



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

ORDER MO-1365

Appeal MA-000036-1

Halton Regional Police Services Board



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NATURE OF THE APPEAL:

The Halton Regional Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a numbered Occurrence Report and for a “full and complete copy” of all information which you have on file with respect to [a named individual’s] death. The death resulted from an incident at the deceased’s workplace.

The request was made by a lawyer acting on behalf of the deceased individual’s wife. I will be referring to the deceased individual’s wife as the appellant.

The Police denied access to the Occurrence Report pursuant to sections 8(2)(a) (law enforcement report) and 14(1) (invasion of privacy) of the *Act*. The Police relied on the presumptions in sections 14(3)(a), (b) and (h), as well as the factor in section 14(2)(f) in support of the section 14(1) exemption claim. The Police did not address the second part of the request.

During mediation, the Police agreed to conduct a further search for records responsive to the second part of the request. After identifying notebook entries made by two police officers who investigated the circumstances surrounding the death, the Police issued a revised decision, claiming the same exemptions as the basis for denying access to these records. The appellant agreed not to pursue access to photographs taken at the scene of the investigation, and also to information contained in the notebooks that relates to other investigations that have no relation to the death of the appellant’s husband.

Mediation was not successful, so the appeal moved to the inquiry stage. I sent a Notice of Inquiry initially to the Police and three individuals who were named in the records and whose interests might be affected by the outcome of this appeal (the affected persons). Because the appellant claimed to be acting in her capacity as executrix of her husband’s estate, I added sections 54(a) and 38 of the *Act* as issues in the Notice.

The Police provided representations in response to the Notice. The Police also stated that two of the affected persons had advised the Police that they objected to disclosure of any information relating to them. One affected person submitted representations objecting to disclosure.

I then sent the Notice to the appellant, together with the non-confidential portion of the Police’s representations. The appellant provided representations, which I forwarded to the Police for reply. Reply submissions were provided by the Police.

RECORDS:

The records at issue consist of a Sudden Death Occurrence Report (eight pages) and the relevant notebook entries made by two police officers (one and nine pages respectively).

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

I will first consider whether, under section 54(a), the appellant is entitled to exercise the access rights of her deceased husband under the *Act*.

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 this section, the appellant can exercise the rights of her deceased husband under the *Act* if she can demonstrate that (a) she is the personal representative of the deceased, and (b) the rights she wishes to exercise relate to the administration of her husband's estate. If the appellant meets the requirements of this section, then she is entitled to have the same access to the personal information of her husband as he would have had. In other words, her access request would be handled under section 36(1) of the *Act*, and would be treated as though it had been made by the deceased husband himself (Order M-927).

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 this analysis. In order for the appellant to establish that she is her husband's personal representative for the purposes of section 54(a) of the *Act*, the appellant would be required to provide evidence of her authority to deal with the estate of her deceased husband. The appellant's production of a Certificate of Appointment as Estate Trustee with a Will (formerly letters probate) would be necessary.

The appellant provided this Office with a copy of her husband’s will, dated May 31, 1990, in which she is named as the sole executrix of the estate. This will was notarized, but the appellant confirmed that the will had not been probated, and that there was no intention to do so. In my view, this is not sufficient to establish that the appellant is the personal representative of the estate for the purposes of section 54(a). Absent official documents, issued by the Superior Court of Justice, I am unable to determine whether this 1990 will is the most recent one executed by the appellant’s husband, or if it is, whether the Court is satisfied that the powers and duties provided to an estate trustee should be accorded to the appellant as the named executrix. For this reason, I find that the appellant has failed to establish the first requirement of section 54(a) of the *Act*.

Consequently, the appellant’s request for her deceased husband’s personal information will be dealt with under Part I of the *Act*.

PERSONAL INFORMATION

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

The records all pertain to a Police investigation into the death of the appellant's husband. As such, I find that all the records contain the deceased husband's personal information. Section 2(2) of the *Act* provides that personal information does not include information about an individual who has been dead for more than 30 years. As the appellant’s husband died on April 20, 1999, section 2(2) does not apply, and the information about the appellant’s husband qualifies as the husband’s personal information.

Pages 1-4 of the Homicide and Sudden Death Report and pages 1-6 of the officer's notebook contain information relating to three affected persons, including their names, addresses, telephone numbers, dates of birth, and the information they provided to the Police. I find that these pages also contain the personal information of these affected persons as defined in section 2(1).

Page 1 of the Homicide and Sudden Death Report also contains the personal information of the appellant, including her name, address, telephone number and date of birth. Page 6 of the same report also contains the officer's summary regarding his meeting with the appellant. I find that these pages contain the appellant's personal information as defined by section 2(1).

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), where a record contains the personal information of both the appellant and other individuals and the Police determine that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Police have the discretion to deny the requester access to that information.

Where, however, the record only contains the personal information of other individuals, section 14(1) of the *Act* prohibits the Police from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. In the circumstances, the only exception which could apply is section 14(1)(f) which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

In determining whether the exemption in section 38(b) applies, sections 14(2), (3) and (4) 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 institution 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 section 14(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the *Act* or if a finding is made under section 16 of the *Act* that a compelling public interest exists in the

disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption (see Order PO-1764).

If none of the presumptions in section 14(3) applies, the institution 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 Police have relied on the "presumed unjustified invasion of personal privacy" in sections 14(3)(a), (b), (g) and (h) of the *Act*, and the factor listed at section 14(2)(f) of the *Act*.

Section 14(3)(b) of the *Act* states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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 submit that the records in this appeal arise out of an investigation that occurred because where there is "[a] death at place of employment means the police were called to investigate possible foul play, thereby a possible violation of law"

The appellant submits:

Under the circumstances of the request, there is no justification to consider the release of the information sought to be an "unjustified invasion of personal privacy" of the deceased. The documentation in the possession of the Police relates to an investigation by the Police to an industrial incident which resulted in the death of an individual. It is not accurate to state that the report ... was "compiled ... as part of an investigation into a possible violation of law". The suggestion by the Police that they were called to conduct an investigation into possible foul play is simply not reflective of facts surrounding the incident in issue. The position of the Police in that regard is untenable.

I do not accept the appellant's submissions. This Office has on numerous occasions dealt with appeals from requests for sudden death reports (see, for example, Orders PO-1777, MO-1352 and MO-1330). Following the reasoning in these past orders, I am satisfied that the purpose of the Police investigation into the deceased husband's death in this case was to determine whether there had been a violation of law, specifically the *Criminal Code*. I also find that the information contained in the records was compiled and is identifiable as part of that investigation, and that the presumption in section 14(3)(b) applies. This

presumption still applies, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225).

I find that none of the information falls within the exceptions listed in section 14(4) of the *Act*, and the appellant has not raised the possible application of section 16.

A finding that section 14(3)(b) applies does not necessarily end the matter. In circumstances where a record contains the personal information of both a requester and another individual (pages 1 and 6 of the Homicide and Sudden Death Report in the present appeal), section 38(b) gives the Police discretion to disclose personal information even if doing so would constitute an unjustified invasion of the other individual's privacy. Although disclosure in these circumstances would be rare, the decision is a discretionary one that must be made by balancing the competing interests present in a particular fact situation (Order M-532).

In this regard, the Police submit:

In summary, a discretionary decision was made by this institution pursuant to the *Act* to deny access in its entirety to the appellant. Section 54 of the legislation does not apply to this access request. The *Act* requires that a deceased's rights or powers can only be exercised by their personal representative but that right or power must be exercised if and only if in the execution of the deceased's estate. A recent judicial review (*Adams et al v. Donald Hale, Inquiry Officer, Information and Privacy Commissioner/Ontario et al*) states:

To disclose personal information of the deceased to someone who is not and is not found to be her personal representative is beyond the jurisdiction of the Commissioner ... The Act assures the public of Ontario of protection of the privacy of an individual by limiting the circumstances and the type of information that may be disclosed after death.

... Compassion should not play a role in deciding whether or not to release someone's personal information when they are not legally entitled to it.

...

The institution feels strongly that the personal information of a deceased should be protected as delegated and guaranteed in the *Act*, especially due to the sensitivity in this particular situation.

I am satisfied that the Police have properly exercised their discretion to withhold the personal information contained in pages 1 and 6 of the Homicide and Sudden Death Report. As such, I find that disclosure of the record would be an unjustified invasion of personal privacy of the appellant's husband, and this information qualifies for exemption under section 38(b) of the *Act*.

In Order MO-1320, Adjudicator Sherry Liang dealt with an appeal involving a request by parents for information about their deceased daughter. The daughter had died in a motor vehicle accident and the parents were denied access to the statements of witnesses at the scene of the accident. Adjudicator Liang made the following comments in that order which I feel are relevant to the present appeal:

The request by the appellants is not unusual. Other decisions of this Office have dealt with attempts by the bereaved relatives of a deceased person to gain access to information about the circumstances of the death. It is not uncommon for such requests, as is apparently the case here, to be made essentially for the purpose of greater understanding of the tragic event.

It is not without sympathy for the appellants' situation that I have arrived at my decision here. My role is to interpret and apply the provisions of the *Act*, which governs the release of information by, among others, the Police. In reviewing the decision of the Police, I am also governed by the *Act*, and I cannot substitute my own views on the fairness and merits of the appellants' request where the *Act* provides a clear direction.

In the 1999 *Annual Report* of the Information and Privacy Commissioner, the Commissioner recommended statutory changes which would recognize the needs of grieving families, and remove restrictions from the *Act* preventing them from having greater access to information about the death of a loved one. Part of that report states:

Of the various types of appeals processed by the IPC, those involving a request for information about a deceased family member are among the most sensitive. Requests of this type are submitted to institutions (most often to local police forces or the Ontario Provincial Police) by immediate family members, or their representatives, in order to obtain information surrounding the circumstances of the relative's death.

Except in certain limited circumstances, institutions must deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the provincial and municipal *Act*.

....

A statutory amendment to address this sensitive and compelling issue is clearly required, and would be supported by a broad cross section of stakeholders; requesters and appellants; Freedom of Information and Privacy Co-ordinators in both the provincial and municipal sectors, including the police community; professionals in the field of grief counseling; and the IPC.

Specific language for a new subsection for section 21 (section 14 of the municipal *Act*) is included in the *Commissioner's Recommendations* section, which follows this review of key issues.

It may be that in the future, the *Act* will be amended to reflect the recommendations of the Commissioner. For the present purposes, however, I must apply the *Act* as it stands today.

I concur with the statements made by Adjudicator Liang.

It should be noted, as pointed out by the Police, that records confirming the cause of death may be accessible to the appellant through the Coroner's Office.

In summary, I find that all pages of the records, with the exception of page 1 of the Homicide and Sudden Death Report, qualify for exemption under section 14(1), and page 1 qualifies under section 38(b) of the *Act*.

ORDER:

I uphold the decision of the Police.

Original signed by:
Tom Mitchinson
Assistant Commissioner

November 16, 2000