



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1563

Appeal MA-010353-1

Waterloo Regional Police Services Board



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Waterloo Regional Police Services Board (the Police) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to a copy of the transcription of an interview conducted by two named police officers with an affected person in regard to a murder-suicide involving the requester's daughter (the deceased) and granddaughter.

In their decision letter, the Police denied access to the information requested, stating that it had not been shown to be necessary for the settlement of the deceased's estate and, therefore, did not qualify for release pursuant to section 54(a) of the *Act*. The Police also denied access pursuant to section 38(a) in conjunction with section 8(2)(a) (law enforcement) and section 38(b) in conjunction with section 14 (invasion of privacy). In their decision letter, the Police refer to sections 14(1)(f), 14(2)(f), 14(2)(h), 14(3)(a) and 14(3)(b) in support of their reliance upon the section 14 exemption.

The appellant appealed the Police's decision to deny access.

Through a Notice of Inquiry, I sought representations from the appellant, initially, in regard to the application of sections 54(a) (administration of estate), 38(b) and 14 (invasion of privacy), and 16 (compelling public interest) of the *Act*.

Subsequently, I sent a Notice of Inquiry to the Police seeking representations on the application of section 38(a) in conjunction with section 8(2)(a), section 38(b) in conjunction with section 14, and section 16.

I then sought reply representations from the appellant in respect of the Police's submissions on sections 38(b) and 14.

The issues to be decided in this appeal are:

- whether the appellant is entitled to exercise the rights of the deceased pursuant to section 54(a) of the *Act*;
- whether the records are exempt under section 38(b) in conjunction with section 14 of the *Act* or under section 38(a) in conjunction with section 8(2)(a) of the *Act*.
- whether there is a public interest in the disclosure of the records pursuant to section 16 of the *Act*.

If I find that section 54(a) applies, the appellant stands in the place of the deceased for the purpose of making her request under the *Act*.

RECORDS:

There are two records at issue, comprised of eleven pages:

- Handwritten witness statement signed by the affected party (pages 1 – 3);

- Handwritten notes from a police officer's notebook (pages 4 – 11).

DISCUSSION:

RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE

Introduction

Section 54(a) states:

Any right or power conferred on an individual by this Act may be exercised,

- (a) 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 herself under section 36(1) of the *Act* (see, for instance, Orders M-927 and MO-1315).

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.

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".

I adopt the analysis of former Adjudicator Fineberg for the purposes of this appeal. The appellant has provided this office with a copy of the Certificate of Appointment of Estate Trustee Without a Will, issued by the Registrar of the Ontario Superior Court of Justice in Kitchener, which names the appellant as the trustee of the deceased's estate. On this basis, I am satisfied that the appellant 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 Order M-1075, 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). Section 54(a) has been held not applicable in cases where the only monetary claim being investigated was one the estate was clearly not entitled to pursue (see Order MO-1256).

In this case, the appellant has expressed a desire to recover property that she alleges was stolen from her deceased daughter's home after her death. The appellant has indicated that she plans to

commence a civil court proceeding to recover stolen property, including furnishings, clothing and original art created by the deceased. The appellant also indicates that the records at issue will "...prove to a judge that slander was the root cause of not only this catastrophic tragedy but also the theft of the estate."

I appreciate that the appellant wishes to bring some closure to these tragic events and I can understand that the appellant feels that gaining access to the records at issue will help to facilitate this difficult process. However, in my view, the appellant has not established that the information contained in *these particular* records is required to undertake the administration of the deceased's estate as these records do not relate at all to the stolen property issue. Based upon the material before me, I cannot find that the appellant's request for access to these records "relates to the administration" of the deceased's estate, within the meaning of section 54(a). I, therefore, find that the appellant's submissions do not satisfy the second part of the test in section 54(a).

PERSONAL INFORMATION

As I have indicated, the Police have relied on section 38(b) in conjunction with section 14 in denying access to the records at issue. In order to assess whether these provisions apply it is, first, 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.

Based on my review of the records, there is no doubt that they contain the personal information of the deceased. The information contained in the records reveals information obtained by the affected person during a therapeutic relationship between the deceased and the affected person. The information includes the number of meetings held, meeting dates, the deceased's reasons for seeking the affected person's assistance and issues and concerns discussed at various meetings. This information was disclosed by the affected person during an interview with the Police and is the personal information of the affected person.

In addition I also find the records contain the personal information of the affected person. While it is arguable that the affected person's information is about her professionally, in these circumstances, where her conduct has been called into question, I find her information to be personal in nature.

I also find that the records contain personal information about other individuals, including minimal information regarding the appellant. The appellant is identified by name. Some of the information about other individuals contains the deceased's views of these individuals and their relationship to the deceased.

INVASION OF PRIVACY

Introduction

Section 36(1) of the *Act* gives individuals a right of access to their own personal information. 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 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).

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(2) provides some criteria for consideration in making this determination. Section 14(3) lists types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

Section 14(3)(b)

The Police claim the application of section 14(3)(b) and make the following submissions in support of their position:

Section 14(3)(b) states 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 records were compiled during the investigation of a homicide. The records were not created after the homicide investigation. Therefore, the records fall within the ambit of the presumption in section 14(3)(b). The records are identifiable as part of the investigation of a homicide and suicide. Homicide is a violation of law. Section 229 of the *Criminal Code* of Canada, R.S.C. 1985, Chap. C-46 defines homicide...

Part of any homicide investigation is the determination of why the event occurred. In order to determine this, the investigators were quite correct in interviewing a person that would be able to provide them with the psychiatric or psychological condition and an evaluation of this condition as it relates to the deceased. The disclosure of the records is an unjustified invasion of personal privacy.

The appellant made extensive representations in response to those submitted by the Police in respect of sections 14(2) and 14(3).

With respect to section 14(3)(b) specifically, the appellant states:

If, there was a proper investigation in determining why the event occurred and that the conclusion of the outcome is different than what I have presented, I, as a Canadian citizen, in a democratic society, and as the closest relative of the deceased have the right to know.

It is clear that the Police compiled all of the information in the records as part of an investigation into a possible violation of law, a possible homicide under the *Criminal Code*. Therefore, I find that the information in the records falls within the scope of the section 14(3) presumption and, therefore, the section 38(b) exemption applies to the records.

Regarding severance, based on my review of the records, it is not possible to disclose to the appellant her personal information without compromising the personal privacy of other individuals. The appellant's personal information is so intertwined with that of others that severing out the personal information of others to enable the appellant to receive her very minimal personal information would only lead to a disclosure of information without context or meaning. In the circumstances, I find that the section 38(b) exemption applies to the records in their entirety.

Exercise of Discretion

The Police made the following representations regarding the exercise of their discretion under section 38(b) of the *Act*:

There were a number of factors considered when deciding to exercise discretion in favour of applying the exemptions. The information gathered from the affected party was provided in confidence. The records do not relate to licensing, training, qualifications or approved procedures which may reach the threshold of compelling public interest. The records relate to communications between a counsellor and her client. The records are extremely sensitive in nature. Due to the nature of the records, the balancing principles in section 38(b) weigh in favour of protecting the privacy interests of the deceased and the counsellor.

After careful consideration of all of the materials before me, I find nothing improper in the Police's exercise of discretion in withholding the records from the appellant.

PUBLIC INTEREST

Introduction

Under section 16 of the *Act*, an exemption from disclosure under section 14 [and by extension section 37(b)] (among others) does not apply where a "compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption." For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “arousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. (See Order P-1398)

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen’s Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that “[a]s the personal information subject to the request becomes more sensitive in nature ... the effect of the proposed exemption is to tip the scale in favour of non-disclosure”. (See Order MO-1254)

Representations

The appellant submits that the deaths of her daughter and granddaughter raise matters of public interest relating to the unlicensed practice of psychological therapy and the dangers of recovered memory therapy. The appellant has provided me with voluminous information relating to these issues, including references to the Romanow Commission on health care reform, a medical report prepared by a licensed psychiatrist, newspaper articles, and the anecdotes of individuals critical of recovered memory therapy. I am grateful to the appellant for this information and appreciate the depth of the appellant’s concern for these issues.

The Police submit:

There is no public interest in disclosure of the records. The records deal specifically with communications between a counsellor and her client. The records do not relate to licensing, training, qualifications, approved procedures or validity of False Memory Syndrome which may reach the threshold of

compelling public interest. The only public interest that could have been generated would have been initiated by the appellant in her efforts to obtain legislation relating to counselling and therapy.

The subject matter of the records has not been discussed in a public forum. The records deal specifically with communications between a counsellor and her client.

There are other mechanisms in place to protect or serve the identified public interest had it been identified. The *Coroners Act*, R.S.O. 1990 provides legislation that allows for deaths to be investigated and should it be determined that holding an inquest would serve the public interest, an inquest may be called.

Findings

I find that the circumstances surrounding this case raise issues that are public in nature, including public awareness about unlicensed therapy and therapeutic practices. However, this appeal arises out of the appellant's wish for access to records that document matters relating to a private therapeutic relationship between the deceased and an affected person. The appellant has not demonstrated a sufficiently strong relationship between disclosure of *these particular* records and the advancement of the public interest she identifies, in this case exposing unlicensed therapy and therapeutic practices. Given the particular sensitivity of the information contained in these records, I find that the public interest in disclosure does not clearly outweigh the purpose of the section 38(b)/14 exemption. I, therefore, conclude that section 16 does not apply in the circumstances of this case.

I am not without sympathy for the predicament of the appellant. I have considered her arguments carefully. Although they raise some important issues, I am satisfied that in this case, the exemption applies and it is not overridden by section 16 of the *Act*.

ORDER:

I uphold the decision of the Police to deny access to the records at issue on the basis of section 38(b) of the *Act*.

Original signed by: _____
Bernard Morrow
Adjudicator

August 9, 2002 _____