



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1715

Appeal MA-030002-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

This appeal concerns a decision of the Toronto 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 a police report concerning the death of a named individual (the deceased). The appellant is the father of the deceased.

In his request the appellant indicated that he was the trustee for the deceased's estate and he enclosed a copy of a certificate of appointment of estate trustee without a will.

The Police wrote to the appellant and raised the possible application of section 54(a) (right of access by a personal representative). Section 54(a) confers an individual's rights and powers under the *Act* to that individual's personal representative where the individual is deceased and the exercise of the right or power relates to the administration of the deceased's estate. The Police indicated that the appellant had met the first requirement by establishing his role as the deceased's personal representative. The Police asked the appellant to provide evidence of the second requirement, that the requested information was needed for the administration of the deceased's estate.

The appellant wrote to the Police and advised that the requested information was required in order to settle the deceased's estate including the processing of an insurance policy claim.

The Police issued a decision providing partial access to 25 pages of records. The Police indicated that access was being denied to certain information pursuant to section 38(a), with reference to section 8(1)(l) (law enforcement), and section 38(b), with reference to section 14 (invasion of privacy). The Police cited sections 14(1)(f) and 14(3)(b) of the *Act* in support of their section 38(b)/14 claim. In addition, the Police indicated that some information was removed as being non-responsive to the appellant's request. The Police did not address the possible application of section 54(a) in their decision letter.

The appellant appealed the Police's decision regarding the denial of access to all responsive information.

Mediation was not successful in resolving all of the issues in the appeal and the file was referred to adjudication.

I first sought and received representations from the Police. With respect to the section 38(a)/8(1)(l) claim the Police clarified in their representations that they are relying on this exemption to deny access to Police "ten-codes" which appear in two places in the records (Records 2 and 4 – see the table below). The non-confidential portions of the Police's representations were shared with the appellant. I then sought representations from the appellant who made submissions on the issues in dispute.

RECORDS:

Portions of four records, totalling 22 pages, remain at issue. The records are comprised of four police reports.

The four records and the exemptions claimed are described in the following table:

Record #	Description	Exemption Claimed
1	Homicide and Sudden Death Report dated December 9, 2001 (1 page)	38(b)/14
2	Supplementary Report dated December 9, 2001 (7 pages)	38(b)/14 38(a)/8(1)(l)
3	Supplementary Report dated December 9, 2001 (1 page)	38(b)/14
4	Homicide and Sudden Death Report updated to January 15, 2002 (13 pages)	38(b)/14 38(a)/8(1)(l)

CONCLUSION:

The portions of the records that the Police withheld from the appellant are exempt from disclosure under the *Act*.

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,
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 he can demonstrate that (a) he is the personal representative of the deceased, and (b) the rights he wishes to exercise relate to the administration of the deceased's estate. If the appellant meets the requirements of this section, then he is entitled to have the same access to the personal information of the deceased as the deceased would have had; his 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 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 provided the Police and 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, which names the appellant as the trustee of the deceased’s estate. 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).

The appellant has not made any formal representations regarding this criterion. The appellant makes it clear in his representations that he seeks the information at issue so that he and another named individual can complete their own investigation into the circumstances surrounding the deceased's death. However, in correspondence with the Police following his initial access request, the appellant states

The police report is required because the estate cannot be settled without access to the police report. The police have listed the cause of death as a suicide and an insurance policy requires proof of their investigation.

The Police respond to the appellant's statement with the following submission:

The above submission by the appellant does not adequately demonstrate how the information requested relates to the administration of the estate. The appellant has failed to provide this institution with a copy of the insurance policy or with information why the personal and sensitive information of other persons is required.

I appreciate that the appellant wishes to bring some closure to these tragic events and I can understand that he 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. In particular, the appellant has not provided evidence to support his assertion

that the information is required in order to prove an insurance claim. 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), read in conjunction with section 14, to deny access to the severed information and section 8(1)(l) or section 38(a), read in conjunction with section 8(1)(l), to deny access to the "ten-codes" in Records 2 and 4. In order to assess whether these provisions apply to these records, 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, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)], the address of the individual [paragraph (d)], the opinions or views of the individual [paragraphs (e) and (g)], 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 [paragraph (h)].

Based on my review of the records, there is no doubt that they contain the personal information of the deceased. The records also contain the personal information of the appellant and several affected persons.

The records contain the details of a Police investigation into the deceased's death including Police officers' observations of the deceased (including information regarding the deceased's physical appearance, condition and personal belongings, and the care of the deceased's body by Police and medical personnel), the names, addresses and views of four affected parties (including three witnesses), and the licence plate numbers for the vehicles of twelve affected persons.

The police ten-codes, which appear in Records 2 and 4, are directly linked to the personal information of the twelve affected persons. These records also contain the personal information of the appellant.

INVASION OF PRIVACY

Introduction

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.

Section 38(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 38(b) of the *Act*, where a record contains the personal information of both the requester 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.

Section 38(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 38(b) gives the institution the discretion to deny access to the personal information of the requester. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining whether 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 head to consider in making a determination as to 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) 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.

With respect to section 14(3), 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 other words, once section 14(3) is found to apply, the factors in section 14(2) cannot be resorted to in favour of disclosure.

As indicated above, the Police are relying upon section 38(b), read in conjunction with section 14, to deny access to the severed portions of the records.

Unjustified invasion of another individual's personal privacy

Introduction

I will consider the application of section 38(b)/14 to the records.

The section 14(3)(b) presumption 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;

Representations

The Police state that they understand that the appellant requires this information to continue an investigation into the deceased's death. They have knowledge that the appellant has hired a private investigator to assist with this investigation. Relying upon previous orders of this office (Order MO-1410, M-249 and M-718), the Police state that the exception contained in section 14(3)(b) refers to the Police investigation for which the personal information was compiled in respect of a possible violation of law. Therefore, although the appellant is continuing the investigation, the presumption in section 14(3)(b) applies.

The Police also address the application of 14(2)(h) in the circumstances of this case. The Police state that “[i]nterviews conducted by the Police with friends and acquaintances of the deceased are done so with an expectation of confidentiality...”

The appellant states that he requires the information at issue in order to continue his investigation into the deceased's death. He understands “...that third party investigators can access police reports.” He finds it “illogical” that he could give a named doctor consent to read the police reports, yet he is denied access to its full contents. He suggests that the police reports “...have never been private” since the information contained in them was “...freely shared with [him]...” by the police in the hours immediately following the deceased's death. The appellant also challenges the Police's reliance on section 14(2)(h). The appellant states that witnesses interviewed could not have supplied information in confidence since “[a]ll interviews that the police conducted were relayed to [him] verbally...” in the hours immediately following the deceased death.

Findings

Based on my review of the records and the parties' representations, I am satisfied that the Police compiled all of the information in the records as part of an investigation into a possible violation of law, a homicide under the *Criminal Code*. The Police concluded that no homicide had taken place and no criminal charges were laid. However, the fact that criminal proceedings were not commenced does not have a bearing on this issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

I acknowledge the appellant's concerns that he requires this information in order to complete his own investigation. However, I agree with the Police's interpretation of the exception in section 14(3)(b). I recently addressed this issue in Order PO-2167, which involved an interpretation of section 21(3)(b), the provincial *Act* equivalent of section 14(3)(b). The following passage from that order is instructive:

[I]n my view, the drafters of the *Act* did not intend to justify the rebutting of the presumption against disclosure under section 21(3)(b) in circumstances where a private individual or organization wished to pursue *their own* investigation. The phrase "continue the investigation" refers to the investigation in which the information at issue was compiled. This view has been followed in previous orders of this office (Orders MO-1356, M-718 and M-249).

In Order MO-1356, former Adjudicator Laurel Cropley considered the meaning of the phrase "continue the investigation" in section 21(3)(b). She reached the following conclusion:

There is nothing in the appellant's submissions that would lead me to conclude that the personal information is required to continue the investigation for which the personal information was compiled. Rather, the appellant seeks the information for his own personal purposes in challenging the motivations and actions of the Police and others in instigating and conducting the investigations in the first place.

I agree with former Adjudicator Cropley's conclusion and find that it applies here. In this case, the investigation was conducted by the OPP and the information contained in the record was gathered as a result of that investigation. It is clear on the evidence that their investigation has been completed. The fact that the appellant now wishes to acquire that information to complete his own investigation is not relevant to a determination of section 21(3)(b). Therefore, I find no justification for rebutting the presumption in section 21(3)(b).

In this case, the Police conducted an investigation and the information contained in the records was gathered as a result of that investigation. It is clear on the evidence that the Police investigation has been completed. The fact that the appellant now wishes to acquire the severed information to complete his own investigation is not relevant to a determination of section 14(3)(b). I find no justification for rebutting the presumption in section 14(3)(b).

In addition, I am not persuaded by the appellant's assertion that the confidentiality of information provided by affected parties to the Police was somehow compromised when the contents of the Police reports and witness statements were shared with him. In my view, the section 14(3)(b) presumption is intended to encourage witnesses to come forward in police investigations. Accordingly, in those circumstances, the personal privacy of those who do come forward must be safeguarded. There is no evidence to suggest that the witnesses in this case

consented to the release of their personal information. Therefore, the presumption stands, even if the Police did convey some of this information to the appellant in the hours immediately following the deceased's death.

In any event, having found that the section 14(3)(b) presumption applies, I am precluded from considering any of the factors weighing for or against disclosure under section 14(2), because of the *John Doe* decision.

I will now consider the application of section 38(a) and/or section 8(1)(l) to the police "ten-codes".

LAW ENFORCEMENT

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 exemptions from this right.

Under section 38(a), an institution has the discretion to deny an individual access to their own personal information where the exemptions in sections 6, 7, 8, 8.1, 8.2, 9, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information.

The Police claim that the "ten-codes" in Records 2 and 4 are exempt under section 38(a), read in conjunction with section 8(1)(l), or under section 8(1)(l) alone. Because I have found that Records 2 and 4 contain the appellant's personal information, I must review the Police's decision to deny access to the ten-codes under section 38(a) in conjunction with section 8(1)(l).

Section 8(1)(l) reads:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

To establish the application of section 8(1)(l), the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Police submit:

The use of ten-codes by law enforcement is an effective and efficient means of conveying a specific message without publicly identifying its true meaning. In

fact, the word “code” implies the intention that the information not be widely disclosed.

By encoding a particular meaning with a ten-code, the police seek to reduce the ability of those involved in criminal activity from using such knowledge to circumvent detection by police while committing criminal activities. This information could also be used to counter the actions of police personnel responding to situations. This could result in the risk of harm to either police personnel or members of the public with whom the police are involved; i.e., victims and witnesses.

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The ten-codes referred to in the records do not, in isolation, provide a specific meaning, however, when read in the context of the records at issue, the corresponding meaning would easily be revealed. Thus, the security of those codes would be compromised if they were released and personal information regarding other persons in the report could be revealed.

The appellant responds that the ten-codes are available through the public library system and to reinforce his point he has attached a document to his representations entitled “Ontario Provincial Police 10-Codes”, dated December 14, 1998.

This office has consistently found that section 8(1)(l) applies to “ten-codes” (see for example, Orders M-393, M-757, PO-1665). Based on these earlier orders and my review of the records and the Police’s representations, I find that disclosing the ten-codes in this case could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. As Adjudicator Laurel Cropley stated in Order PO-1665, “disclosure of the ‘ten-codes’ would leave [...] officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of [...] officers who communicate with each other on publicly accessible radio transmission space.” Therefore, I find that the Police have properly applied section 8(1)(l) to this information and I find it exempt under section 38(a) of the *Act*.

SEVERANCE

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. In my view, the Police have acted reasonably in severing the records and providing the appellant with some information, while withholding other information on the basis of the personal privacy exemption.

POLICE'S EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act's* discretionary exemptions.

Because sections 38(a) and 38(b) are discretionary exemptions, I must also review the Police's exercise of discretion in deciding to withhold the information.

The Police have made the following representations on this issue:

In balancing the rights of access for the appellant and the right of privacy for the deceased this institution in exercising our discretion under section 38(b) determined that it would not be an unjustified invasion of the deceased's rights to privacy to release certain portions as the appellant had been notified by police as the deceased's next of kin. The appellant was also provided with cause of death and personal effects. However, in further exercise of this institution's discretion, the institution is unable to justify the release of all third party (including deceased) information concerning the investigation.

I find that the Police properly exercised their discretion in refusing to disclose the information at issue under both sections 38(a) and 38(b). They took into account and appropriately balanced relevant considerations, including the appellant's right of access, the interests section 8(1)(l) seeks to protect, and other individuals' right to privacy. I am satisfied that the Police properly exercised their discretion in reaching their decision in this case.

ORDER:

I uphold the Police's decision.

Original signed by: _____
Bernard Morrow
Adjudicator

November 27, 2003 _____