



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2025

Appeal MA-040179-1

Hamilton Police Services Board



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NATURE OF THE APPEAL:

The Hamilton Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*) from a lawyer representing a deceased individual's daughter (the requester), in her capacity as the executor of her mother's estate. The same lawyer also represents the estate and several other family members. The request was for information regarding an investigation by the Police into the physical condition of the deceased individual at the time of her transfer from a long-term care facility (the nursing home) to a named health care facility (the hospital). Many of the records requested also included information about the requester as well as information about her deceased mother. Therefore, the Police treated the request as a request by the requester for her own personal information as well as a request for her mother's personal information.

The Police located the following records which they identified as responsive to the request:

- Sudden/Violent Death Report
- Possible Senior Abuse/Neglect Occurrence Report
- Two Supplementary Persons Reports
- Two Supplementary Occurrence Reports

The Police denied access to these records in their entirety. They based their refusal to disclose the records on section 38(a) in conjunction with the exemptions in sections 8(2)(a) and 8(2)(c) (right of access to one's own personal information/law enforcement). The Police also rely on section 38(b) (right of access to one's own personal information/personal privacy of another individual) in conjunction with section 14(1)(f), and in support they claim the application of the factors in sections 14(2)(e), 14(2)(f), 14(2)(h), 14(2)(i), and the presumptions of an unjustified invasion of privacy in sections 14(3)(a), 14(3)(b), 14(3)(d) and 14(3)(g) .

The requester (now the appellant) appealed the decision of the Police.

This office appointed a mediator to assist the parties to resolve issues in the appeal. Although the original request and the appeal were brought in the name of the estate of a deceased individual, during mediation, the appellant's representative indicated to the mediator that her clients are several family members of a deceased individual as well as that individual's estate. She advised that the estate is the plaintiff in a lawsuit and it would therefore be the estate that received any damages awarded as a result of the litigation. Based on this, the appellant's representative stated that she wished to pursue access through section 54(a) of the *Act* on behalf of the appellant and the estate of the deceased person. Section 54(a) provides that where an individual would have a right under the *Act*, that right may be exercised, if the individual is deceased, by the individual's personal representative for the purpose of administration of the individual's estate.

The mediator communicated this information to the Police, who maintained their position that the records are exempt from disclosure pursuant to the exemptions claimed and that the appellant's circumstances do not fit the criteria for granting access under section 54(a).

The mediator also advised the Police that the records they located refer to audiotapes and/or videotapes of interviews taken from four individuals, photographs, and a report from a doctor, and that these records had not been provided to this office for review.

The Police conducted a further search and found transcripts of four taped interviews carried out in the course of their investigation, which they provided to this office, as well as 38 photographs. The Police stated that they could not provide prints of the photographs, but provided this office with photocopies of the photographs. The appellant was satisfied with this.

In this search, the Police did not locate the tapes themselves or the doctor's report. As a result of a further search, however, the Police found the four interview audiotapes and two reports from the doctor; namely, a "Geriatric Medicine Consult Note" and a "Geriatric Medicine Follow Up Note", and provided them to this office.

The Police advised the mediator that they are withholding all the additional records that were located based on the same exemptions that they claimed for the original set of records and that no additional exemptions are being claimed for these records.

I sent a Notice of Inquiry to the Police initially, setting out the facts and issues in this appeal, and the Police provided me with representations. I then sent a Notice of Inquiry to the appellant together with the non-confidential portion of the representations of the Police, and invited the appellant to make representations.

As noted above, one of the reasons given by the Police for refusing to disclose certain information was that disclosure would unjustifiably interfere with the privacy of other individuals. However, in their decision the Police did not identify the individuals whose privacy they seek to protect. My review of the records revealed that there is information about numerous individuals in the records. This office contacted the Police and asked them to identify the individuals whose personal information they claimed to be exempt under section 38(b)/14 and provide addresses so that this office could notify them and provide them with an opportunity to provide representations.

The Police declined to provide a list of names of these individuals or their addresses, but advised orally that a list of names and addresses would be found "at tab 7" of a binder provided by them. Tab 7 consists of all the records at issue originally identified by the Police before they provided the photographs and transcripts and reports subsequently located. Accordingly, I attempted to notify the nine individuals whose names and addresses are set out in the original records (affected persons A to H) after making additional efforts to determine the addresses of these individuals where they were absent or incomplete. I also notified two other individuals mentioned in the transcripts later provided to me, but not identified by the Police as affected persons (individuals I and J). I sent all these individuals a Notice of Inquiry, together with the representations of the appellant and the non-confidential representations of the Police, and

invited them to provide representations. I also offered them an opportunity to consent to the disclosure of any information relating to them.

Two of the affected persons notified (C and H) consented to disclosure of information in the records that relates to them. Three others (B, D and E, who are professional staff at the hospital) stated that they neither consented to nor opposed disclosure, but provided no representations. One individual associated with the nursing home (I) stated that he did not consent but did not intend to provide representations. One family member (G) responded by a telephone call to a member of the staff of this office seeking further information, but provided no written representations or consent. Two individuals associated with the hospital (F and J) did not respond. One Notice of Inquiry (to A) was returned by the courier service because the affected individual was not at the address indicated in the records.

None of the affected individuals who did not provide their consent to disclosure of their information took the position that disclosure would constitute an invasion of their privacy. As noted, one affected party expressly refused consent; the others simply failed to comment on the consent issue.

The appellant's lawyer also provided the consent of three further individuals (individuals K, L, and M), to the disclosure of any information in the records relating to them. These individuals are other family members who were not identified or notified by the Police as affected persons.

A list of the names of these individuals together with the letters assigned is provided to the Police with this decision.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Only information that falls within the definition of "personal information" qualifies for exemption under sections 14 and 38 of the *Act*. Therefore, to determine whether the exemptions claimed by the Police apply to the records at issue, I must first consider whether the records requested contain the personal information of the appellant, the appellant's deceased mother, and/or other individuals.

The term "personal information" is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name if 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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Analysis and findings

All of the written records originally provided by the Police except one (the Supplementary Persons Report at page 9 of the records) and all of the tapes and transcripts contain the name of the appellant's deceased mother, together with one or more of the following: her age, address, sex, medical history and the views or opinions of other individuals about her. As the mother has been deceased for less than 30 years, the exception to the definition of personal information at section 2(3) does not apply, and I find that all the records except page 9 contain the personal information of the appellant's mother, as defined in section 2(1) of the *Act*.

I also find that four of the written records originally provided by the Police and two tapes and transcripts also contain the appellant's personal information. The written records are the Sudden/Violent Death form (p. 1); the Supplementary Persons Report (pp. 3-4); the Supplementary Occurrence Report (pp. 5-7), the Supplementary Occurrence/Crown Instruction Report (pp. 12-14)

Each of the written records, other than page 9, and each of the tapes and transcripts also contains the name of one or more of the affected individuals together with information about them. However, in some cases, the information is not about the individual in a personal capacity. In these cases, the information is associated with the individual in a professional, official or business capacity and does not reveal anything of a personal nature about the individual. This information is therefore not personal information.

As indicated earlier, the records relate to a police investigation into the physical condition of the deceased individual at the time of her transfer from a nursing home to a hospital. Individuals A, B, D, E, F and J are health professionals associated with that hospital. Individuals C and G are members of the mother's family. Individual H is an employee of the Ontario Ministry of Health and Long-Term Care. Individual I is a health care professional associated with the nursing home.

The Police and the appellant state, and I agree, that some of the records contain the personal information of individuals C and G. I also find that some of the records contain the personal information of four other family members referred to earlier in this order, who were not among those indicated by the Police to be affected persons – individuals K, L, M, and N.

The Police submit that the information about the individuals who are health care professionals is their personal information, notwithstanding that it relates to them in their professional capacity. In response to the question, "Is the information about an individual in a personal capacity or in a professional, official or business capacity", the Police state:

The information in these records relates to the deceased, nurses, medical professionals, staff at the nursing home, family members, and hospital emergency staff. The information supplied by all affected parties relates to the past medical issues of the deceased as well as the medical problems that led to her death. In

relation to the business aspect, there are issues relating to the care given at the long term care facility which could lead to civil matters.

All individuals can be identified if the information were disclosed. Each medical person has a role and title that directly relates to their involvement with the deceased. Further, the staff members at the nursing home are all documented on internal charts, which would reveal their contact and subsequent involvement with the deceased prior to and at the time of death.

In response, the appellant makes the following submissions, among others:

Where the information relates to the deceased or one of the other appellants, we submit that we are entitled to this information. Where the information pertains to an individual other than the deceased or one of the other appellants, we are not interested in the “address, phone numbers, [or] dates of birth of these other individuals and do not seek this information to be released to us. ...

Where the information pertains to the employment information of an individual other than the deceased or one of the appellants, we respectfully submit that in the circumstances of this case, this does not qualify as “personal information”. Information about doctors, nurses and other employees discharging their official functions, does not qualify as their personal information, and the names and professional or business positions of the various individuals involved in the care of the deceased would not constitute their personal information, and should therefore not qualify for exemption under section 14 of the Act.

In fact, the submissions of the Hamilton Police highlight that this information is not “personal information” for these other affected individuals. ...[T]he police state, [t]he information supplied by all affected parties relates to the past medical issues of the deceased as well as the medical problems that lead to her death.” ...The Police also state that, “Each medical person has a role and title that directly relates to their involvement with the deceased”. Therefore, according to the submissions of the police, the information in the records does not “reveal something of a personal nature about the individual”; rather, the information relates to these individuals in their professional, official or business capacity. [Emphasis in original].

I agree with the parties that the home addresses and telephone numbers and dates of birth of the health care professionals identified by the Police as affected persons are their personal information. As the appellant has indicated that she does not seek disclosure of any such information, it is no longer at issue.

Individual H is an employee of the Ministry of Health and Long-Term Care. Any information about her in the records is professional rather than personal information. In any event, she has consented to disclosure of any information about her, so this information is not in issue.

As stated earlier, individuals A, B, D, E, F and J are health professionals associated with the hospital to which the appellant's mother was transferred. The records contain information provided by them as to the medical condition of the mother, treatment provided at the hospital, appropriate treatments and medical standards, and similar information. All this information is professional rather than personal information.

The records also contain the views and opinions of some of these professionals as to the quality of care provided to the appellant's mother at the nursing home. If this information can be considered personal information, which I will discuss below, it is the personal information of members of the staff of the long term care facility, and not the personal information of individuals A, B, D, E, F and J [Order P-1082].

Information about an employee or professional does not constitute personal information where the information relates to the individual's employment or professional responsibilities or position. Where, however, the information consists of another person's opinion about the quality or propriety of the individual's conduct or performance in his or her employment or professional capacity, the opinion is that individual's personal information. Therefore, to the extent that the opinions of the hospital staff and other professionals examine the quality of care provided by an identifiable individual employed at the nursing home, those opinions about the conduct of the nursing home employee are the personal information of the employee.

Previous orders have held that information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. However, where the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information [P-721]. In my view, this does not mean that all information about an individual's performance becomes that individual's personal information just because it is found in records generated in the course of an investigation. A distinction must be made between the views of a third party who is investigating or examining an individual's conduct about the quality or propriety of that conduct and information provided by the individual whose conduct is being investigated or examined.

The views of the investigator or examiner about the quality or propriety of an individual's professional conduct are the personal information of that individual. However, if that individual or another individual provides factual information describing how he or she carried out professional or employment duties, this is professional or employment information, and does not become personal information merely because it was provided in the context of an investigation or examination of his or her conduct. It is only evaluative comments that are personal information.

The Police state that “[a]ll individuals can be identified if the information were disclosed”. In support of this claim, they state that “the staff members at the nursing home are all documented on internal charts, which would reveal their contact and subsequent involvement with the deceased”. However, they provide no persuasive evidence that identities or actions of the individuals mentioned in the records are documented on nursing home charts in a way that would permit them to be identified. Nor did the affected parties associated with the nursing home who were notified by this office provide any such evidence.

Page 9 of the written records contains the personal information of an individual, but does not contain the personal information of the appellant, her mother, or any other individual.

Page 5 and pages 13 and 14 of the Supplementary Occurrence Report found at pages 12 to 14 of the records originally provided by the Police contain the views of members of the appellant’s mother’s family and staff of the nursing home about the quality of care the mother received at the nursing home. However, in my view, none of this information is about an *identifiable* individual, and therefore these pages do not contain the personal information of an individual other than the appellant’s mother.

In addition to the written records, twenty pages of photocopied photographic prints are in issue. Page 1 consists of two photographs of what appears to be the entrance to a hospital room and a hospital hall. Neither picture contains any personal information. Therefore, I will order its disclosure as this will not result in an invasion of personal privacy. Page 2 is a photograph of an elderly woman together with a woman who resembles a photograph of the appellant in a newspaper article provided by the appellant’s representative. I am satisfied that this is a photograph of the appellant and her mother. Pages 3 to 6, the top photo on page 7, and pages 8 to 20 appear to be photographs of the appellant’s mother. The bottom photograph on page 7 appears to show the appellant’s mother with two unidentified women, at least one of whom, judging from her dress and actions, appears to be acting in her professional capacity as a health care provider. However, as there is no evidence that the other woman is shown in a professional capacity, I find that this is the woman’s personal information. The other photos contain the personal information of the appellant’s mother alone.

The Geriatric Medicine Consult Note and Follow Up Note contain the personal information of individual C who has consented to disclosure. They also contain information about quality of care at the long-term care facility, but this information is about the nursing home as a whole and not any identifiable individual. Thus they contain no personal information other than that of the appellant’s mother and an individual who has consented to disclosure.

The audiotape and transcript of a Police interview of the appellant contain the personal information of the appellant, the appellant’s mother, family members who have consented to disclosure, and a family member (N) who has not. Although the interview discusses the treatment the mother received at the nursing home, it does not refer to an identifiable individual in that regard, and therefore contains no personal information of any nursing home staff. It also contains information about the appellant’s father, who died more than thirty years ago. By virtue

of section 2(2), information about an individual who has been dead for more than thirty years is not "personal information".

The audiotape and transcript of the interview with individual B, a health professional at the hospital, contains the personal information of the appellant's mother and of individual C, who has consented to disclosure. The interview refers to individuals D and J who are professionals at the hospital. The information about them is not personal information. It also contains comments about the quality of care at the nursing home, but no individual staff member can be identified from this information. It does not contain the personal information of the appellant.

The tape and transcript of the Police interview with individual C, a family member who has consented to disclosure of her personal information, contain the personal information of C, the appellant, the appellant's mother, family members who have consented to disclosure, and a family member (N) who has not consented. They also contain the personal information of another resident of the nursing home at the top of page 9 of the transcript. On pages 13 and 14 there is a reference to a nursing home staff member who may be identifiable; however, the information is about her purely in her professional capacity and has no evaluative component. It is therefore not her personal information. On pages 14 and 15, individual C provides information and views about the performance of another nursing home employee. However, there is nothing in the records from which this individual can be identified. I find therefore, that this is not personal information. In the last two lines of page 16 and the first three lines of page 17, there are references to a nursing home employee who is identified by first name and profession. The witness's opinion of the employee on page 17 is the employee's personal information. Although the interview contains other criticisms of the nursing home, they do not relate to any identifiable individual.

The audiotape and transcript of the interview with individual D, a health professional at the hospital, contains the personal information of the appellant's mother and of individual C, who has consented to disclosure. It also contains references to other hospital staff in their professional capacity, which is not their personal information. The interview contains one sentence in the last paragraph of page 5 referring to a staff member of the nursing home by name and profession, which I find to be that individual's personal information. The interview does not contain the personal information of the appellant.

PERSONAL REPRESENTATIVE

Section 36(1) gives individuals a general right of access to their own personal information held by an institution. Section 54(a) gives the personal representatives of such individuals the right to exercise this right of access under certain circumstances. Section 38 provides a number of exemptions from this right.

In this case, as stated earlier, the requester is the executor of the estate of her mother, who is deceased, and seeks to invoke section 54(a) to exercise her mother's right of access to her own personal information under section 36(1). Therefore, before considering whether the exemptions

in section 38(a) or (b) apply, I will determine whether the requester may rely upon section 54(a) to invoke section 36(1) on her mother's behalf.

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, a requester can exercise the deceased's right of access under the *Act* if he/she can demonstrate that

- He or she is the personal representative of the deceased, and
- the right he or she wishes to exercise relates to the administration of the deceased's estate.

If the requester meets the requirements of this section, then he or she is entitled to have the same access to the personal information of the deceased as the deceased would have had. The request for access to the personal information of the deceased will be treated as though the request came from the deceased him or 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*].

Generally, to establish that he or she is the deceased's personal representative, the requester should provide written evidence of his or her authority to deal with the estate of the deceased, including a certificate of appointment of estate trustee [Order MO-1449].

Relates to the administration of the estate

The requester must demonstrate that the request "relates to the administration of the estate". To meet this test, the requester must demonstrate that he or 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 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]
- required to prepare an action on behalf of the estate for damages for injuries caused to the deceased person prior to death, where the damages would be recoverable by the estate, rather than the surviving family members [Order MO-1803]

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

- sought to support a civil action on behalf of a deceased’s estate for the wrongful death of that individual, as section 38(1) of the *Trustee Act* precludes recovery by the estate of damages for the death or loss of expectation of life by the individual [Orders M-400, PO-1849]
- 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]

Analysis and findings

The appellant’s lawyer has stated that the appellant is the executor of her mother’s estate and provided a copy of the appellant’s mother’s will, showing this.

In Order MO-1365, former Assistant Commissioner Tom Mitchinson refused to accept a will naming an appellant as executor as sufficient proof that the appellant was the “personal representative” of the deceased. He stated:

Absent official documents, issued by the Superior Court of Justice, I am unable to determine whether this 1990 will is the most recent one executed by the appellant’s husband, or if it is, whether the Court is satisfied that the powers and duties provided to an estate trustee should be accorded to the appellant as the named executrix.

However, as stated earlier, the Divisional Court in *Adams*, above, has ruled that for the purposes of section 54(a), the term “personal representative” has the meaning given to the same term in the *Estate Administration Act*, namely, “an executor, an administrator, or an administrator with the will annexed”.

The authority of an executor to administer an estate stems from the will itself and does not depend on any action by a court. As stated in Robert Spencely, *Estate Administration in Ontario – A Practical Guide*, 2nd ed., CCH Canadian Limited, 1999, at p. 51:

[The certificate of appointment of estate trustee with a will] replaces what was formerly referred to as letters probate or letters of administration with will annexed. It will be applied for where it is judged that the administration of the estate requires judicial certification of the validity of a will and judicial confirmation of the authority of the estate trustee (i.e., the executor named in the will). The authority of an executor, however, stems from the will and not from the certificate, which, in some cases, may not be necessary.

Similarly, *The Executor’s Handbook* states:

[T]he executor’s authority comes from the will itself and not the court; therefore, if the estate is relatively small and uncomplicated, probate may not be necessary.

Jennifer A. Greenan, *The Executor’s Handbook*, 2nd ed., CCH Canadian Limited, 2003, at pp. 22-23.

The fact that the will in question was ten years old may have been a consideration in Assistant Commissioner Mitchinson’s decision in Order MO-1365 to require additional evidence of authority to deal with the estate in that appeal. However, in my view, a will naming an appellant as executor is sufficient evidence that he or she is a personal representative for the purpose of section 54(a) in the absence of evidence that the will is not the most recent one or some other evidence that the individual named as executor does not have the power or authority to administer the estate.

As the appellant is named as executor in her mother’s will and there is no evidence to suggest that she does not have the power or authority to administer the estate, I find that the appellant is the personal representative of her deceased mother for the purpose of section 54(a).

The Police stated that the request does not relate to the administration of the estate because, “(t)he purpose for obtaining the report is medical litigation which is not in accordance with the provisions of s. 54(a) of [the *Act*]”. The Police provided no evidence or authority to support the bald assertion that the litigation is “medical litigation” or that “medical litigation” does not relate to the administration of an estate.

As indicated above, this office has found that certain forms of litigation in which an estate is not entitled to collect damages are not related to “the administration of the estate”. This may apply where surviving relatives have a cause of action in their own right under Part V of the *Family Law Act*, such as damages for a wrongful death, as opposed to situations where the estate itself has a cause of action and is itself entitled to damages. The Police have provided no evidence that the civil action in this case is one where the surviving relatives have a personal cause of action, or that the estate does not itself have a cause of action.

In contrast, the lawyer for the estate has provided uncontradicted representations that the appellant “is the litigation administrator of the estate of the deceased;...as such had the power and authority to institute civil proceedings on behalf of the estate of the deceased,...has retained me and authorized that I begin civil proceedings on her behalf and that of the estate of the deceased, and...*a claim has been issued in the name of the estate, wherein, if successful, the estate would benefit from any damages recovered*”. [Emphasis added].

In light of this evidence, I find that the appellant is her mother’s personal representative and the request relates to the administration of the appellant’s mother’s estate. Therefore, in addition to her right of access to her own personal information, the appellant, as executor, is entitled to exercise her mother’s right of access to her mother’s own personal information under section 54(a).

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/LAW ENFORCEMENT EXEMPTIONS

Section 36(1) 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 information.

In this case, the Police rely on section 38(a) in conjunction with sections 8(2)(a) and (c).

Sections 8(2)(a) and (c) state:

A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;
- (c) that is a law enforcement record if the disclosure could reasonably be expected to expose the author of the record

or any person who has been quoted or paraphrased in the record to civil liability; or

The term “law enforcement” is used in several parts of section 8, and is defined in section 2(1) as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b)

The term “law enforcement” has been found to apply to a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085].

Where section 8(2)(c) uses the words “could reasonably be expected to”, the institution 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. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Section 8(2)(a): law enforcement report

The word “report” means “a formal statement or account of the results of the collation and consideration of information”. Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

Analysis and Findings

The Police are an agency that has the function of enforcing the *Criminal Code*, under which abuse and neglect of the elderly may be offences. In this case, they carried out “an investigation

into the sudden death as well as into the care received [by the appellant's mother] at the nursing home, namely possible elder abuse". I find therefore that the records at issue relate to a law enforcement investigation.

However, the evidence does not satisfy me that any of the records prepared by the Police are "reports", because none of them is "a formal statement or account of the results of the collation and consideration of information".

This includes two supplementary occurrence reports. Generally, occurrence reports generated by police forces have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations [See Order MO-1986]. However, an occurrence report may qualify as a "report" if it contains analysis and conclusions which transform it into "a formal account of the collation and consideration of information" [Order MO-1927].

Both the supplementary occurrence reports consist of mere observations and recordings of fact rather than analysis and conclusions. However, the second occurrence report does contain a one-word description of the result of the investigation. In my view, this does not make the document a "report". In MO-1896, Adjudicator Bernard Morrow found that an occurrence report did not meet the definition of "report" under the *Act* because, "[a]lthough there are a few comments by police officers which might be considered evaluative, the records consist primarily and essentially of descriptive information". Similarly, in Order MO-1927, Senior Adjudicator John Higgins found that "the brief disposition noted" in each of three occurrence reports was not sufficient to qualify them as "reports".

I agree with the findings in these orders and find that the one-word disposition found in the second supplementary occurrence report is not sufficient to qualify it as a "report" under the *Act*.

The Geriatric Medicine Consult Note and Geriatric Medicine Follow Up Note were prepared by a treating physician, not by a law enforcement agency. I therefore find that they were not prepared "in the course of law enforcement" as required by section 8(2)(a). Accordingly, they do not qualify for exemption under this section.

In conclusion, I find that none of the information is exempt under section 38(a) in conjunction with section 8(2)(a).

Section 8(2)(c): exposure to civil liability

The purpose of section 8(2)(c) is to protect individuals who have provided information to a law enforcement agency during a law enforcement investigation, or who have authored a record in this context, the nature of which may expose them to civil liability. This may include information of a speculative nature, innuendo and hearsay. The exemption is not intended to protect a police officer's routine recordings of observations and actions [Order MO-1192].

Analysis and findings

While section 8(2)(a) applies only to law enforcement reports, section 8(2)(c) applies to a broader category, namely “law enforcement records”. To qualify for exemption under this provision, it must also be the case that disclosure of the records “... could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability”.

As noted above, the Geriatric Medicine Consult Note or Geriatric Medicine Follow Up Note were not prepared by a law enforcement agency, and were therefore not prepared during the course of law enforcement. There is nothing before me to indicate that they were prepared in relation to “law enforcement” as defined in section 2(1), and I therefore find that they are not “law enforcement records”. For this reason, they do not qualify for exemption under section 8(2)(c).

The remaining records appear to be law enforcement records, meeting the first threshold under this exemption. However, for the reasons outlined below, I find that there is nothing in either of these records that could reasonably be expected to expose the author or anyone else to civil liability, so the substantive harm criterion in this exemption is not met.

The representations of the Police as to exposure to civil liability are found in the last sentence of the second last paragraph of page 4 of their representations. As this sentence has been treated as confidential, I will not reveal the content. However, I note that the Police do not claim that disclosure of the records may expose all the individuals mentioned in them to civil liability, but only a certain class of individuals. Therefore, I find that the application of section 8(2)(c) because of possible civil liability for any individuals mentioned in any of the records other than those described in this portion of the representations is not established.

In regard to the individuals for whom the Police claim this exemption, the Police do not identify which of the records contain information subject to section 8(2)(c), what specific information is of concern, or how the disclosure of this information could reasonably be expected to expose these individuals to civil liability. The Police have thus failed to provide “detailed and convincing” evidence, or indeed any evidence at all, in this regard, nor is this apparent from reviewing the records.

I note that I informed a number of individuals in this category of this appeal and of the exemptions claimed by the Police, and provided them with an opportunity to provide representations. None of them expressed any concerns about exposure to civil liability if any information in the records were to be disclosed. The representations of the Police on this point are, at best, vague and speculative.

I find that none of the records are exempt from disclosure under section 38(a) in conjunction with section 8(2)(c).

PERSONAL PRIVACY

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF ANOTHER INDIVIDUAL

Under section 38(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

Where a record only contains the personal information of an individual or individuals other than the requester, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

Under both sections 38(b) and 14, sections 14(1) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold is met.

If the information fits within any of paragraphs (a) to (e) of section 14(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 38(b) or 14.

If paragraph (a) or (b) of section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under sections 38(b) or 14.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under sections 38(b) and 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. If no section 14(3) presumption applies, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under sections 38(b) or 14 [Order P-239].

Analysis and Findings

Although the Police have claimed that disclosure of all the records would be an unjustified invasion of personal privacy, which would result in it being exempt under either section 14(1) or 38(b), there are some records that contain only the personal information of the appellant and/or her mother, and do not contain the personal information of any other person identified by the Police as an affected person for the purpose of this exemption. Therefore, sections 36(a) and/or

54(a) give the appellant a right of access to these records and the section 14(1) and 38(b) exemptions have no application:

These are: Pages 3 and 4 of the original records, entitled Supplementary Persons Report; page 10, entitled "Supplementary Arrest/Crown Instruction"; Page 11, a Supplementary Occurrence Report; and all the photographs except the bottom photo on page 7.

Accordingly, I find that pages 3, 4, 10 and 11 and all the photographs, except the bottom photograph on page 7, are not exempt from disclosure under section 38(b) because they do not contain the personal information of anyone other than the appellant's mother and/or the appellant.

The Supplementary Occurrence Report at pages 12 to 14 of the records originally provided by the Police do not contain the personal information of any individual other than the appellant, her mother, and another family member who has consented to disclosure of her personal information. Therefore, pages 12 to 14 are not exempt under either section 38(b) or section 14(1).

14(1)(a): consent

Section 14(1)(a) provides:

(1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

For section 14(1)(a) to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request [see Order PO-1723]. The individual can provide this consent either directly to the institution or indirectly through this office on appeal [Orders PO-2033-I, PO-2280-I].

Some individuals have consented to the disclosure of their personal information. Therefore, I find that any personal information in the records relating to individuals C, H, K, L, and M is not exempt because they have consented to disclosure.

I will address the personal information of N in the appellant's witness statement under the heading "Absurd Result", below. As the rest of the appellant's witness statement contains only the personal information of the appellant, her mother, and others who have consented to disclosure, it is not exempt.

Section 14(3)

In addition, the information that I earlier identified as personal information of individuals other than the appellant and her mother for which consent to disclosure has not been given in the four witness statements, in the photographs taken by the Police, and in the fourteen pages of records originally provided to this office, were all compiled and are identifiable as part of an investigation into a possible violation of law. Therefore, the presumption at section 14(3)(b), that its disclosure would constitute an unjustified invasion of personal privacy, applies. This presumption is not rebutted by section 14(4) nor is it overridden by any public interest under section 16. Accordingly, with the exception of the personal information discussed below under the heading "Absurd Result", this personal information, which I have highlighted on a copy of the record for greater certainty, is exempt from disclosure under section 14(1) and should be severed from the copy of the record that is disclosed.

Page 9 is entitled Supplementary Persons Report. It contains the name, address and telephone number of an individual who has not consented to disclosure of his personal information. It does not contain the personal information of the appellant or her mother. Therefore, section 14, a mandatory exemption, potentially applies to this information rather than section 38(b), a discretionary exemption.

Section 14(3)(b) states, in part:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

(b) was compiled and is identifiable as part of an investigation into a possible violation of law... .

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

As the personal information on page 9 was compiled and is identifiable as part of an investigation into a possible violation of law, the presumption at section 14(3)(b), that its disclosure would constitute an unjustified invasion of personal privacy, applies. This presumption is not rebutted by section 14(4) nor is it overridden by any public interest under section 16. Accordingly, this personal information, which I have highlighted on a copy of the record for greater certainty, is exempt from disclosure under section 14(1) and should be severed from the copy of the record that is disclosed.

Absurd result

Where the requester originally supplied the information or the requester is otherwise aware of it, the information may be found not exempt under section 38(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]
- the requester was present when the information was provided to the institution [Order P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is in the requester's knowledge [Orders M-757, MO-1323, MO-1378].

As I indicated above, the appellant provided a witness statement to the Police. I have found that the only personal information in this witness statement is that of the appellant herself, her mother, and other individuals who have consented to disclosure, with one exception. As noted above, at page 5 of her statement, she provided the Police with some information about an individual, N, who has not consented to disclosure.

As the appellant herself provided this information to the Police, it would be absurd to refuse to provide her with her own witness statement containing this information. Accordingly, I do not find this personal information to be exempt from disclosure under section 38(b).

Despite the fact that I have found some information exempt under section 38(b), the institution may exercise its discretion to disclose the information to the requester. I will consider the Police's exercise of discretion in the discussion below.

EXERCISE OF DISCRETION

I have found that certain personal information is exempt under section 38(b). The section 38 (b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion.

On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

I find no error in the manner in which the Police exercised their discretion in relation to the personal information I have found to be exempt under section 38(b).

ORDER:

1. I order the Police to disclose the records to the appellant no later than **April 11, 2006** but not earlier than **April 4, 2006**, with the exception of the personal information that I have identified as exempt, which is highlighted on a copy of the records provided to the Police with this order.
2. I uphold the decision of the Police not to disclose the highlighted information as well as any home addresses, home telephone numbers and dates of birth of any individuals who have not consented to disclosure in any of the records, and the photograph of the appellant's mother with two women on page 7 of the photographs.
3. To verify compliance with this order, I reserve the right to require the Police to provide to me a copy of the records disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
John Swaigen
Adjudicator

_____ March 7, 2006