



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

ORDER MO-1196

Appeal MA-980257-1

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

NATURE OF THE APPEAL:

The London Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for a copy of the police report in relation to the death of the appellant's sister. The requester enclosed a copy of the Certificate of Appointment of Estate Trustee Without a Will, appointing him as his sister's estate trustee.

The responsive record identified by the Police is 71 pages in length, and consists of Occurrence Reports, Witness Statements, a Coroner's Warrant, a Report of the Centre of Forensic Sciences, E-mails, a General Incident Report and a Property Return Authorization Form. The Police denied access to the entire record pursuant to sections 8(1)(d), (l), 8(2)(a), 14(1), and 38(a) and (b) of the Act. The Police later added sections 8(1)(c) and (h) and section 9(1)(d) as additional exemption claims during the 35-day period permitted for the late raising of discretionary exemptions.

The Police also pointed out the potential availability of section 54(a) of the Act, which provides:

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 requester, now the appellant, appealed the decision of the Police.

Following unsuccessful mediation efforts, a Notice of Inquiry was sent to the Police and the appellant. Representations were received from both parties. In their representations, the Police state that they will not be making representations on the application of section 8(1)(c). Accordingly, this exemption is no longer at issue.

DISCUSSION:

LAW ENFORCEMENT

Section 8(2)(a) reads as follows:

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;

Only a report is eligible for exemption under this section. The word "report" is not defined in the Act. 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 (Order P-200). Generally speaking, results would not include mere observations or recordings of fact (Order M-1048).

The Police submit that the record is the complete account of an investigation of a sudden death, and is a report compiled by the Police, which has the function of enforcing the law pursuant to the Police Services Act.

Having reviewed the various documents which comprise the record, I find that they neither collectively nor individually qualify as a "report". These documents consist almost exclusively of factual information provided by the individuals involved, together with observations by the investigating police officers. They do not contain a formal statement or account of the results of the collation and consideration of information.

Rather, the contents are more appropriately described as a collection and recitation of "observations and recordings of fact". Therefore, I find that the record does not qualify as a "law enforcement report" and section 8(2)(a) does not apply, regardless of the fact that the record was prepared during the course of a criminal law enforcement investigation by an agency which has the function of enforcing and regulating compliance with the law.

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information", in part, as recorded information about an identifiable individual.

As stated earlier, the documents which comprise the record all pertain to the investigation into the death of the appellant's sister. As such, I find that all 71 pages contain the personal information of the deceased. Certain portions of the record include witness statements and personal identifiers of the witnesses, such as names, addresses, telephone numbers and dates of birth, and I find that these portions also contain the personal information of these individuals. Finally, pages 11, 14, 52, 56, 58 and 66 contain information which identifies the appellant as the deceased's next of kin, and the contact person for the return of the deceased's personal property, and I find that these pages also contain the appellant's personal information.

Section 2(2) provides that personal information does not include information about an individual who has been dead for more than 30 years. Because the deceased died in 1997, section 2(2) has no application in this case.

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

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 he is able to:

1. demonstrate that he is the "personal representative" of the deceased; and
2. demonstrate that his request for access "relates to the administration of the deceased's estate".

Personal Representative

In Order M-919, former Adjudicator 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.

...

... I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the Act if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

I agree with former Adjudicator Fineberg's analysis. The appellant has provided a copy of the Certificate of Appointment of Estate Trustee Without a Will which appoints him as the "Estate Trustee" of the deceased's estate. In my view, this appointment is comparable at law to the positions listed under the definition of "personal representative" in the statutes referred to by the Court in Adams, and I find that the appellant has established that he is the "personal representative" of his sister's estate, for the purposes of section 54(a).

Relates to the Administration of the Individual's Estate

In Order M-1075, I made the following statements about the second requirement of section 54(a):

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 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 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 only records which the personal representative requires in order to wind up the estate.

The appellant states that he applied to become his late sister’s personal representative for the purpose of filing income tax returns, requesting the return of an unused legal retainer, and assuming a position of greater authority in relation to the deceased’s daughter. The daughter was later adopted by another sister of the appellant and her husband. The appellant expresses concern that his niece receive proper treatment or counselling, and wants access to the record in order to:

. . . gather any information I can concerning my late sister and the circumstances of her death to assist my [named] sister and to assist [a named counsellor] , or such other counsellor as may be involved with my niece, in the assessment, treatment and general upbringing of this child who is now 13.

The appellant acknowledges that his sister died without any assets, and also states that he is not seeking access to the record for the purposes of seeking damages or pursuing wrongful death claims.

The Police rely on Order M-206, where former Adjudicator Fineberg found 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 Police submit that the record does not relate to financial matters and therefore cannot qualify under section 54(a).

The Police also submit that the type of personal information contained in the record is not relevant to the administration of the deceased’s estate.

The record in this case relates exclusively to the police investigation into the circumstances surrounding the death of the appellant’s sister. None of the documents which comprise the record contain information relating to the deceased’s finances or financial transactions. The appellant states his mother took out a life

insurance policy on his deceased sister, and named him as trustee. However, the appellant also points out that the trust funds are intact, and there is no indication that the record at issue in this appeal is in any way connected to the administration of this trust.

Without lessening the seriousness of the emotional impact that her mother's death may have had on the appellant's niece, and acknowledging the conscientious efforts of the appellant and his family to assist this young girl to cope with her loss, I am unable to conclude that the record in this case relates to the administration of the deceased's estate, as required by section 54(a). The estate is apparently without funds and would appear to have already been essentially wound up. The appellant has not demonstrated any need for the information contained in the record in order to discharge his responsibilities as estate trustee. Therefore, section 54(a) does not apply, and I am precluded from allowing the appellant to stand in the place of his deceased sister for the purpose of making a request for access to her personal information. In the circumstances, I will treat this appeal as a request by an individual for another individual's personal information under Part I of the Act.

INVASION OF PRIVACY

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the Act, where a record contains the personal information of both the appellant and another individual (in this case pages 11, 14, 52, 56, 58 and 66), and the Police determine that the disclosure of the information would constitute an unjustified invasion of the other individual's personal privacy, the institution has the discretion to deny the appellant access to that information. However, where a record contains only the personal information of individuals other than the appellant (in this case all other pages), and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 14(1) of the Act prohibits an institution from releasing this information.

In both of these situations, sections 14(2) and (3) of the Act provide guidance in determining whether disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Ontario Court of Justice (General Division) determined in the case of John Doe et al. v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, that 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) or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption.

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

The appellant's representations speak in considerable detail to his reasons for wanting access to the records, but do not address the application of any of the various components of the section 14 exemption claim.

The Police submit that the following factors and presumptions apply: sections 14(2)(f), (h) and (i), and 14(3)(a), (b) and (h). I will begin with the presumption in section 14(3)(b).

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 Police state that all of the information was recorded as a result of an investigation into the circumstances of the death of the appellant's sister. The Police submit that the investigation conducted by the attending police officers was an investigation into a possible violation of law, specifically whether there was any criminal activity involved in the death. I agree, and find that the presumption in section 14(3)(b) applies to the personal information in the record.

None of the personal information contained in the record falls under section 14(4), and the appellant has not raised the possible application of section 16 of the Act.

Accordingly, I find that the entire record, with the exception of the appellant's personal information which appears on pages 11, 14, 52, 56, 58 and 66, qualifies for exemption from disclosure under section 14(1) of the Act.

The appellant's personal information relates to either the return of the deceased's property, which he signed for (pages 11, 14 in part, 52, and 66); or the listing of the appellant as a contact person by the Police, together with the brief statement he provided (pages 56 in part and 58 in part). The appellant is clearly aware of all of this information.

A number of previous orders have found that non-disclosure of personal information which was originally provided to an institution by an appellant would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (See Orders M-444, M-613, M-847, M-1977 and P-1263, for example). These orders all determined that applying the presumption to deny access to information which the appellant provided to the institution would, according to the rules of statutory interpretation, lead to an

“absurd” result. I find that the same reasoning applies to the personal information of the appellant in this case.

In my view, to apply the presumption in section 14(3)(b) to those portions of the record which contain information which is about or was provided by the appellant, or of which he is clearly aware, would lead to an absurd result. Accordingly, I find that this presumption does not apply to the personal information of the appellant on pages 11, 14, 52, 56, 58 and 66. I have also considered the factors in section 14(2) and all of the circumstances of this appeal, and I find that disclosure of this information would not constitute an unjustified invasion of personal privacy, and section 38(b) does not apply to these pages.

My findings under section 14(1) have upheld the decision of the Police to deny access to those portions of the record which are also subject to exemption claims under sections 8(1)(d), (h) and (i), 9(1)(d) and 38(a). Consequently, I do not need to consider these exemption claims further.

The result of my findings in this case is that the appellant will not receive access to the personal information about his deceased sister contained in the record. I understand the appellant’s desire to obtain more information about his sister’s death. However, in circumstances where the requirements of section 54(a) are not present, and a presumed unjustified invasion of a deceased’s privacy has been established, the Divisional Court’s decision in John Doe indicates that the factors favouring disclosure under section 14(2) cannot overcome the presumed unjustified invasion of privacy.

ORDER:

1. I order the Police to disclose pages 11, 52 and 66 in their entirety and pages 14, 56 and 58 in accordance with the highlighted copies of these records which I have attached to the Police copy of this order (the highlighted portions are **not** to be disclosed) to the appellant by **April 6, 1999**.
2. I uphold the decision of the Police to deny access to the remainder of the records.
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: _____
Tom Mitchinson
Assistant Commissioner

_____ March 16, 1999