



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1538

Appeal MA-010275-1

Sault Ste. Marie Police Services Board



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NATURE OF THE APPEAL:

This is an appeal from a decision of the Sault Ste. Marie Police Service (the Police), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Originally, the requesters (who became the appellants) were the mother and step-father of a deceased individual who sought police records pertaining to the circumstances of their son's death. One of them has withdrawn as an appellant; the only appellant currently before me is thus the mother of the deceased individual.

In refusing access to the records, the Police relied on the mandatory exemption in section 14(1) of the *Act*, referring to the presumption in section 14(3)(b) (law investigation).

During mediation through this office, and during the course of this inquiry, some issues have been clarified or narrowed. The records remaining in issue are the notes of a specified police officer, as well as the statements of two named individuals (the affected parties). Further, the mediator informed the parties that the provisions of section 38(b) may also apply to this appeal (discretion to refuse requester's own personal information). There is also an issue as to whether section 54(a) of the *Act* is applicable in the circumstances of this appeal. If section 54(a) applies, the appellant stands in the place of her deceased son for the purpose of making this request for access under the *Act*.

I sent a Notice of Inquiry to the appellant initially, inviting her to make representations on the issues raised by the appeal. The appellant has provided representations, which included the written consents of the two affected parties to the disclosure of their information. These representations were subsequently shared with the Police, who have also made representations.

RECORDS:

The records at issue consist of handwritten excerpts from a police officer's notebook, numbered 0140 to 0158. During the course of the inquiry, it was clarified that the statements of the two affected individuals, numbered pages 0124 to 0133 and 0187 to 0188, are also at issue. These statements are contained on standard Police forms with the title "Interview Report".

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Introduction

I will first consider whether, under section 54(a) of the *Act*, the appellant is entitled to exercise the 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 will be treated as though the request came from the deceased himself under section 36(1) of the *Act* (see, for instance, Orders M-927 and MO-1315).

Personal Representative

In Order M-919, former Inquiry Officer 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.

Based on the court's analysis set out above, 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 Police have accepted that the deceased's mother is a personal representative of the deceased.

Based on the court order issued December 6, 2001, appointing the deceased's mother the Estate Trustee of the deceased's estate, I am also satisfied that she is a "personal representative" within the meaning of section 54(a) of the *Act*.

Relates to the Administration of the Individual's Estate

In Order M-1075, Assistant Commissioner Tom Mitchinson reviewed the scope of the access rights of a personal representative under 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.

In that order, Assistant Commissioner Mitchinson accepted the argument of a personal representative that access to certain police records was required in order to determine whether the major beneficiary of the estate was disentitled from benefiting under the will by contributing to the death of the testator. It was found that access to the records was required in order for the personal representative to make an informed decision about matters relating to the beneficiary's entitlement to assets of the estate, and met the second requirement under section 54(a).

Other orders have applied section 54(a) in circumstances where access to the records was required in order to defend a claim being made against an estate (Order M-919), to exert a right to financial entitlements being denied to the estate or said to be due to the estate (Orders M-934 and MO-1315) or to investigate allegations of fraud which might affect the size of the estate (MO-1301).

In this case, the appellant has submitted with her representations a copy of a Statement of Claim naming the estate as a plaintiff. The claim is based on the circumstances of the death of the appellant's son and includes, but is not limited to, a claim under the *Family Law Act*. Prior orders of this office have found that section 54(a) does not apply where the only action contemplated is a wrongful death suit on the part of family members, since damages from such a suit do not form part of the estate of the deceased, but go to

the individual family member plaintiffs [see, for example, Order MO-1256, referring to the decision in *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 (Div. Ct.).] I am satisfied that the facts of this case are different from those in MO-1256 and other similar orders, in that, as I have indicated above, the lawsuit here is not confined to claims under the *Family Law Act*.

I am therefore satisfied on the basis of the material before me, including the Statement of Claim, that the request for access is "related to the administration" of the deceased's estate, within the meaning of section 54(a) of the *Act*. I note that after considering the representations of the appellant, the Police have also accepted that the appellant meets this second component of section 54(a).

The result of my finding is that the appellant's right to have access to the records is to be determined as a request for her own information and as well, as if the request came from the deceased himself.

PERSONAL INFORMATION/INVASION OF PRIVACY

Although the Police have, in their representations, accepted that section 54(a) applies to the circumstances of this appeal, they maintain that sections 14(1) and 38(b) still apply to justify denying access to some of the information in the records. In order to assess whether these provisions apply it is necessary to determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined as recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The appellant submits that certain of the information obtained by the police officers during their investigation of the death of the deceased is not "personal information" as defined in the *Act*. The Police submit that the records contain the personal information of a number of individuals. There is personal information of the deceased, the two affected parties, the mother and step-father of the deceased, and other third parties.

I agree with the Police and find that the records contain the personal information of the categories of individuals listed above.

Section 36(1) of the *Act* gives individuals a right of access to their own personal information. Since I have found that the appellant is entitled to exercise the rights of her deceased son, she is accordingly entitled to any personal information about him in the records. She is also entitled to any information relating to herself.

Section 38 provides certain exceptions to the section 36(1) right of access. Under section 38(b) of the *Act*, where a record contains the personal information of both the deceased (or the appellant) and of other individuals, the Police have the discretion to deny the appellant access to that information if they determine that the disclosure of the information 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 (see Order M-1146).

Section 14(1) permits disclosure of the personal information of an individual provided that prior written consent has been obtained. In view of the consents of the two affected parties before me, I am satisfied that their personal information may be disclosed, with one exception. Upon withdrawing as an appellant to this appeal, the step-father of the deceased has provided his written consent to disclosure of his personal information, and I accordingly find that any information about him may also be disclosed. The Police have submitted that the consent of one of the affected parties does not apply to pages 0157 to 0158 of the police officers' notes. The Police state that, in providing her written consent, this affected party was not aware of the existence of these pages in the records, and did not intend to provide consent to the release of these portions.

These pages of the records are not part of the formal statement of this affected party, and contain information provided by the affected party which does not relate to the circumstances of the deceased's death. The appellant has indicated in her representations that her request is very limited, and specifically relates to the circumstances of the deceased's death. Because of this, I am satisfied that pages 0157 to 0158 may be excluded from the scope of the request, and it is not necessary to determine whether they may be released under the *Act*.

As I have indicated above, the records also contain personal information of some other individuals, in addition to the deceased, the mother and step-father, and the affected parties. Sections 14(2) and (3) 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(3)(b) of the *Act* provides that the disclosure of personal information which was "compiled and is identifiable as part of an investigation into a possible violation of law" is *presumed* to 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].

In this case, I am satisfied that the section 14(3)(b) presumption applies to the personal information of these other individuals in the records, since this information was gathered during the course of the police investigation into the circumstances of the deceased's death. I am also satisfied that the Police have exercised their discretion appropriately in deciding to withhold access to this information.

Section 4(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. In their representations, the Police have reviewed the records in detail and submit that access may be granted with the personal information of the third parties severed. I have considered the severances suggested by the Police, and find them to be a reasonable application of section 4(2), with two minor additions on pages 0126 and 0152 which also contain personal information of third parties.

The Police have also severed some additional incidental portions in the records, containing police codes, or information about unrelated matters. Since the appellant's request, as she has explained in her representations, is very limited in nature, I am satisfied that these portions may be excluded.

ORDER:

1. I order the Police to release the records to the appellant in their entirety, with the exception of the portions they have severed in their representations, further portions identified by me, and with the exception of pages 0157 to 0158. For greater certainty, I have sent the Police a copy of the records to be disclosed, showing the portions to be withheld highlighted in yellow.
2. I order disclosure to be made by sending the appellant a copy of the records, severed according to my directions, by June 17, 2002 but not earlier than June 11, 2002.
3. In order to verify compliance with my directions, I reserve the right to require the Police to provide me with a copy of the records sent to the appellant.

Original signed by: _____

Sherry Liang
Adjudicator

_____ May 10, 2002