



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

# **ORDER M-950**

**Appeal M\_9700042**

**Hamilton\_Wentworth Regional Police Services Board**



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/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The appellant represents the families of two women who were hit and killed in a pedestrian/motor vehicle accident (the decedents). In particular, the appellant represents the widowers of both women (the widowers) and the daughter of one of the women (the daughter), who was also at the scene of the accident. The appellant submitted a request to the Hamilton-Wentworth Regional Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for any witness statements, photographs and/or videotapes taken at the scene of the accident.

The Police located records responsive to the request and denied access to them pursuant to the following sections of the Act:

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

The Police also referred to section 54(a) in their decision, which pertains to the rights of a personal representative to exercise the rights of a deceased.

The appellant appealed this decision.

This office provided a Notice of Inquiry to the Police, the appellant, two individuals who gave statements to the Police at the scene of the accident (the witnesses), and the driver of the motor vehicle involved in the accident (the driver). Because some of the information at issue appears to relate to the daughter, the Notice of Inquiry also raised the possible application of sections 38(a) (discretion to refuse requester's own information) and 38(b) (invasion of privacy). Sections 38(a) and (b) would also be relevant in the event that section 54(a) is found to apply in the circumstances.

Representations were received from the appellant and the Police. Additional representations were received from the daughter. Because the appellant is representing different clients, each client provided a consent for the disclosure of his/her personal information to each other. In their representations, the Police raised, for the first time, the possible application of the discretionary exemption in section 8(2)(c) of the Act. I will address this issue below under the heading "Preliminary Matters".

During the inquiry stage of this appeal, this office was notified that the driver of the vehicle involved in the accident had recently died. The driver's daughter contacted this office and advised that she supported the position taken by the Police in this matter. She also wrote to the Police to ask that they represent her father's interests during the inquiry. The Police attached this letter to their representations.

The records at issue in this appeal consist of the following:

- three witness statements (four pages)
- three occurrence reports (five pages)
- one occurrence report containing statement of the daughter (one page)
- one occurrence report containing statement of the driver (one page)
- photocopies of photographs taken at the scene (5 pages - 60 photographs).

## **PRELIMINARY MATTERS:**

### **LATE RAISING OF DISCRETIONARY EXEMPTIONS**

Upon receipt of the appeal, this office provided the Police with a Confirmation of Appeal. This notice indicated that the Police had 35 days from the date of the notice, that is until March 25, 1997, to raise additional discretionary exemptions not claimed in its decision letter. No additional exemptions were raised during this period.

Subsequently, in its representations, dated May 20, 1997, the Police raised the application of the discretionary exemption provided by section 8(2)(c).

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in the original decision letter.

The Police did not provide any reasons in their representations for claiming the discretionary exemption after the expiration of the 35-day period.

In Order P-658, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision-maker has the authority to decline to consider the discretionary exemption. I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

In the circumstances of this appeal, I am not persuaded that a departure from the 35-day time frame is justified. Accordingly, I decline to consider the application of section 8(2)(c) to the records.

### **RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE**

Before discussing the exemptions claimed by the Police, I will first consider whether, under section 54(a) of the Act, the appellant's clients are entitled to exercise the same right of access to the personal information contained in the records as the decedents.

Under section 54(a), the appellant's clients would be able to exercise the decedents' rights to request and be granted access to the decedents' personal information if they are able to:

1. demonstrate that they are the “personal representative” of the decedents; and
2. demonstrate that their request for access “relates to the administration of the decedents’ estates”.

It is also to be noted that, if section 54(a) applies, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the Act, where “personal information” is defined to specifically include that of individuals who have been dead for less than 30 years.

### **Personal Representative**

In Order M-919, Inquiry Officer Anita Fineberg reviewed the law with respect to section 54(a) and came to the following conclusions:

The meaning of the term “personal representative” as it appears in section 66(a) of the Freedom of Information and Protection of Privacy Act, the equivalent of section 54(a) of the Act, was considered by the Divisional Court in a judicial review of Order P-1027 of this office. In Adams v. Ontario (Information and Privacy Commissioner) (1996), 136 D.L.R. (4th) 12 at 17-19, the court stated:

Although there is no definition of “personal representative” in the Act, when that phrase is used in connection with a deceased and the administration of a deceased’s estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s.1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1:

1(1) “personal representative” means an executor, an administrator, or an administrator with the will annexed.

The appellant attached copies of the wills of both decedents to her representations. In each case, the decedent has named her respective husband executor and trustee. Accordingly, I am satisfied that the widowers are the personal representatives of the decedents (respectively).

### **“Relates to the Administration of the Individual’s Estate”**

The appellant does not specifically address this issue other than to assert that the decedents would be entitled to receive the records in question. Thus, she argues that, as their personal representatives, the husbands of the decedents should also be entitled to receive this information. The appellant states further that until this information is received, the administration of the estates will remain incomplete.

In reviewing the records and the appellants' submissions, I am of the view that the exercise of the right of access sought by the appellant's clients does not relate to the administration of the estate of either decedent in the sense contemplated by section 54(a). Therefore, the appellant's clients are not entitled to exercise the rights of the decedents regarding the requested information under section 54(a) of the Act.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the information contained in the records and I find that, with two exceptions, they all contain personal information. In particular, I find as follows:

- two of the witness statements contain the personal information of the two decedents as well as that of the witnesses (Records 1 and 2). The third witness statement (Record 3) contains the personal information of the driver, another individual, the two decedents and the daughter;
- the occurrence report containing the daughter's statement (Record 4) contains her personal information and the personal information of the two decedents and the driver;
- the occurrence report containing the statement given by the driver (Record 5) contains the personal information of the driver, another individual, the two decedents and the daughter;
- one occurrence report (Record 6) contains the personal information of the two decedents and the driver;
- one occurrence report (Record 7) contains the personal information of the two decedents, the driver, the daughter and the witnesses;
- one occurrence report (Record 8) does not contain personal information, nor do the photographs.

### **DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT**

I found above that some of the records contain the daughter's personal information. Section 38(a) of the Act gives the Police the discretion to deny access to records containing a requester's own personal information where certain listed exemptions, including section 8, would otherwise apply.

The Police claim that section 8(2)(a) applies to the records. This section reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of "law enforcement" as defined in section 2(1) of the Act. The records consist of occurrence reports, statements and photographs prepared by the Police during the course of their investigation into a fatal pedestrian/motor vehicle accident, which clearly qualifies as a law enforcement matter within the meaning of section 2(1) of the Act.

The word "report" is not defined in the Act. Based on previous orders, however, for a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact (Order 200).

I have reviewed the records and the representations submitted by the Police. I find that the records contain the statements of witnesses and the observations made by the police officers during the investigation. I find that the records contain recordings of fact and do not qualify as "reports" for the purposes of section 8(2)(a) of the Act. Accordingly, the records do not qualify for exemption under section 8(2)(a).

Because of this finding, it is not necessary for me to consider the application of section 38(a).

### **INVASION OF PRIVACY**

I found above that Record 8 and the photographs do not contain personal information. Since the exemptions in sections 14(1) and 38(b) can only apply to personal information, I find that Record 8 and the photographs are not exempt under these sections. As the Police have not claimed that any other discretionary exemptions apply to these records, and no mandatory exemptions apply, Record 8 and the photographs should be disclosed to the appellant.

As I indicated above, Records 3, 4, 5 and 7 contain the personal information of the daughter and other identifiable individuals, while Records 1, 2, and 6 contain only the personal information of individuals other than the appellant and/or her clients.

Once a record is found to contain personal information of individuals other than the appellant or her clients, section 14(1) of the Act provides that this information shall not be disclosed unless one of the exceptions listed in section 14(1) applies. The only such exception which could apply here is section 14(1)(f), which permits disclosure if it would not constitute an unjustified invasion of personal privacy.

However, where a record contains an appellant's personal information and the Police decide not to disclose all or part of the record to prevent an unjustified invasion of someone else's privacy, section 14 does not apply (Order M-352). In such a case, section 38(b) gives the Police the discretion to deny access where disclosure would be an unjustified invasion of privacy.

Therefore, for the records which contain the daughter's personal information (Records 3, 4, 5 and 7), I will decide whether section 38(b) applies. For the other records (Records 1, 2 and 6), I will decide whether section 14(1) applies.

In both these situations, 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.

In their representations, the Police claim the application of the presumptions in sections 14(3)(a) (medical information) and 14(3)(b) (investigation into a possible violation of law). They also submit that the factors weighing against disclosure mentioned in sections 14(2)(f) (highly sensitive), 14(2)(h) (supplied in confidence) and 14(2)(i) (unfair damage to reputation) apply.

In reviewing the records, I find that the presumed unjustified invasion of personal privacy in section 14(3)(b) applies to the personal information in Records 1 - 7, because this information was clearly "compiled" and is "identifiable" as part of an investigation into a possible violation of law (a pedestrian/motor vehicle accident).

However, the information contained in Record 4 and portions of Record 7 was clearly provided to the Police by the daughter. In Order M-444, Inquiry Officer John Higgins found that it would be an absurd result, and therefore an error in statutory interpretation, to apply section 14(3)(b) to information which had been supplied to the police by the requester. I agree. In my view, the circumstances here are essentially the same as those in Order M-444, and I find that the presumption in section 14(3)(b) does not apply to the information provided by the daughter in these two records.

The Police submit that the presumption in section 14(3)(a) applies to portions of all of the records. In my view, however, the portions of the records which contain information given by the daughter do not relate to the medical condition of either the decedents or the driver. Accordingly, section 14(3)(a) does not apply to these portions of the records.

I have considered the factors in section 14(2). I find that the information provided by the daughter was not provided in confidence in the circumstances. Further, I am not persuaded that disclosure of the information provided by the daughter would **unfairly** damage the reputation of any individual. Therefore, I find that the factors in sections 14(2)(h) and (i) are not relevant with respect to the information provided by the daughter.

I accept that the information relating to the circumstances surrounding a fatal accident are highly sensitive (section 14(2)(f)), and this factor is, therefore, relevant. However, for the same reasons

outlined in my discussion above regarding the application of section 14(2)(b), I find that, in the circumstances of this appeal, this factor is not applicable to the information provided by the daughter.

I find that sections 14(4) and 16 do not apply to the information which is subject to the presumption in section 14(3)(b). Accordingly, I find that the exemption in section 38(b) applies to Records 3, 5, and parts of Record 7, and that section 14(1) applies to exempt Records 1, 2 and 6 from disclosure.

As I indicated above, Record 4 and the portions of Record 7 which I have highlighted on the copy of the records being sent to the Police's Freedom of Information and Privacy Co-ordinator with a copy of this order, should be disclosed to the appellant.

**ORDER:**

1. I order the Police to disclose Records 4, 8, the photographs, and the portions of Record 7 which I have highlighted on the copy of the records being sent to the Police's Freedom of Information and Privacy Co-ordinator with a copy of this order, by providing a copy of this record and part of record to the appellant by **July 16, 1997** but not earlier than **July 11, 1997**.
2. I uphold the decision of the Police to withhold the remaining records from disclosure.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Police to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ June 11, 1997