



**Information and Privacy
Commissioner/Ontario**

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

ORDER M-243

Appeal M-9300145

Metropolitan Toronto Police Services Board



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ORDER

BACKGROUND:

The Metropolitan Toronto 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 deceased individual (the deceased):

A copy of the full police investigation report respecting the death of the deceased, including the names of all persons contacted by the police and any information given by such persons.

The request was made by the representative of the two sons (the sons) of the deceased.

The Police initially responded to the request by stating:

Before an institution can respond to a request for the personal information of another individual, we must be provided with an authorization from said individual consenting to the release of his/her personal information to an agent or representative.

The Police forwarded a copy of section 54(a) of the Act to the requester and requested photocopies of the documents certifying the sons' position as executor(s), the relevance of the requested information to the administration of the estate of the deceased and an authorization from the sons to authorize response to the requester as their representative.

The requester then provided the Police with affidavits of the sons. Each affidavit indicates the following:

- (1) That the affiant is the son of the deceased.
- (2) The date of birth of the affiant.
- (3) That the deceased died without a will and without any substantial assets and consequently there was no one appointed as executor/executrix, that the proceeds of a small insurance policy of the deceased were paid to the affiant and his siblings, and that the estate was not administered.
- (4) That the requester's firm has been retained as representative and authorizes the Police to respond directly to the requester's firm.

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) and 14(1) of the Act. The Police indicated that they had
[IPC Order M-243/January 12,1994]

considered the application of section 54(a) of the Act to the request, but decided that it did not apply because the individual who made the access decision was not satisfied that the affidavits signed by the sons and the purpose for which access to the record was being sought met the requirements of the Act as relating to the administration of the estate.

The requester appealed the decision of the Police. During mediation, the Police disclosed to the appellant some records to which access had initially been denied. The Police also located additional records which are responsive to the request. The Police issued a second decision letter identifying 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)(l) and 38(b) of the Act. As well, the Police identified certain pages of the record as not being responsive to the request.

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. A supplementary Notice of Inquiry expanding on some of the issues initially identified was also sent to the Police and the appellant. Representations were received from both parties.

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. No additional representations were received from either party.

In their representations, the Police indicated that they were no longer relying on the exemption provided by section 8(2)(a) of the Act. As this is a discretionary exemption, I will not consider it in this order.

THE RECORDS:

The Police identified 522 pages of records as being responsive to this request. During mediation they granted access in full to 180 pages and partial access to another 145 pages. The pages remaining in issue and the exemptions claimed by the Police for each may be described as follows:

Portions of 140 pages of responsive records, withheld pursuant to sections 14(1)(f), 14(3)(b), 14(3)(d), 14(3)(f) and 38(b) of the Act.

171 pages of responsive records withheld in their entirety pursuant to sections 14(1)(f), 14(3)(a), 14(3)(b), 14(3)(g) and 38(b).

All of the above pages or parts thereof consist of witness statements, excerpts from Police officers' notebooks, occurrence reports and supplementary reports and photographs prepared during the investigation into the death of the deceased.

The Police also withheld 26 pages in their entirety on the basis that they are not responsive to the request. I have reviewed these pages and I agree that the information contained in these pages falls outside the scope of the request. Accordingly, I will not consider them in this order.

In addition, the only information withheld from Pages 371, 383, 384, 407 and 408 consists of computer terminal address numbers of computer data banks. In my view, this information is not responsive to the request and will, therefore, not be considered in this order. As the Police denied access to this information on the basis of section 8(1)(l) of the Act, I also need not consider the application of this exemption.

ISSUES:

The issues arising in this appeal are as follows:

- A: Whether the information contained in the records 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 appeal.
- C: If the answer to Issue A is yes, whether the mandatory exemption provided by section 14 of the Act applies.
- D: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.
- E: Whether the search by the Police for responsive records was reasonable in the circumstances.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records 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, ...

The pages at issue describe incidents relating to the circumstances of and the investigation into the death of the deceased. In my view, they contain recorded information about identifiable individuals and, therefore, qualify as "personal information" as defined in section 2(1) of the Act. Some of the pages contain the personal information of the deceased only, while others contain the personal information of the deceased as well as that of other identifiable individuals. As the death occurred within the past 30 years, section 2(2) of the Act does not apply.

I find that only Pages 100, 183, 184, 187, 188, 197, 205 and 226 contain the personal information of the sons, the deceased, as well as other identifiable individuals.

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 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 would be able, on behalf of the sons, 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 one or both of the sons 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 appellant has taken the position that the sons ought to be considered the "personal representative" of the deceased for the purposes of the Act. The appellant's representations indicate that the sons are the children and sole survivors of the deceased who died intestate and that the estate of the deceased is devoid of assets. He further submits that if the sons, or any of them, had applied for Letters of Administration, an order of the Court would have followed and they would be, by definition, a "personal representative" as defined by S. 1 of the Estates Administration Act.

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, the representations of the appellant clearly indicate that neither son is the executor, administrator, or administrator with will annexed of the deceased's

estate. Moreover, there are other members of the deceased's family who may be entitled to seek the authority to act as the deceased's personal representative upon an application to court pursuant to the Estates Administration Act. In my view, therefore, neither son can be considered to be the "personal representative" of the deceased as required by section 54(a).

The appellant also submits that the requested records relate to the administration of the estate. He maintains that the only possible asset of the estate is a potential cause of action against the person or persons who might have been responsible for the injuries suffered by the deceased or the police who failed in their duty to protect him and to render assistance to him.

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. The deceased retains his or her right to privacy except in so far 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 sections 1(b) and 2(2) where, as I have noted, "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.

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 to wind up the estate (Orders M-205 and M-206). Therefore, I am not satisfied that the appellant's clients are entitled to exercise the deceased's right of access to his own personal information under section 36 of the Act both because the appellant's clients are not the "personal representative" of the deceased and because the exercise of the right of access sought by the sons does not relate to the administration of the estate of the deceased in the sense contemplated by section 54(a).

Accordingly, section 54(a) of the Act does not apply to the appellant's request for information on behalf of the sons.

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

In Issue A, I found that certain pages contain the personal information of the deceased only, certain pages contain the personal information of the deceased and other individuals and that eight pages of the record contain the personal information of the sons as well as that of the deceased and other individuals. In this issue, I will only consider the pages in the first two categories. I will consider the pages that contain the personal information of the deceased, his sons and other individuals in Issue D.

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 sections 14(3)(a), (b), (d), (f) and (g) of the Act apply to the majority of the pages at issue, or portions thereof. These sections state:

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;

- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

As far as the application of section 14(3)(b) is concerned, the Police submit:

The record is an occurrence report, investigation notes and witness statements relating to the finding of the deceased and the investigation into the cause of death ...

I have reviewed the pages at issue and have found that they are accurately described in the representations of the Police. They contain the personal information of the deceased and of other identifiable individuals which was compiled by the Police during their investigation into the death of the deceased. Accordingly, I am of the view that the presumption contained in section 14(3)(b) applies to all of the pages at issue.

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 applies.

The appellant has referred to certain additional factors which he believes are relevant to this appeal and which he maintains should be considered in weighing the rights of access to the records.

Even if I were to find that these are relevant considerations in determining whether the personal information should be disclosed, they would be insufficient to dislodge the presumption.

Accordingly, I find that disclosure of the personal information at issue would constitute an unjustified invasion of the personal privacy of individuals other than the sons and is, therefore, properly exempt from disclosure under section 14 of the Act. It is, therefore, not necessary for me to consider the application of sections 14(3)(a), (d), (f) and/or (g).

ISSUE D: If the answer to Issue A is yes, whether the discretionary exemption provided by section 38(b) of the Act applies.

In Issue A, I found that Pages 100, 183, 184, 187, 188, 197, 205 and 226 contain the personal information of the sons of the deceased as well as that of the deceased and other identifiable individuals.

Section 36(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution. However, this right of access is not absolute. Section 38 provides a number of exceptions to this general right of access. One such exception is found in section 38(b), which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Section 38(b) introduces a balancing principle. Where the personal information of the sons, as well as that of the deceased and other identifiable individuals, is found in the same record, the Police must look at the information and weigh the sons' right of access to their own personal information against the rights of other individuals to the protection of their personal privacy. If the Police determine that disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, then section 38(b) gives the Police the discretion to deny the sons access to their own personal information.

In my view, where personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 38(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

As I have stated under Issue C, 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 an individual's personal privacy. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

Like the pages considered in Issue C, the pages that contain the personal information of the sons, that of the deceased and other identifiable individuals are pages to which the Police have submitted section 14(3)(b) of the Act would apply. I have reviewed these records and, in my view, the same analysis applies as that considered under Issue C. Accordingly, I am of the view that the presumption contained in section 14(3)(b) would apply to Pages 100, 183, 184, 187, 188, 197, 205 and 226 and the release of the information contained in them would constitute an unjustified invasion of the personal privacy of the deceased and other individuals.

My comments under Issue C concerning the non-application of section 14(4) of the Act as well as those related to the other considerations the appellant has raised also apply to the pages containing the personal

information of the sons.

Section 38(b) is a discretionary exemption. In weighing the right of the sons to access to their own personal information against the right to privacy of the deceased and other individuals, the head has exercised his discretion to deny access. In reviewing the exercise of discretion of the Police in favour of refusing to disclose those pages for which I have found section 38(b) to apply, I have found nothing to indicate that the exercise of discretion was improper and would not alter it on appeal.

ISSUE E: Whether the search by the Police for responsive records was reasonable in the circumstances.

The appellant takes the position that further records responsive to his request should exist in the custody or under the control of the Police.

Where a requester provides sufficient details about the records which he or she is seeking and the Police indicate that additional records do not exist, it is my responsibility to ensure that the Police have made a reasonable search to identify any records which are responsive to the request. While the Act does not require that the Police prove to the degree of absolute certainty that such records do not exist, the search which the Police undertake must be conducted by knowledgeable staff in locations where the records in question might reasonably be located.

In their representations, the Police describe certain record generating and storage activities in detail, explaining how records in the present appeal were created, indexed and later located and retrieved. Specifically, they have explained that a portion of the records requested was retrieved from Police Headquarters and, based on information in that record, additional responsive records were obtained from the investigating officer. According to the representations of the Police, the responsive records were retrieved by a police officer with 27 years service to the Police who contacted the individuals in whose custody the records were and confirmed that the retrieved records represented the complete responsive record.

Having reviewed the representations of the Police, I am satisfied, in the circumstances of this appeal, that the Police have taken all reasonable steps to locate any records which would respond to the appellant's request and I find that the search conducted by the Police was reasonable.

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ January 12, 1994