



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1850

Appeal MA-030260-1

Ottawa Police Service



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NATURE OF THE APPEAL:

The requester in this case is a lawyer representing the estate of a named deceased person. She is also the deceased person's sister. Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the requester asked the Ottawa Police Services Board (the Police) for access to the report prepared following the investigation into her sister's death. She also wanted all the background information related to the preparation of the report, including notes of any interviews conducted.

The Police identified a number of responsive records and provided the requester portions of one of them, specifically the first page of her own statement to the Police. The Police denied access to the rest of the information on the basis of the following exemptions in the *Act*:

- Section 8(2)(a) (law enforcement report) and section 38(a) (discretion to refuse requester's own information) in conjunction with section 8(2)(a).
- Section 14(1) (invasion of privacy) and section 38(b) (unjustified invasion of another individual's personal privacy). The Police identified the presumptions in section 14(3)(a) and (b) in support of the section 14(1) and section 38(b) claims.

The requester (now the appellant) appealed the Police's decision.

During mediation, the Police disclosed the rest of the appellant's statement, as well as portions of five other records containing information about her. The Police also clarified that some of the information contained in the records was not disclosed because it was not responsive to the request. Finally, the Police sent the appellant an index of records identifying the withheld records and the exemptions applied to each of them.

For her part, the appellant indicated that she was relying on section 54 of the *Act* to make this request. Where an individual has died, section 54 allows that individual's personal representative to exercise his/her rights under the *Act*, as long as the exercise of those rights relates to the administration of the individual's estate. The appellant also indicated during mediation that she did not accept that certain withheld portions of records were non-responsive. Accordingly, the responsiveness issue and section 54 were added as issues in the appeal.

At the completion of mediation, the file was transferred to the adjudication stage.

This Office initiated an inquiry by sending a Notice of Inquiry to the Police, setting out the facts and issues and soliciting representations. The Police responded with representations, which were then shared with the appellant. The appellant in turn provided representations. The Police were then invited to reply to the non-confidential portions of the appellant's representations, which they did. I offered the appellant the opportunity to respond to these reply representations, and she submitted a brief final reply.

RECORDS:

The Police identified a total of 74 pages of responsive records. Pages 18, 19 and 65-72 have been disclosed to the appellant in full, and pages 2, 5, 21 and 47 in part. The disclosed portions consist of the statement provided by the appellant to the Police during the course of investigating her sister's death, as well as portions of other documents reflecting information about the appellant obtained in this context.

The remaining records are described as follows:

1. A 28-page General Occurrence Report reflecting the results of the Police's investigation. Pages 18 and 19 and portions of pages 2, 5 and 21 (all of which form part of the Report), have been disclosed to the appellant, as described above.
2. An 18-page witness statement provided to the Police during the investigation (Pages 29-46).
3. Nineteen pages of Police officers' notebook entries (Pages 47-64A). Portions of page 47 have been disclosed to the appellant, as described above.

DISCUSSION:

RESPONSIVENESS

The Police have withheld portions of pages 47, 48, 52, 53, 54, 55, 62, 63, 63A, 64 and 64A on the basis that they contain non-responsive information. The Police explain in their representations that these portions of Police officer notebook entries relate to activities undertaken by the officers on the same day as activities relating to the investigation of the appellant's sister's death, but involve entirely different investigations or other policing activity.

I have reviewed the withheld portions of these pages and, with the exception of one portion of Page 64A, I confirm that they are not reasonably related to the subject matter of the appellant's request, and are therefore not responsive (Order P-880).

One entry on page 64A refers to a phone conversation between a Police officer and the appellant made during the course of the investigation. This portion is responsive to the request and I will consider it along with other responsive records in the discussion that follows.

PERSONAL REPRESENTATIVE

General principles

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 deceased's right of access under the *Act* if she can demonstrate that

- she is the personal representative of the deceased, and
- the right she wishes to exercise relates 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 degree of access to the personal information of her sister as her sister would have had when alive, and the request would be treated as though it came from the deceased sister herself [Orders M-927; MO-1315].

Personal representative

The term "personal representative" means an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate [*Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.)]. The term "estate trustee" is also used to describe such an individual [Order MO-1449 and rule 74 of the Rules of Civil Procedure under the *Courts of Justice Act*].

At the time of submitting her request to the Police, the appellant attached a notarized copy of her Certificate of Appointment as executor of her sister's estate, thereby satisfying the first requirement of section 54(a).

Relates to the administration of the estate

To satisfy the second requirement of section 54(a), the appellant must demonstrate that the request "relates to the administration of the estate". To meet this test, the appellant must demonstrate that she is seeking access to the records for the purpose of administering the estate [Order MO-1315; *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.)].

Requests have been found to “relate to the administration of the estate” where the records are:

- relevant to determining whether the estate should receive benefits under a life insurance policy [Order MO-1315]
- relevant to the deceased’s financial situation and allegations of fraud or theft of the deceased’s property [Order MO-1301]
- required in order to defend a claim against the estate [Order M-919]

Requests have been found *not* to “relate to the administration of the estate” where the records are:

- sought to support a civil claim by family members under the *Family Law Act*, where any damages would be paid to the family members and not to the estate [Order MO-1256]
- sought for personal reasons, for example, where the requester “wishes to bring some closure to . . . tragic events” [Order MO-1563]

In their initial set of representations, the Police question how the information collected and documented in the context of the sudden death investigation of the appellant’s sister “can accommodate or influence the settling of an estate when the final result would remain the same”. The Police point out that their involvement was to ensure that no criminal offences had been committed, and that the investigation was done in accordance with their responsibilities under the *Police Services Act*. The Police submit that it is not their practice to share “personal information to others to ensure their satisfaction with the way the Police handled the criminal investigation”.

In response, the appellant attaches a copy of a statement issued by the investigating coroner, which concludes that her sister’s death “has been ruled a suicide”. The appellant states:

There are a number of significant payments involved in the administration of the estate that are heavily related to the manner and circumstances surrounding my sister’s death. There is a significant difference as to whether the cause of death is proven to be suicide, as opposed to being assumed to be suicide and whether it was intended, or was accidental. Also, the family may wish to request a full oral inquiry if they are not satisfied with the scope of the investigation that has taken place.

...

... The coroner’s report which is based on the police investigation is highly prejudicial to the estate’s position respecting the possible claims it may make. If I am able to show that the conclusion of the coroner is of a speculative nature based

on a lack of information available to the police, this will materially affect the rights of the minors to receive benefits from this estate.

In Order M-1075, I 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.

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).

Although the appellant alludes to the presence of unresolved issues relating to the administration of her sister’s estate, the representations do not persuade me that disclosing the specific records that are at issue in this appeal would advance any interest in that regard. The appellant has not identified the specific basis for any financial gain that could accrue to estate beneficiaries through disclosure of the Police records nor, based on my review of the records themselves, is any such basis clear from their content.

The records at issue here were all gathered over a short period of time by the Police in discharging their normal duties to investigate a sudden and unexpected death that occurred in the psychiatric ward of an Ottawa-area hospital. Facts were gathered by the Police from hospital staff and family members and provided to the coroner, who concluded, based on this evidence, that the cause of death was suicide. The basis for this conclusion is outlined in the coroner’s report, and the appellant has a copy of this document. There is nothing to support the appellant’s contention that the coroner’s conclusion is “speculative” or “based on a lack of information available to the police”. A significant number of individuals were interviewed, including the appellant, as reflected by the number of pages of records identified by the Police as responsive to the appellant’s request.

Accordingly, I find that any right the appellant may wish to exercise through use of the undisclosed investigative records gathered by the Police during the sudden death investigation do

not “relate to the investigation of the deceased’s estate”, as required in order to satisfy the second requirement of section 54(a), as outlined in past orders of this office and by the Divisional Court in *Adams, supra*. Because both requirements of section 54(a) must be present, I find that this section has no application in the circumstances of this appeal.

INVASION OF PRIVACY

The Police rely on sections 14(1)/38(b) as one basis for denying access to all undisclosed records or portions of records. These exemptions can only apply to records containing “personal information”, as defined in section 2(1) of the *Act*, so I will consider this requirement first.

Personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the race, nationality, age, sex, or marital or family status of the individual (paragraph (a)), information relating to the medical, psychiatric, psychological history of the individual (paragraph (b)), the address or telephone number of the individual (paragraph (d)), the personal opinions or views of that individual except where they relate to another individual (paragraph (e)), the views or opinions of another individual about the individual (paragraph (g)), or 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)).

I have examined the records and find that all of them contain the personal information of the appellant’s deceased sister, as defined in various paragraphs of the definition. Some records contain information gathered from family members during the course of the sudden death investigation, including the appellant and her sister’s former common law spouse. I find that those records contain the personal information of both the sister and these other individuals. Other records contain information gathered from various health care providers that was gathered in the context of discharging professional responsibilities, and I find that this information does not qualify as the personal information of these individuals [Orders R-980015, MO-1550-F].

During the course of responding to the appellant’s request and participating in the mediation stage of this appeal, the Police made a decision to provide the appellant with access to all information in the records that relates to her, including the statement she provided to the Police and police officer notebook entries of conversations with the appellant during the course of the investigation. On my review of the records, it would appear that one portion of page 64A, which is highly similar to the disclosed portion of Page 47, was not disclosed. In my view, this is likely to have been an oversight by the Police, and I find that the undisclosed responsive portion of Page 64A should be provided to the appellant.

All other records that remain at issue here deal with aspects of the Police investigation that do not involve the appellant. As such, they do not include the appellant’s personal information, and I find that they are appropriately dealt with under the invasion of privacy exemption in section 14(1) of the *Act*, rather than under section 38(b), which is restricted to records containing a requester’s own personal information.

The only part of section 14(1) with potential application in this appeal 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,

- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

In determining whether the exception in section 14(1)(f) 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 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 [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.

Police rely on the “presumed unjustified invasion of personal privacy” in section 14(3)(b) of the *Act* to withhold the undisclosed records or portions of records.

Section 14(3)(b) 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 Police submit that the investigation into the sudden death of the appellant’s sister was undertaken to determine if there had been a violation of the *Criminal Code* of Canada,

specifically to ensure that there was “no possibility of murder, assisted suicide or foul play involved in assisting or causing the death of the victim”.

I accept the Police’s submissions, and find that the section 14(3)(b) presumption applies to all of the withheld information at issue in this appeal, other than the aforementioned portion of page 64A.

It is evident from an examination of the records and the circumstances under which they came into being that the Police compiled this information during the course of their investigation into the sudden death of the appellant’s sister in order to determine whether there had been a possible violation of the *Criminal Code*. If a record contains personal information and that information was compiled during the course of an investigation and is identifiable as such, the presumption at 14(3)(b) applies even where charges are not laid, as is the case here [Orders P-223, P-237, P-1225, MO-1181, MO-1443].

As indicated above, the section 14(3)(b) presumption cannot be overcome by any factors, listed or unlisted, under section 14(2). In addition, I find that no exceptions under section 14(4) apply. The application of the “public interest override” at section 16 of the *Act* was not raised, and I find that it has no application in the circumstances of this appeal.

Therefore, I find that the exception in section 14(1)(f) does not apply, and all withheld records or portions of records fall within the scope of the mandatory exemption in section 14(1) of the *Act*.

Because of this finding, it is not necessary for me to consider the sections 8(2)(a) and 38(a) exemption claims.

It is important for me to state in closing that my role here 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 appellant’s request where the *Act* provides a clear direction.

In this office’s 1999 Annual Report, 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 [Office of the Information and Privacy Commissioner], 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 counseling; and the IPC.

Specific language for a new provision in section 14 of the *Act* was included in the Annual Report.

I am hopeful that the government will amend the *Act* to reflect these recommendations, but in the meantime I must apply the *Act* as it stands today.

ORDER:

1. I uphold the Police's decision to deny access to the portions of Pages 47, 48, 52, 53, 54, 55, 62, 63, 63A, 64 and 64A identified as not responsive to the appellant's request.
2. I order the Police to disclose the responsive information appearing on page 64A to the appellant by **November 2, 2004**.
3. I uphold the Police's decision to deny access to all remaining undisclosed records or portions of records.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ October 8, 2004