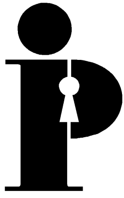

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1241

Appeal MA-990078-1

Peel Regional Police Services Board

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NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Peel Regional Police Services Board (the Police). The request was for access to a copy of the "last part" of the investigation file relating to an alleged theft of money from a named deceased individual. The "first part" of the investigation file was addressed separately in response to a request dated March 20, 1998 and is not within the scope of this appeal.

The appellant provided the Police with a certificate appointing her Estate Trustee, and the Police acknowledged the requester's right to exercise access to the deceased individual's personal information pursuant to section 54(a) of the Act.

The Police granted the requester partial access to the information they identified as responsive to the request and for the remaining information claimed the exemptions found in sections 7, 12, 14(1) and 38(b) of the Act. The Police also determined that portions of the records, specifically portions of a police officer's notes pertaining to other cases, are not responsive to the request. Because of the way in which the Police processed the request, I have added the application of section 38(a) as an issue in this appeal.

The appellant appealed the decision of the Police.

During mediation of the appeal, the appellant agreed with the Police that portions of the records were not responsive to her request. Accordingly, Records 5, 6 and 19 are no longer at issue.

RECORDS:

Records 4, 7, 8, 15-18, 23, 24, and 34-36 have been disclosed to the appellant in their entirety, and are no longer at issue in this appeal. The records or parts of records remaining at issue consist of police officer's notes (Records 1-3, 9-14 and 20-22), a report submitted by a police officer to an assistant crown attorney (Records 25-32) and a memorandum from the assistant crown attorney to the police officer (Record 33).

DISCUSSION:

Personal representative

The appellant is able to exercise the deceased's right to request and be granted access to the deceased's personal information if she can demonstrate: (1) that she is the deceased's "personal representative" and (2) that her request for access to the information "relates to the administration of the deceased's estate".

The term "personal representative" in section 54(a) of the Act means an executor, an administrator, or an administrator with will annexed (Order P-294). The phrase "relates to the administration of the individual's estate" in section 54(a) refers to records relating to financial matters to which the personal representative requires access in order to wind up the estate. (Adams v. Ontario (Information and Privacy Commissioner) (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.), quashing Order P-1027; Orders P-294, M-919, MO-1174).

The appellant has provided the Police with a Certificate of Appointment of Estate Trustee Without a Will, appointing her as the trustee of her father's estate. The appellant asserts that as her father's Estate Trustee, she is entitled to exercise the right to access information which relates to the administration of the estate.

I am satisfied that the appellant qualifies as the deceased's personal representative.

Because the appellant alleged that money belonging to her father had been stolen, the Police initially accepted that the request related to the administration of his estate and processed the request on that basis. In their representations, however, the Police submit that the request cannot relate to the administration of the estate because the money in the deceased's bank account was lawfully removed and, therefore, there was no estate to administer.

The appellant submits that she is responsible for settling the deceased's outstanding account at the nursing home where he lived before he died. She indicates that she has been unable to account for the disbursement of insurance money, Canada Pension and other money, the deceased's personal property and savings, and the status of the deceased's business.

Although the Police did not lay criminal charges in response to the appellant's allegations of theft, the appellant is not precluded from initiating a private prosecution or civil proceeding if there are grounds to do so. Because the records relate to the Police investigation of the deceased's financial situation and a potential unlawful removal of money, it is reasonable to conclude that the type of information contained in the records would be relevant to the administration of the estate.

In my view, the appellant has provided sufficient evidence to establish that she requires the requested information to make an informed decision about matters relating to the administration of the estate. I find that the second requirement of section 54(a) has been established by the appellant.

Therefore, I find that the appellant, in her capacity as Estate Trustee, has a right of access under section 36(1) of the Act to the personal information of the deceased which is contained in the records, subject to any exemption claims established by the Police under section 38.

Invasion of Privacy

Under section 2(1) of the Act, "personal information" is defined as recorded information about an identifiable individual and includes, under paragraph (b), information relating to financial transactions in which the individual has been involved.

The information at issue consists of the police officer's notes of interviews with various witnesses, the officer's notes relating to meetings with and reports to the crown attorney, and a memo from the crown attorney. The records all contain the personal information of the deceased and the witnesses or other named parties, including the appellant.

Section 36(1) of the Act gives individuals a general right of access to their own personal information held by an institution. 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 other individuals, and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

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. Section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

The Police argue that the presumption in section 14(3)(b) applies. This section states:

> 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;

I am satisfied that Records 1-3, 9-14 and 20-22 were created as part of a police investigation into the circumstances surrounding the removal of money from the deceased's bank account, with a view to determining whether criminal charges should be laid against any individual under the Criminal Code. I find that the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law. Thus its disclosure would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b). This presumption applies, even if, as in the present case, no charges were ultimately laid (Orders P-223, P-237 and P-1225).

The personal information in Records 25-33 is largely reproduced from the records described above and, therefore, I find that section 14(3)(b) applies.

Some of the information contained in Records 25-32, however, was provided to the Police by the appellant and/or her representative during the course of the investigation.

In Order M-444, former Adjudicator John Higgins found that the refusal of access to information which the appellant originally provided to the Metropolitan Toronto Police would be contrary to one of the 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. This reasoning has been applied in a number of subsequent orders of this Office (M-451, M-613 and P-1457, among others) and, in my view, is equally applicable to certain parts of Records 25-32 in the present appeal. Applying the section 14(3)(b) presumption to deny access to information which the appellant or her representative originally provided to the Police would, applying the rules of statutory interpretation, lead to an "absurd result". Accordingly, the presumption in section 14(3)(b) does not apply to the portions of Records 25-32 which contain this information.

I also find that none of the circumstances outlined in section 14(4) which rebut the section 14(3)(b) presumption are present in this appeal.

In short, disclosure of the information at issue in Records 1-3, 9-14, 20-22, 33 and parts of Records 25-32 would constitute an unjustified invasion of the personal privacy of individuals other than the deceased and the appellant under section 38(b) of the Act.

Section 37(2) and/or section 4(2) of the Act require disclosure of as much of the record as can reasonably be severed without disclosing information that falls under one of the exemptions.

Records 1-2, 9-14 and 20-22 are the police officer's notes of interviews with three witnesses. In my view, the personal information of the deceased and the appellant are so intertwined with that of the witnesses and other individuals mentioned therein that they cannot reasonably be severed without disclosing information that falls within the section 38(b) exemption.

Parts of Records 3 and 25-32 relate exclusively to the deceased and/or the appellant and can be severed without constituting an unjustified invasion of another individual's personal privacy under section 38(b) of the Act. However, in light of my other findings under section 12 of the Act, severance of these records is not required.

Solicitor-Client Privilege

The Police claim that section 12 applies to Records 3 and 25-33.

In Order M-52, former Commissioner Tom Wright found that section 12 did not apply to pages of a Crown Brief prepared for the crown attorney by a municipal police service. Order M-52 states:

> In my view, these pages cannot qualify for exemption under section 12 as the relationship between the Police and a Crown Attorney is not that of solicitor and client. The Police are not the clients of the Crown Attorney, and the Crown Attorney, who is an employee of the provincial government, is not "employed or retained" by the Police. Therefore, section 12 does not apply to pages 1, 2, 15 and 75 of the record.

Based on the recent Supreme Court of Canada judgement, R. v. Campbell [1999]1. S.C.R. 565 the Police submit that the conclusion in Order M-52 does not reflect the law of solicitor-client privilege in Canada. I will deal with this submission later in these reasons.

Section 12 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, and

   (b) the communication must be of a confidential nature, and

   (c) the communication must be between a client (or his agent) and a legal advisor, and

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49, see also Orders M-2 and M-19]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by an institution; and

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Scope of Branches 1 and 2 determined with reference to the common law

Although the wording of the two branches is different, the Commissioner's orders have held that their scope is essentially the same:

> In essence, then, the second branch of section 19 was intended to avoid any problems that might otherwise arise in determining, for purposes of solicitor-client privilege, who the "client" is. It provides an exemption for all materials prepared for the purpose of obtaining legal advice whether in contemplation of litigation or not, as well as for all documents prepared in contemplation of or for use in litigation. In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.
>
> [Order P-1342; upheld on judicial review in Ontario (Attorney General) v. Big Canoe, [1997] O.J. No. 4495 (Div. Ct.)]

Solicitor-client communication privilege

At common law, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

This privilege has been described by the Supreme Court of Canada as follows:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...
>
> [Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

With respect to Branch 1 of the exemption, the Police submit that the officer's report on Records 25-32 and the reply from the assistant crown attorney on Record 33 is a written communication. The Police submit that this communication was intended to be of a confidential nature, as indicated in the Crown Policy Manual, which states that, when advising police seeking charging advice:

> Your letter should clearly indicate that you are providing a legal opinion only and that your legal opinion is not binding on the police. As legal advice within the meaning of s. 19 of *The Freedom of Information and Protection of Privacy Act*, your letter cannot be disclosed to third parties without the written consent of the Ministry and you may want to remind the police of this.

However, it appears that the author of Record 33 did not follow the policy in this case, as the suggested statements were not included.

Finally, the Police submit that the communication is between a client, in this case the Police, and a legal adviser, in this case the assistant crown attorney. The Police make reference to R. v. Campbell in support of its position that there is a solicitor-client relationship between the Police and the Crown.

R. v. Campbell addressed a claim of solicitor-client privilege by the RCMP for advice received from a Department of Justice lawyer respecting the lawfulness of a particular investigative technique. On the question of the existence of a solicitor-client relationship between the RCMP and lawyers in the Department of Justice, the Court found, at paragraph 49, that:

> The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.

In applying this principle to the circumstances in that case, the Court concluded that the RCMP consultation with the Department of Justice lawyer, "... falls squarely within this functional definition ...." The Court disagreed with the proposition which had been adopted by Commissioner Wright in Order M-52 that because a police officer is not an agent of the Attorney General, no solicitor-client relationship could exist between a Crown counsel and a police officer at paragraph 54:

> The existence of an agency relationship is not essential to the creation of solicitor-client privilege. In seeking advice from a lawyer about the exercise of his original authority "that cannot be exercised on the responsibility of any person but himself". [the RCMP officer] satisfied the conditions precedent "to the existence of the right of the lawyer's client to confidentiality"... when [the Department of Justice lawyer] initially advised [the RCMP officer] about the legality of a reverse sting operation, these communications were protected by solicitor-client privilege. [Cites omitted.]

In this case the Police sought legal advice from a professional legal adviser, the assistant crown attorney, and, as such, the communications relating to that purpose, Records 3 and 25-33, are subject to the common law solicitor-client privilege and section 12 applies. Accordingly, I do not consider Order M-52 to be a proper statement of the law of Canada, and I do not follow its precedent here.

The appellant submits that the Court in R. v. Campbell did not intend to extend and apply privilege to Police in a situation "where it chooses to operate outside the law". On the face of the records, there is nothing which would lead me to conclude that the conduct of the Police in this case was unlawful. Further, although the appellant has persuaded me that she is dissatisfied with the handling of the case, she has not persuaded me that the purpose of the communications between the Police and the assistant crown attorney was to assist the Police to perpetrate a crime or fraud.

Conclusion

Because I have found that all of the records contain the personal information of the deceased and/or the appellant, and Records 3 and 25-33 qualify for exemption under section 12, these records are exempt under section 38(a).

I have found that all of the records at issue are exempt under either sections 38(a) or 38(b). Accordingly, it is not necessary for me to consider the application of sections 7 and 9(1) of the Act.

ORDER:

I uphold the decision of the Police.

Original signed by ____________________ October 18, 1999
Holly Big Canoe
Adjudicator