act applies to the facts of this case.

Because of the manner in which I have dealt with Issues A, B, and C, it is not necessary for me to address Issues D and E.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ October 26, 1993