



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

ORDER P-1027

Appeal P-9500090

Ministry of the Solicitor General and Correctional Services



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records held by the Regional Coroner for Eastern Ontario in relation to the death of the requester's wife which occurred in a hospital. The Ministry located 60 pages of records which were responsive to the request and, pursuant to section 28 of the Act, notified seven individuals whose rights might be affected by the disclosure of the requested records (the affected persons). Following the receipt of the representations of the affected persons, the Ministry disclosed 35 pages, in whole or in part, to the requester and denied access to the remaining pages pursuant to the following exemption contained in the Act:

- invasion of privacy - section 21(1)

The requester appealed the Ministry's decision. A Notice of Inquiry was sent to the Ministry, the appellant and the seven affected persons in which submissions were sought on the application of sections 21(1) and 49(b) to the records. Representations were received from the appellant and five of the affected persons.

The records at issue consist of the interview notes and summaries of the interviews conducted by the Regional Coroner with hospital staff following the death of the appellant's wife.

ACCESS TO INFORMATION BY A PERSONAL REPRESENTATIVE

The appellant argues that, by virtue of section 66(a) of the Act, he is entitled to access the personal information of his deceased wife in his capacity as her personal representative. This section 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 appellant would be able to exercise the same right of access to the personal information of his wife if he is able to demonstrate that he is: (1) her "personal representative" and (2) his request relates to the administration of the wife's estate.

The appellant submits that his wife died intestate and that because of the small value of her estate, it was unnecessary for him to be appointed as administrator. He further argues that he has the right to make investigations on behalf of the estate. He also points out that, in his capacity as litigation guardian, he is entitled under the Family Law Act to initiate a derivative legal action against the hospital and its staff on behalf of himself and his children for the loss of his wife's care, guidance and companionship.

I find that the appellant is able to initiate an action against the hospital solely because he is the husband of the deceased. His cause of action is derived from that relationship. There exists, accordingly, some measure of concurrence between the rights of his deceased wife and those which the appellant can exercise as a result of her death. In addition, I find that there do not exist any adverse interests between the appellant and the estate of the deceased, in fact, the appellant is acting in the interests of the surviving family members.

In previous orders, the Commissioner's office has adopted the very narrow definition of the term "personal representative" found in the Estates Act and the Trustees Act. By taking this approach, close family members have been denied access to personal information about their deceased spouses, children and parents as they did not fall within this definition of "personal representative" of the deceased. I find that this has resulted in prejudice to families without significant assets for whom an application for letters of administration would not make economic sense. Close family members, regardless of their economic status, ought to have a similar right of access to information about their deceased spouse, child or parent as those families who have sufficient assets to require the appointment of an administrator for the deceased's estate.

I find, therefore, that there exists a sufficient degree of overlap between the rights which the appellant is exercising on behalf of himself and his children with those of the estate such that the husband can be likened to a personal representative of his deceased wife, and can act in this capacity for the purposes of the Act.

The next question to be determined is whether the appellant's request for access to the information contained in the records "relates to the administration of the estate". A personal representative acting on behalf of an estate itself has no cause of action for the wrongful death of a deceased as a result of section 38(1) of the Trustee Act. Accordingly, the value of the estate would not be enhanced should the appellant be successful in an action against the hospital. The appellant does not, therefore, require the information requested in order to assist in the winding up or gathering of the assets of the estate.

In my view, however, the phrase "relates to the administration of the individual's estate" can be read so as to encompass information which would enhance decision making relating to matters involving the estate. The question to be addressed is whether granting access to the requested information would enable the deceased's personal representative to make a more informed decision about matters which relate to the estate. In this case, I find that obtaining access to the requested information would enhance the appellant's ability to make an informed choice about whether to proceed with a Family Law Act derivative action on behalf of himself and his children for the loss of the deceased's care, guidance and companionship. As this right is derived as a result of the death of the appellant's wife, I conclude that in the circumstances of this appeal, the exercise of the right of access to information relating to the deceased by the appellant relates to the administration of her estate within the meaning of section 66(a) of the Act. The appellant is, accordingly, entitled to stand in the position of the deceased person with respect to the requested information.

INVASION OF PRIVACY

Section 2(1) of the Act defines "personal information", in part, to include information relating to the medical history of an individual and the views or opinions of another person about an individual. I have reviewed the records at issue to determine whether they contain personal information and, if so, to whom the personal information relates.

I find that all of the records at issue contain personal information relating to the medical history of the appellant's deceased wife. Pages 25, 28, 47 and 48 also contain references to the appellant which I find to be his personal information. Pages 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35, 45, 46, 47, 48, 49 and 50 contain the views and opinions held by the individuals who were interviewed by the

Regional Coroner about one of the affected persons. I find that this information qualifies as the personal information of that individual. The records do not, however, contain the personal information of the other six affected persons as defined in the Act. Any references to these individuals are made in their professional capacities as doctors, nurses or orderlies rather than in their personal capacities.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

Included in the representations which I considered in this appeal was the submission that the personal information contained in the records gives rise to a presumed unjustified invasion of personal privacy on the basis of sections 21(3)(a), (b) and (d). These sections state:

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

In my view, insofar as the section 21(3)(a) presumption is concerned, the information contained in each of the records relates to the medical diagnosis, condition and treatment of the appellant's deceased wife and describes in detail the treatment administered and the actions taken by the hospital staff prior to her death. The information contained in the records relates directly to the deceased's medical diagnosis, condition and treatment. Although I found above that the records also contain the personal information of the appellant and one of the affected persons, it does not relate to their medical, psychiatric or psychological history, diagnosis, treatment or evaluation.

As the appellant is acting in a capacity akin to that of a "personal representative" of the deceased, he is entitled to access to the personal information relating to her medical history, diagnosis, condition, treatment and evaluation which is contained in the records. The presumption under section 21(3)(a) is designed to

protect the privacy interests of the individual to whom the information relates not those of the medical, psychiatric or psychological staff caring for this individual.

In order for personal information to fall within the presumption under section 21(3)(b), it must have been compiled and be identifiable as part of an investigation into a possible violation of law. I find that the personal information contained in the records at issue in this appeal was compiled as part of an investigation under the Coroners Act conducted by the Regional Coroner. Section 2(2) of the Coroners Act states that the powers conferred on a coroner to conduct an inquest shall not be construed as creating a criminal court of record. In addition, the Coroner's Court is not a court or tribunal which is empowered to impose penalties or sanctions and its proceedings do not, therefore, meet the definition of a law enforcement proceeding under section 2(1) of the Act. The presumption, accordingly, has no application to the records at issue in this appeal.

With respect to the section 21(3)(d) presumption, I find that information contained in records relating to a single discrete event which occurs in the course of an individual's employment do not constitute that individual's employment history for the purposes of the Act. Accordingly, the section 21(3)(d) presumption does not apply.

I have found that none of the presumptions apply to the personal information contained in the records which relates to the one affected person. I must now consider whether any of the factors listed in section 21(2) as well as any other relevant considerations are applicable in order to determine whether the disclosure of this information would result in an unjustified invasion of the personal privacy of this affected person. One of the affected persons objects to the disclosure of his personal information on the grounds that the disclosure of the information will unfairly expose this individual to pecuniary or other harm (section 21(2)(e)), the information is highly sensitive (section 21(2)(f)), the information is unlikely to be accurate or reliable (section 21(2)(g)), the information was supplied in confidence (section 21(2)(h)) and that the disclosure of the information may unfairly damage this individual's reputation (section 21(2)(i)). In addition, all of the affected persons argue that the disclosure of the requested information would "go against the spirit and intent of the Coroners Act."

The appellant argues that professional medical staff providing emergency care in a hospital must be accountable to those they serve. For this reason, he submits that the disclosure of the interview notes in their entirety would not result in an unjustified invasion of the personal privacy of any of the affected persons.

I have reviewed the representations of the parties and the remaining information at issue contained in the records and make the following findings:

1. The disclosure of the information contained in the records would not **unfairly** expose any of the affected persons to pecuniary or other harm. Should this information be later tendered as evidence in a legal proceeding against the affected person(s), the trier of fact in that forum will determine the weight to be given to such evidence. The affected persons will not, in my view, be unfairly exposed to harm as a result of its disclosure.

2. I agree that the personal information contained in the records which relates to one of the affected persons may properly be characterized as "highly sensitive" within the meaning of section 21(2)(f). This factor weighs in favour of privacy protection.
3. One of the affected persons objects to the accuracy of a statement contained in the records which purports to summarize a conversation between the Regional Coroner and the affected person. It is not possible for me to determine whether this statement accurately reflects the contents of their conversation. I will, however, consider this factor, which weighs in favour of privacy protection, when balancing the considerations for and against the disclosure of the information.
4. All of the affected persons submit that they were assured explicitly by the Regional Coroner at the time the interviews were conducted that the notes which he took of their conversations and the "statements" which each provided to him were to be treated as confidential and were for his personal use to assist him in his investigation. In the circumstances, I find that the expectation of confidentiality is a relevant consideration which weighs in favour of privacy protection.
5. The applicability of section 21(2)(i) is not dependent on whether the damage or harm envisioned by this clause is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Order 256). Following my review of the records, I find that the consequences which might result from the disclosure of this information would not result in any unfair harm or damage to any individual's reputation.
6. All of the affected persons further submit that the information was supplied for an investigation under the Coroners Act and should only be disclosed for use in those proceedings. Section 67(1) of the Act states that the Freedom of Information and Protection of Privacy Act prevails over any confidentiality provision in any other Act unless section 67(2) or any other Act specifically provides otherwise. I note that no reference is made to the Coroners Act in section 67(2) and that the Coroners Act does not contain any confidentiality provisions which expressly override the provisions of the Act.

Section 1 of the Act sets out the purposes of Ontario's Freedom of Information legislation, one of which is to provide individuals with a right of access to information about themselves which is held by government institutions. The records which are the subject of this appeal are records held by the Ministry as a result of an investigation by one of its Regional Coroners into the death of the appellant's wife. I am not satisfied that the confidentiality provisions contained in sections 18(2) and 42(1) of the Coroners Act are designed to limit the right of access granted under the terms of the Act. As such, I find that the confidentiality provisions contained in the Coroners Act are not a relevant consideration in the circumstances of this appeal.

7. By inference, the appellant has raised the application of section 21(2)(a). This consideration, which weighs in favour of the disclosure of personal information, is relevant when the disclosure of the requested information is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny. The appellant is interested in finding out what caused his wife's death and whether the hospital or its staff may have been negligent in their treatment of her.

The appellant also argues that if deficiencies in the treatment of emergency patients at the hospital exist, it is in the public interest that such problems be exposed and, if necessary, corrected.

I agree that it is important that public confidence and public safety are assured at this particular facility. I find that this is a factor weighing in favour of the disclosure of the requested information.

8. The appellant has also made reference to his interest in determining what caused the death of his wife, for his own satisfaction, as well as that of his children. In my view, this is also a consideration, albeit an unlisted factor, in balancing the privacy interests of one of the affected persons against the appellant's right of access.

The balancing of competing interests under section 21(2) of the Act is usually difficult, and this case is no exception. I have carefully weighed the factors favouring the protection of privacy of one of the affected persons against the right of the appellant, standing in the position of the deceased, to access to the requested records. I find that, on balance, the disclosure of the remaining information contained in the records would not result in an unjustified invasion of the personal privacy of one of the affected persons. I find that the appellant's right to know the circumstances which led to his wife's death outweigh the privacy concerns of this affected person and that the information should be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose the records at issue to the appellant within thirty-five (35) days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

October 19, 1995