



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

ORDER MO-1174

Appeal MA-980167-1

Hamilton-Wentworth Regional Police Services Board



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NATURE OF THE APPEAL:

The Hamilton-Wentworth Regional Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to the investigation into the death of the appellant's husband. The records consist of a Sudden Death Report and Supplementary Occurrence Reports totalling 27 pages, and two pages of police officer's notes.

The Police denied access to all records pursuant to the following exemptions contained in the Act:

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

The appellant appealed this decision.

A Notice of Inquiry was provided to the appellant and the Police. Sections 38(a), 38(b) and 54(a) of the Act were thought to have potential relevance, and the Notice asked the parties to provide representations on these issues, as well as the exemption claims identified by the Police. Representations were received from both parties.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. Having reviewed the records, I find that they all contain information which is primarily about the appellant's husband and the circumstances surrounding his death. Section 2(2) provides that personal information does not include information about an individual who has been dead for more than thirty years. Because the appellant's husband has been dead for less than 30 years, the information in the records which is about him continues to qualify as his personal information. The records also contain the personal information of a number of other identifiable individuals, such as witnesses interviewed by the Police, as well as the appellant.

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Section 54(a) of the Act states:

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;

Under section 54(a), the appellant would be able to stand in the place of her deceased husband and exercise his right to request access to his personal information if she is able to:

1. demonstrate that she is her deceased husband's "personal representative"; and

2. demonstrate that her request for access "relates to the administration of the deceased's estate".

The term "personal representative" used in section 54(a) is not defined in the Act. However, section 54(a) relates to the administration of an individual's estate and the meaning of the term must be derived from this context.

In Order M-919, former Adjudicator Anita Fineberg reviewed the law with respect to section 54(a), and came to the following conclusion:

... 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".

The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased person retains the right to personal privacy except insofar as the administration of his or her estate is concerned.

In Order M-1075, it was established that in order to give effect to the rights established by section 54(a), the phrase "relates to the administration of the individual's estate" should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate. Therefore, the appellant in this case must establish not only that she is her husband's personal representative, for the purposes of section 54(a), but also that she needs access to the records for the purposes of exercising her duties as a personal representative. To do this, the appellant must first provide evidence of her authority to deal with the estate of her deceased husband. As set out in the Notice of Inquiry, the production by the appellant of letters probate, certificate of appointment of estate trustee, letters of administration or ancillary letters probate under the seal of the proper court would be necessary to establish that she has the requisite authority.

The Police state that the appellant did not provide them with evidence to establish that she was the personal representative of her husband's estate, and that without this evidence, his personal information cannot be released to her.

The appellant states that her husband did not have a will, and that their marriage certificate was all that was required in order to change ownership of assets registered in his name. She does not appear to have obtained any of the court documents listed above which would establish her status as a personal representative. The appellant also provided no evidence that the records at issue in this appeal are required in order to wind up her husband's estate.

In the absence of the evidence required to establish that the appellant is her husband's personal representative, and that the requested information relates to the administration of his estate, I find that the requirements of section 54(a) have not been established. Therefore, the appellant is not entitled to stand in the place of her deceased husband for the purpose of making a request for access to his personal information.

INVASION OF PRIVACY

Where records contain the personal information of both the appellant and other individuals, section 38(b) allows the Police to refuse to disclose these records to the appellant if they determine that disclosure would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information 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) of the Act 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 contained in section 14(3) apply, the institution 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.

The appellant states that she has been given access to some records about her husband's death, such as the report of the investigating coroner, but that she is interested in receiving information about what happened to him while he was still alive. The appellant feels there are unanswered questions that need to be addressed, and that the records may provide these answers.

The Police submit that the factors and presumptions in the following sections are applicable in determining that disclosure of the personal information would constitute an unjustified invasion of privacy: sections 14(2)(e), (f), (h) and (i), and 14(3)(a) and (b). 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 appellant's husband's death. The Police submit that the investigation conducted by the attending police officers was an investigation into a possible violation of the Criminal Code of Canada. The content of the records supports the position of the Police, and I find that the presumption in section 14(3)(b) applies to the personal information at issue in this appeal. Even if I were to accept the appellant's arguments, as I have previously indicated, a factor or combination of factors under section 14(2) cannot rebut a presumption under section 14(3).

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

Accordingly, I find that the information contained in the records qualifies for exemption under section 38(b) of the Act.

I understand the appellant's desire to know more details surrounding her husband's death, and realize that she will be disappointed that she is not entitled to access to this information under the Act. However, in the circumstances of this appeal, I feel bound by the findings of the Divisional Court in the John Doe case referred to earlier in my order.

Because of the manner in which I have disposed of the records under section 38(b), it is not necessary for me to consider the application of section 8(2)(a) of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

_____ December 9, 1998