



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

ORDER M-622

Appeal M_9500303

Nepean Police Services Board



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NATURE OF THE APPEAL:

This is an appeal under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant submitted a request to the Nepean Police Services Board (the Police) under the Act. This request pertained to the appellant's deceased brother, who apparently committed suicide. This sudden death, and a previous incident involving the appellant's brother, were both investigated by the Police. The appellant's request was for "... all details/facts/data/notes/photos ..." held by the Police regarding her brother.

Before the request was submitted, the Police provided the appellant with informal access to the Sudden Death Report prepared in connection with her brother's death. However, in response to the formal request under the Act, the Police declined to provide access to any further records, under the following exemptions in the Act:

- invasion of privacy - section 14(1)
- law enforcement - section 8(2)(a).

The appellant filed an appeal from this denial of access with the Commissioner's office.

The Commissioner's office sent a Notice of Inquiry to the Police and the appellant, inviting these parties to submit representations. Both the Police and the appellant submitted representations.

The records at issue consist of Police Reports, other Police forms completed in connection with the two investigations pertaining to the appellant's brother, firearm registration information, interview notes taken by Police, computer printouts, a witness statement, extracts from a police officer's notes, correspondence and memoranda.

DISCUSSION:

RIGHT OF ACCESS OF A PERSONAL REPRESENTATIVE

In her representations, the appellant referred to her application for a Certificate of Appointment of Estate Trustee Without a Will with regard to her brother's estate. This application, when granted, would make the appellant her brother's personal representative. However, I have not been provided with confirmation that this application has been granted.

Section 54(a) of the Act 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;

Since individuals may have a greater right to receive records containing their own personal information than other individuals would have to that information, and since it appears that the records contain a great deal of personal information pertaining to the appellant's brother, the appellant's ability to obtain this information could be enhanced by section 54(a), if it applies.

Under section 54(a), the appellant would be able to exercise the deceased's right to request and be granted access to the deceased's personal information if she is able:

1. to demonstrate that she is the deceased's "personal representative" **and**
2. to demonstrate that her request for access "relates to the administration of the deceased's estate".

In Order P-1027, Inquiry Officer Donald Hale considered the provisions of section 66(a) of the Freedom of Information and Protection of Privacy Act (the provincial Act), which is the equivalent of section 54(a) of the Act. In that order, Inquiry Officer Hale expanded the situations in which an individual could be found to be a "personal representative", and also expanded the meaning of the phrase "relates to the administration of the deceased's estate", as compared to the interpretation of these two phrases in previous orders.

In particular, Inquiry Officer Hale found that, where an individual's estate was not of sufficient value to merit an application for the appointment of a "personal representative", the husband of the deceased "could be likened to" a personal representative and on this basis, could meet the first criterion mentioned above. Previous orders had required individuals to demonstrate that they had been officially appointed as a "personal representative" before they could meet this criterion.

He also concluded that the second criterion could be met, even if the proceeds of a contemplated lawsuit would not accrue to the estate itself, but to the survivors of the deceased, if "granting access to the requested records would enable the deceased's personal representative to make an informed decision about matters which relate to the estate." Previous orders had determined that, because lawsuits for wrongful death are not a cause of action accruing to the estate itself, but rather to the surviving spouse and relatives, requests made to facilitate such lawsuits do not "relate to the administration of the deceased's estate".

I will bear in mind these interpretations from Order P-1027 in my assessment of whether the appellant in this case should be permitted to rely on section 54(a) of the Act.

With regard to the first of these two requirements under section 54(a), I have not been provided with any evidence to indicate that the appellant's application referred to above, has been granted. The granting of the certificate referred to by the appellant would mean that she is, in fact, the deceased's "personal representative" within the meaning of this section. In my view, this situation is slightly different from the one in Order P-1027. Here, the application has been made. It is possible that such an application could be opposed, and that some other individual could in fact become the personal representative. Under these circumstances, I am not prepared to conclude that the appellant is the deceased's "personal representative" within the meaning of section 54(a).

For this reason alone, a conclusion that the appellant cannot rely on section 54(a) in this case would be justified. However, since the appellant has evidently applied to become her brother's personal representative, it may be helpful to explain that, in my view, the second requirement under section 54(a) has also not been met because the request does not "relate to the administration" of the appellant's brother's estate. My reasoning in reaching this conclusion is set out in the paragraphs which follow.

In the appellant's letter of appeal and representations, she sets out information which, in her view, substantiates the connection between the request and the administration of the estate. This information consists of the appellant's expressed concerns about both police investigations and how they were conducted, speculation as to possible malfeasance in connection with her brother's death, and comments about possible litigation in that regard. The question therefore arises whether this possible litigation could relate to the administration of the appellant's brother's estate within the meaning of section 54(a).

In Order P-1027, the Inquiry Officer found that, in the circumstances of that case, a request made with a view to an action for wrongful death related to the "administration of the individual's estate". In my view, in the present appeal, the connection between the contemplated litigation and the subject matter of the request is not linked in the same way as in Order P-1027. In that case, the deceased had died while in hospital and an action was contemplated against the hospital. The request was for coroner's records, which would describe the condition of the deceased individual and the probable cause of death. Thus there was a clear connection between the contemplated lawsuit and the subject matter of the request. In this appeal, the request is for police records and an action is contemplated against unspecified individuals, apparently on the basis that the suicide was caused by "malfeasance". Thus the connection between the contemplated action and the requested records is much less clear in this appeal. Therefore, in my view, Order P-1027 is distinguishable on the facts. In the circumstances of this case, I find that the request does not relate to the administration of the deceased's estate within the meaning of section 54(a).

Accordingly, neither of the requirements under section 54(a) are satisfied in this appeal. Therefore, I find that the appellant cannot rely on that section to obtain access to the records.

I must now determine whether the disclosure of the personal information in the records would result in an unjustified invasion of personal privacy.

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

I have reviewed the records at issue. All of them contain the personal information of the appellant's deceased brother. In addition, several of the records contain references to other individuals who attended at the scene, and/or individuals known to the deceased, which constitute the personal information of those individuals.

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. The only one of these circumstances which could apply in this appeal is referred to in section 14(1)(f), which permits disclosure if it would not be an unjustified invasion of personal privacy.

Sections 14(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 14(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 14(4) or where a finding is made that section 16 of the Act applies to the personal information.

If none of the presumptions contained in section 14(3) apply, the Police must consider the application of the factors listed in section 14(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

Section 14(3)(b) provides that

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

The records were compiled by the Police during two investigations involving the deceased (one of which was an investigation into the death of the deceased). Both were "investigations into a possible violation of law" (namely, the Criminal Code). Accordingly, I am of the view that the presumption contained in section 14(3)(b) applies to all of the records.

As noted above, where one of the presumptions in section 14(3) apply, it can only be rebutted if section 14(4) or 16 applies. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767.

I have considered the application of 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 raised the application of section 16 of the Act.

I find that the disclosure of the personal information contained in the records at issue would constitute an unjustified invasion of the personal privacy of the deceased and other individuals and therefore, the exemption in section 14(1) of the Act applies.

Because of the manner in which I have disposed of section 14(1), it is not necessary for me to address the application of section 8(2)(a) of the Act to the records.

ORDER:

I uphold the decision of the Police.

Original signed by: _____

John Higgins
Inquiry Officer

_____ October 20, 1995