



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

ORDER MO-1352

Appeal MA-000100-1

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

NATURE OF THE APPEAL:

The appellant made a request to the Toronto Police Services Board (the Police) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an occurrence report relating to the investigation of the sudden death of her son. In her request, the appellant advised the Police that she is her son's next of kin and executor. The Police located 20 pages of responsive records and granted access to portions of two pages. Access to the remaining records and parts of records was denied under the following exemptions contained in the *Act*:

- law enforcement - section 8(2)(a)
- invasion of privacy - sections 14(1) and 38(b), with reference to the presumptions in sections 14(3)(a) (medical information about an individual) and (b) (information compiled as part of an investigation into a possible violation of law)

In addition, the Police advised the appellant that they required evidence of her status as "personal representative" of her deceased son's estate in order to entitle her to exercise the broader access rights prescribed by section 54(a) of the *Act*.

The appellant appealed the decision of the Police to deny access to the responsive records.

I provided a Notice of Inquiry to the Police initially and to two other individuals whose rights may be affected by the disclosure of the information contained in the records (the affected persons). Because some of the records appeared to contain the personal information of the appellant, I also requested that the Police consider the possible application of section 38(a) of the *Act* for those records which it claimed to be exempt under section 8(2)(a). I received representations from the Police only.

I then provided the appellant with the non-confidential portions of the representations which I received from the Police, along with a modified version of the Notice of Inquiry which was forwarded to the Police. The appellant made lengthy representations both personally and through her counsel and other individuals. With her representations, the appellant also provided me with a copy of a Certificate of Appointment of Estate Trustee Without a Will appointing her as the Estate Trustee of her deceased son's estate. The relevant portions of the appellant's submissions were then provided to the Police, who were invited to make additional representations by way of Reply, addressing the issues raised by the appellant in her submissions. In particular, the Police were asked to comment on the possible application of section 54(a) in light of the appellant's appointment as Estate Trustee. I received detailed reply representations from the Police.

PRELIMINARY ISSUE:

SCOPE OF THE REQUEST

In the representations received from the appellant's counsel, the appellant sought to broaden the scope of the request to include not only the occurrence report originally requested, which is comprised of various Sudden Death Reports, Supplementary Reports and Property Reports, but also any investigating officer's

notes, forensic reports or witness statements. In their submissions, the Police object to the broadening of the scope of the request at the second step of the inquiry stage of the appeal.

In my view, it would be unreasonable to broaden the scope of the appeal at this late stage of the Inquiry process. The appeal as originally framed concisely stated the parameters of the request to include only the “occurrence report regarding the death of my son”. Acting on the request as clearly indicated, the Police conducted a search for responsive records and identified the 20 pages which now form the records at issue as being the sole responsive records. I find that the Police acted properly in the manner in which they responded to the request and that the appellant is not entitled to broaden the scope of the request to include other records relating to the investigation into the death of her son.

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

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

Section 54(a) 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 the deceased 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 the deceased'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 the deceased as the deceased would have had; her request for access to the personal information of the deceased under section 36(1) of the *Act* will be treated as though the request came from the deceased himself: see, for instance, Order M-927.

Personal Representative

The appellant has provided the Police and this office with a copy of the Certificate of Appointment of Estate Trustee Without a Will. The Police have indicated that they are satisfied that this documentation establishes that the appellant qualifies as the deceased's personal representative. In the circumstances, I am also satisfied that the first requirement under section 54(a) has been met.

Relates to the Administration of the Individual's Estate

The appellant has stated that access to the police report is necessary in order to settle the estate. She indicates that at the time of his death, her son left no will and no substantial assets beyond a life insurance policy "which is affected by the police finding that he committed suicide." The appellant submits that "The administration of [the deceased's] estate, therefore, cannot be completed absent additional information about the determination that he committed suicide." The appellant's submissions go on to conclude that:

... [the appellant] seeks this information both as a mother who needs to be informed of these circumstances in order to accept her son's passing, and as a member of the public who is concerned about the nature of the investigation into his death. While [the appellant] now has standing under section 54(a), having obtained a Certificate of Appointment as Estate Trustee, it must be understood that **her primary motivation for this appeal is not the administration of her son's estate. Rather, it is to understand her son's death, ensure there was adequate investigation into the circumstance surrounding his death and to restore [the deceased's] personal reputation should the information provided show that he did not commit suicide.** [my emphasis]

The Police rely on several previous decisions of the Commissioner's office, along with a decision of the Divisional Court following an application for the judicial review of my decision in Order P-1027, cited as *Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1996), 136 D.L.R. (4th) 12 (Div.Ct.). Specifically, the Police reiterate that the right of access to personal information relating to a deceased individual must relate to the administration of the estate. Their submissions quote from Order MO-1315, in which Adjudicator Sherry Liang held that:

In their representations, the Police have correctly stated that the rights of a personal representative under section 54(a) are *narrower* than the rights of the deceased person, in that the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned: see Order M-1075. Other decisions of this office and the courts have confirmed the limited nature of the rights of personal representatives to obtain information relating to the deceased: see M-1048 and *Adams v. Ontario (Information and Privacy Commission, Inquiry Officer)* (1996), 136 D.L.R. (4th) 12 (Div.Ct.).

The Police further submit that:

No information has been presented on what effect the circumstances of the [deceased's] death would have on this insurance policy, a copy of which was not provided, nor has there been any information put forth insofar as the name of the beneficiary.

In light of the foregoing, without any convincing evidence as to the necessity of this information for the purposes of the administration of the estate, access to the information must be denied.

The Police conclude their reply representations on this issue by referring to the *Adams* decision as follows:

Again the Inquiry Officer recognizes that the information is not needed for an action which is a derivative action for the next of kin directly but not for the estate, but finds that information relating to the deceased relates to the administration of the estate “within the meaning of section 66(a) of the Act” without saying what that meaning is or how or why it diverges from the well-understood meaning of that term.

The Inquiry Officer may have had a compassionate motive for holding that the exercise of a power to request information relates to the administration of the deceased’s estate, while recognizing that it in fact relates to the needs of the requester, not related to the administration of the estate, however, that motive does not make the decision a reasonable one in the context of the role of the Commissioner to interpret and apply the Act.

In Order MO-1315, Adjudicator Liang succinctly summarized the thinking of the Divisional Court and subsequent decisions of the Commissioner’s office with respect to the meaning of the term “relates to the administration of the deceased’s estate”. She found that:

The limited nature of the rights of personal representatives arises from the requirement that the request for information be related to the administration of the deceased’s estate. To put the issue another way, the appellant must demonstrate that “the purpose for which the information is sought is for the administration of the estate” (*Adams v. Ontario, supra* at p.18).

In my view, the appellant has not provided me with the kind of detailed, specific information which would enable to make a finding that the request for information relates to the **administration** of the estate for the purposes of section 54(a). Rather, as conceded by the appellant, the request was made for other, more personal, reasons. I have not been provided with any information which would demonstrate that the information contained in the records at issue would assist the appellant in the administration of the estate, beyond her assertion that the insurance policy on the deceased’s life “is affected by the police finding that he committed suicide” and that the deceased’s estate “cannot be completed absent additional information about the determination that he committed suicide.” In my view, these statements, taken alone, are insufficient for me to make a finding that the request relates to the administration of the estate under section 54(a).

I have a great deal of sympathy for the position in which the appellant finds herself as a result of my findings under section 54(a). I recognize the appellant's need to understand better what happened to her son. In Order MO-1320, Adjudicator Liang was faced with a very similar set of circumstances. She observed that:

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 Acts.

....

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 counselling; 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.

Pending the implementation of the recommended changes to the *Acts*, I too am bound to interpret their provisions as they stand now.

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 son. As such, I find that they all contain the deceased son's personal information.

Records 1, 2-4, 9-10 (which is identical to Record 16-17), 13, 14, 18 and 19-20 contain information obtained from the two affected persons, including their names, addresses, telephone numbers (section 2(1)(d)), dates of birth (section 2(1)(a)) and the information which they provided to the Police (section 2(1)(h)). I find that these records contain the personal information of the affected persons as that term is defined in section 2(1).

Records 1, 2-4, 9-10 (and Record 16-17) and 19-20 also include the personal information of the appellant, including her name, address, telephone number (section 2(1)(d)), her medical history (section 2(1)(b)) and the personal opinions or views of other individuals about her (section 2(1)(g)). Those portions of Records 1 and 2-4 containing the appellant's personal information were provided to her by the Police in response to her request.

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 1999, section 2(2) has no application in this case.

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 a requester and another individual, and the institution determines that the disclosure of the information would constitute an unjustified invasion of the other individual's personal privacy, the institution has discretion to deny the requester access to that information. Sections 14(2) and (3) provide guidance in determining whether disclosure would result in an unjustified invasion of privacy. Section 14(2) provides some criteria for the head to consider in making this determination, and 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.

In *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, 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). This decision was made in the context of sections 21(2) and (3) of the provincial *Freedom of Information and Protection of Privacy Act*, which are virtually identical to sections 14(2) and (3) of the *Act*.

The Police state that all of the information contained in the records was compiled as part of its investigation into the circumstances surrounding the death of the appellant's son. The Police rely on the presumption of an unjustified invasion of privacy contained in section 14(3)(b), which reads:

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 appellant submits that:

... even if the information request [sic] is "personal" as defined by section 2(1), the records do not qualify for exemption under section 14(1) of the Act. Specifically, the disclosure of records requested does not constitute an unjustified invasion of personal privacy, as provided by section 14(1)(f). The records requested would, in fact, contain very little information about [the deceased]. Rather, they predominantly contain information about evidence collected at the scene, and the adequacy of the police investigation and forensic analyses into his death.

...

Pursuant to section 14(2)(a), disclosure is justified by the public interest of ensuring appropriate use of government discretion, and subjecting these activities to public scrutiny.

...

It is already public knowledge that [the deceased's] cause of death, as determined by state authorities, was suicide. It would absolutely not do any further harm to [the deceased's] reputation to provide the factual basis for this determination. The concern that provision of personal information not damage an individual's reputation, as articulated in section 14(2)(i) is therefore not in issue. To the contrary, such disclosure might restore [the deceased's] reputation if the records indicate that his death was not thoroughly investigated and may not have been a suicide.

...

Further, it is respectfully submitted that the circumstances where disclosure of personal information are presumed to constitute an unjustified invasion of personal privacy under section 14(3), do not apply to the circumstances of this case.

In my view, the information contained in the records was clearly compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. Therefore, the section 14(3)(b) presumption of an unjustified invasion of personal privacy applies. Because the exempt information falls within the scope of one of the section 14(3) presumptions, *John Doe, supra*, precludes a consideration of the application of any of the factors weighing for or against disclosure under section 14(2).

I understand the appellant's desire to know more details surrounding her son's death, and realize that she will be disappointed that she is not entitled to access to all of her son's personal information under the *Act*. However, my role is to interpret and apply the provisions of the *Act*, even if the result may seem unfair to the appellant. The Divisional Court's statement in *John Doe, supra*, that presumptions of the kind found in section 14(3) are not rebuttable by factors in section 14(2), would not support a result in this case that would satisfy the appellant's desire for more information. Under the *Act*, according to the Divisional Court's interpretation, any disclosure of the personal information I have found to fall within section 14(3)(b) would constitute an unjustified invasion of personal privacy. Accordingly, the records which contain only the personal information of individuals other than the appellant (Records 5 (which is identical to Record 15), 6 (which is the same as Record 8), 7, 11-12, 13, 14 and 18) are exempt from disclosure under section 14(1).

A finding that section 14(3)(b) applies does not necessarily end the matter, because section 38(b) gives the Police discretion to disclose personal information even if doing so would constitute an unjustified invasion of privacy, in circumstances where a record contains the personal information of both a requester and another identifiable individual, as is the case with Records 1, 2-4, 9-10 (and Record 16-17) and 19-20. 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).

The Police submit:

When opting to apply section 38(b) to any record containing the personal information of both the appellant and third parties the institution must weigh the right of access to that of protection. In this regard, the institution took into consideration the appellant's failure to meet the requirements of section 54(a), the sensitive nature of the information . . . the failure to obtain consent from the third parties as well as the appellant's right to receive information from the Coroners Office pursuant to the Coroners Act.

Where the interests of a deceased individual are at issue, I accept that the factors identified by the Police in exercising discretion under section 38(b) are reasonable and appropriate. In the circumstances of this appeal, I am satisfied that the Police have properly exercised discretion in favour of withholding the personal information of the appellant's deceased son. Consequently, I find that the disclosure of Records 1, 2-4, 9-10 (and Record 16-17) and 19-20 would constitute an unjustified invasion of the personal privacy of the appellant's son, and this information qualifies for exemption under section 38(b) of the *Act*.

Finally, I note that none of the considerations in section 14(4) apply to the records at issue in this appeal and the appellant has not raised the possible application of the "public interest override" provision in section 16 of the *Act*.

Because of the manner in which I have addressed the application of sections 14(1) and 38(b) to the records, it is not necessary for me to determine whether they also qualify for exemption under sections 8(2)(a) and 38(a).

ORDER:

I uphold the decision of the Police.

Original signed by: _____
Donald Hale
Adjudicator

_____ October 20, 2000