



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2350

Appeal PA-030334-1

Niagara Parks Commission



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NATURE OF THE APPEAL:

The requester made a request to the Niagara Parks Commission (the NPC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a suicide note written by his son, and a related videotape.

The NPC located the suicide note and videotape and issued a decision letter to the requester denying access to these records. The NPC relies on the exemption from disclosure at section 21 (invasion of privacy) with specific reference to sections 21(3)(a) (medical, psychiatric or psychological information), 21(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law), 21(1)(a) (consent) and 21(1)(f) (disclosure does not constitute an unjustified invasion of privacy). The NPC's decision letter also indicated that section 66(a) (administration of estate) does not permit the requester to exercise his son's rights or powers under the *Act* because disclosure of the records at issue "would serve no purpose towards the settlement of the estate of [the requester's son]."

The requester (now the appellant) appealed the NPC's decision to deny access.

During mediation, the appellant indicated that he has a "Certificate of Appointment of Estate Trustee Without a Will" in relation to his son's estate, and he took the position that the records at issue relate to the administration of his son's estate.

Mediation did not resolve this appeal, and the file was transferred to adjudication. This office sent the Notice of Inquiry to the NPC, initially. The NPC responded, indicating that it had reviewed the Notice of Inquiry and would not be providing representations. The Notice of Inquiry was then sent to the appellant, who provided representations.

DISCUSSION:

ACCESS BY A PERSONAL REPRESENTATIVE

Section 66(a) of the *Act* states:

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

where 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 section 66(a), the appellant would be able to exercise the deceased's right to request access to the deceased's personal information if he is able to demonstrate that:

1. he is the "personal representative" of the deceased; and
2. his request for access relates to the administration of the deceased's estate.

The term “personal representative” used in section 66(a) is not defined in the *Act*. However, section 66(a) relates to the administration of an individual’s estate and the meaning of the term must be derived from this context.

In Order M-919, Adjudicator Anita Fineberg reviewed the law with respect to section 54(a), (the equivalent of section 66(a) in the *Municipal Freedom of Information and Protection of Privacy Act*), and came to the following conclusion:

... 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 rights of a personal representative under section 66(a) are narrower than the rights of the deceased person. That is, the deceased person retains the right to personal privacy except insofar as the administration of his or her estate is concerned.

In Order M-1075, it was established that in order to give effect to the rights established by section 54(a) of the municipal *Act*, the phrase “relates to the administration of the individual’s estate” should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate. Therefore, the appellant in this case must establish not only that he is the deceased’s personal representative for the purposes of section 66(a), but also that he requires access to the records for the purposes of exercising his duties as a personal representative.

As noted, in this case the appellant has provided a copy of his “Certificate of Appointment of Estate Trustee without a Will”. I am satisfied that he is the personal representative of his deceased son, and he therefore meets the first requirement for the application of section 66(a).

As regards the second requirement, the appellant’s representations indicate that his son had been prosecuted for an unspecified criminal offence. The appellant states:

I believed in justice and tried to follow the legal procedures. In the end, after suffering financial and emotional hardships, my son ... as well as my family was punished by the judicial system. I was very critical with some of the decision making by the crown attorney, judges, his employer and even our lawyer who represented my son. Therefore, [my son]’s suicide was not just a suicide. He was completely destroyed during these allegations.

The chain of negative events against my son was the cause of his suicide; due to the injustice of the entire judicial process. Was justice served? Absolutely not. His lawyer did a poor and unsatisfactory job.

...

I have been searching for justice for my son ... whose life has been wasted at a young age.

The appellant does not state that he intends to launch an action in consequence of these events, yet it appears that he may be considering this. In Order PO-1849, Assistant Commissioner Tom Mitchinson commented as follows with respect to actions for wrongful death in the context of section 66(a):

It would appear that, as suggested by the Ministry, the estate is precluded by section 38(1) of the *Trustee Act* from commencing or participating as a plaintiff in an action for wrongful death. Despite what is argued by the appellant, I find the estate will not benefit in any way should the lawsuit proceed to a successful conclusion as it is not a party to the action and, because of the operation of section 38(1) of the *Trustee Act*, the estate is not entitled to bring such an action on its own behalf.

Having reviewed the records, I find that, even if section 38(1) of the *Trustee Act* does not preclude the appellant from bringing some other type of action, the records at issue in this case shed no light on the appellant's allegations and therefore do not "relate to the administration" of the appellant's son's estate on that basis. As Assistant Commissioner Mitchinson commented in Order PO-1849, "... the right of access being asserted by the appellant does not relate to a claim for financial entitlements being denied to the estate, nor will the disclosure of these documents assist in the administration of the estate." I am not satisfied that the request relates to the administration of the deceased's estate as this term has been applied in previous orders.

Therefore, section 66(a) does not apply and I am precluded from allowing the appellant to stand in the place of the deceased person for the purposes of making a request for access to his personal information. In the circumstances, I will treat this request and the subsequent appeal as a request by an individual for the personal information of another individual under Part I of the *Act*.

PERSONAL INFORMATION

The section 21 personal privacy exemption applies only to information which qualifies as "personal information", which is defined in section 2(1) of the *Act* to mean "... recorded information about an identifiable individual, including ...", followed by a non-exhaustive list of examples of information that would qualify.

I have reviewed the two records at issue in this appeal and find that because they relate to the circumstances surrounding the death of the appellant's son, both of them contain his personal information. They do not contain the personal information of other identifiable individuals.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

In this case, the NPC referenced both sections 21(1)(a) and (f) in its decision. Section 21(1)(a) provides an exception to the exemption “upon the prior written request or consent of the individual”. In my view, there is no evidence of such consent in this case, and it appears that the only exception that could apply is section 21(1)(f). This section provides an exception to the exemption “if the disclosure does not constitute an unjustified invasion of personal privacy.”

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the *Act* applies to the personal information [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Section 21(3)(b) of the *Act* states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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.

Although the NPC did not provide representations, it is evident from documents submitted by the appellant with his request that both records were obtained by the Niagara Parks Police Service in the course of investigating the sudden death of the appellant's son. The videotape was collected and retained by the police as “evidence” in the investigation.

Under the circumstances, I find that both records were compiled and are identifiable as part of an investigation into a possible violation of law, and the presumed unjustified invasion of privacy established by section 21(3)(b) therefore applies.

The appellant does not refer to sections 16 or 21(4), and based on my review of the records and representations before me, I find that they do not apply. The records are therefore exempt under section 21(1) of the *Act*.

Before concluding my reasons in this appeal, I would like to refer to an argument advanced by the appellant based on *Hicks Estate v. Hicks* (1986), 15 C.P.C. (2d) 146 (Ont. Dist. Ct.). In that decision, the Court ordered two solicitors to disclose their files because an estate trustee has the right to waive solicitor-client privilege on behalf of a deceased person. The appellant also indicated that he waives any privilege in the records. In my view, this argument does not assist the appellant because the NPC did not deny access based on solicitor-client privilege, which is the subject of a separate exemption at section 19 of the *Act*. Nor does it assist the appellant as regards section 66(a) of the *Act* because the right to waive privilege has no effect on the statutory requirements imposed by that section which, as noted earlier, are not met in this case.

I appreciate that this result will be difficult for the appellant to accept. Nevertheless, it is the one required by wording of the *Act* and the decision of the Divisional Court in *John Doe v. Ontario (Information and Privacy Commissioner)*, cited earlier in this order. This interpretation is also supported by many previous decisions of this office (see Orders PO-1849 and M-1122).

ORDER:

I uphold the NPC's decision.

Original signed by: _____
John Higgins
Senior Adjudicator

November 30, 2004