



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1993

Appeal MA-040394-1

Toronto Police Services Board



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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request from the appellant's representative for a copy of all records relating to the sudden death of a named individual under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

The Police located the responsive records and granted partial access. The Police issued a decision denying access to the remaining records and portions of records on the basis of the exemptions in 8(1)(l), 9(1), 14(1), 14(3)(a) and (b), and 38(a) and (b). In the same decision, the Police also stated that "the reasons stated in your letter concerning the purpose for which the information is requested do not relate to the administration of the estate" and did not accept that the request met the criteria under section 54(a) of the *Act*.

The requester, now the appellant, appealed this decision.

During mediation, the appellant agreed to remove from the scope of the appeal the severances under section 8(1)(l) of the *Act*, and the records identified by the Police as "non-responsive". These portions of the records as well as section 8(1)(l) and the "non-responsiveness" claim made by the Police, are no longer at issue in this appeal.

The records remaining at issue consist of 154 pages of occurrence reports, police officers' notes, supplementary reports, faxes and photographs.

As no further issues could be resolved, the file was moved to the adjudication stage.

I sought and received the representations of the Police. I also sought the representations of five individuals whose rights could be affected by the disclosure of the information in the records (the affected parties). I received representations from three of the five affected parties. One of the affected parties stated: "I [do not] wish for any party to disclose any of my personal information whatsoever at this time". Two affected parties provided joint representations and consented to the release of their personal information. The other two affected parties did not provide representations.

I then sent a Notice of Inquiry to the appellant along with the complete representations of the Police. The representations from the two responding affected parties were summarized in the Notice of Inquiry.

The appellant provided representations in response.

DISCUSSION:

Right of access by a personal representative

In the request letter, the appellant identified that she is the deceased's personal representative and requests the information for the administration of the estate under section 54(a) of the *Act*.

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

If the requester meets the requirements of this section, then he/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/she is the deceased's personal representative, the requester should provide written evidence of his/her authority to deal with the estate of the deceased, including a certificate of appointment of estate trustee [Order MO-1449].

In the present appeal, there is no dispute that the appellant qualifies as the "personal representative". The Police, in their representations, acknowledge that the "...appellant did provide a Certificate of Appointment of Estate Trustee With a Will", and the [Police accept] that the Certificate establishes the appellant's status as the personal representative of the deceased."

Relates to the administration of the estate

In order to satisfy this part of the test, the requester must demonstrate that the request "relates to the administration of the estate". To meet this test, the requester must demonstrate that he/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]
- 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 deceased [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]

The Police submit that while they recognize that the appellant is the personal representative of the deceased for the purposes of section 54(a), they are not satisfied that the information is required to “administer the estate”. The Police state:

The two reasons provided by the appellant for seeking access to the deceased’s personal information do not relate to the administration of the estate.

The appellant provided no information to establish how “...whether to file a formal request for reconsideration under s. 26(1) of the Coroner’s Act” related to the administration of the estate.

The second reason provided by the appellant is "...whether the estate should be taking action with regard to the lengthy period that he was left alone prior to his death. Any action for he suffering by [the deceased] during this period belongs to the estate."

The Police submit further that, in this appeal, the lack of "documentation which establishes that the estate of the deceased is currently involved in litigation" demonstrates that the appellant fails to "meet the criteria required to establish that the requested information related to the administration of the estate". The Police refer to Orders MO-1803 and PO-1849 and state that these orders "have established that to bring legal action within the framework of 'administration of the estate', that the estate itself must be a party to the litigation and that the litigation must not relate to the wrongful death of that individual."

The appellant responds to this argument by submitting that the "requested information is necessary in order for the Appellant to assess whether the estate should take civil action with regard to the lengthy period during which [the deceased] was left alone prior to his death. In particular, depending on the content of the requested information, the estate of [the deceased] may claim damages for the suffering experienced by [the deceased] prior to his death."

The appellant also responds that it is irrelevant whether action is contemplated or commenced at the time of the request and refers to Orders MO-1256 and MO-1563, arguing that in those orders, "the fact that the appellant requested access prior to commencing litigation was not considered as a relevant factor in determining whether the requested access was related to the administration of the estate."

Findings

I have carefully reviewed the representations of the Police and the appellant and I am persuaded by the appellant's submissions that the request "relates to the administration of the estate" for the purposes of the second part of the test under section 54(a). In my view, and in keeping with Orders MO-1256 and Orders MO-1563, whether the appellant has or has not commenced action is not determinative: what is relevant is the *reason* for the request. In the present appeal, I am persuaded that the request was made, at least in part, in order for the appellant to "assess whether the estate should take civil action with regard to the lengthy period during which [the deceased] was left alone prior to his death". I am also satisfied that this action would be pursued by the estate, as it relates to damages suffered *by the deceased*.

My reasoning is supported by Adjudicator Donald Hale in Order MO-1803 in which Adjudicator Hale assessed the reason for the request and made a similar finding:

I am satisfied that the request was made, at least in part, to *assist in the preparation of an action on behalf of the estate for damages for injuries caused to the deceased person prior to his death* and that such damages would be recoverable by the estate, rather than the surviving family members. As such, I

find that the appellant is entitled to “step into the shoes” of the deceased person and exercise the same right of access to the requested information under section 36(1) of the *Act* that would have been available to him, subject to any exemptions that may apply to the information. [Emphasis added]

In summary, the appellant is the personal representative of the deceased and makes the request for access for reasons that relate to the administration of the estate. As such, the appellant now “stands in the shoes of” the deceased and is entitled to the personal information of the deceased, in keeping with the requirements under section 54(a).

PERSONAL INFORMATION

General principles

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. That term 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].

The meaning of “about” the individual

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].

The meaning of “identifiable”

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.)].

Findings

In this case, the records at issue comprise “all records” of the Police relating to the sudden death of the deceased. I therefore find that all of the records constitute his personal information. Some of the records also contain the personal information of the appellant and I find that this qualifies as her personal information.

The records therefore include contacts between the Police and a number of individuals (i.e. the affected parties).

The appellant submits:

[T]o the best of the Appellant's knowledge, the requested documents likely do not contain ‘personal information’ with respect to the affected parties who have not consented to disclosure. The records likely contain the actions and/or opinions of

the affected parties with respect to their professional, official or business capacities.

I have reviewed the records. They contain information pertaining to five affected parties in total. In my view, the information about three of the affected parties relates to them in a personal capacity only, not in their professional, official or business capacity. I therefore find that this is the personal information of those affected parties.

Some information about the remaining two affected parties relates to them in a personal capacity. This qualifies as their personal information. Other information about these two affected parties clearly relates to their professional capacity only, and does not reveal anything of a personal nature about them. I find that this is not their personal information. Because the personal privacy exemptions at sections 14(1) and 38(b) can only apply to "personal information", these exemptions have no application to the information that relates to these two individuals in their professional capacity, and as no other exemption applies, this information must be disclosed.

I have found that some of the records contain the appellant's personal information and that all of them contain the personal information of the deceased. I have already found that the appellant is entitled to "stand in the shoes" of the deceased because of the application of section 54(a). The effect of this is that the records will be analyzed under Part II of the *Act*, and I will therefore consider the possible application of sections 38(a) and (b). (Order M-352). I will begin with section 38(b).

PERSONAL PRIVACY

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* states:

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

(b) 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.

As noted above, in addition to the appellant's right of access to her own information under section 36(1), section 54(a) applies to allow the appellant access to the deceased's personal information as if it were her own.

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy", the information in question must be the personal information of an individual or individuals other than the person requesting it. In this case, that means that in order to constitute an unjustified invasion of personal privacy, the information in question must be the personal information of individuals other than the deceased and the appellant. To put it another way, personal information pertaining only to the appellant or the deceased cannot be withheld under section 38(b) in this appeal, and I find that such information, wherever it occurs in the records, is not exempt under section 38(b).

Sections 14(1), (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(1)(a) through (e) list exceptions to the mandatory exemption at section 14(1), and in the context of section 38(b), the application of any of these subsections indicates that disclosure would not be an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the institution to consider in determining whether disclosure would be an unjustified invasion of personal privacy. 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.

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. 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].

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. [See 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.

In this case, two of the affected parties have consented to disclosure of their personal information. I find that this consent satisfies the requirements of section 14(1)(a), and disclosure of their information would therefore not be an unjustified invasion of personal privacy. This information is therefore not exempt under section 38(b).

I turn now to the other information at issue, i.e. personal information of the other three affected parties and other individuals. In the present appeal, the Police rely on the "presumed unjustified invasion of personal privacy" in section 14(3)(b). The Police state:

While not all investigations into sudden deaths result in a law enforcement proceeding, the intent of the investigation is to determine whether a possible violation of law has been committed; i.e. whether the deceased died as a result of the infliction of intentional harm or criminal negligence.

Sections 14(3)(b) states:

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, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation...

Having reviewed the records, I am satisfied that the balance of the information was compiled and is identifiable as part of an investigation by the investigating officers into the death of the deceased in order to determine whether a criminal offence had occurred. I therefore find that section 14(3)(b) applies. As this is not information to which section 14(4) applies, it is exempt under section 38(b). I will consider, below, whether the "public interest override" at section 16 applies.

DENIAL OF ACCESS TO ONE'S OWN INFORMATION/RELATIONS WITH GOVERNMENTS

Section 38(a) of the *Act* states:

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

(a) if section 6, 7, 8, **9**, 10, 11, 12, 13 or 15 would apply to the disclosure of that personal information [emphasis added]

Sections 9 (1)(b) and (d) state:

- (1) A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,
- (b) the Government of Ontario or the government of a province or territory in Canada;
 - (d) an agency of a government referred to in clause (a), (b) or (c)...

In this instance, the Police rely on section 9(1) in relation to Records 64 and 66 through 71. Although the Police specifically refer to section 9(1)(d), the Office of the Coroner is not an agency, it is a part of the Ministry's "Policy and Public Safety Programs Division", therefore section 9(1)(b) is the relevant part of this exemption.

Because these records contain the personal information of the appellant and the deceased, the provisions of Part II of the *Act* (governing requests for one's own information) therefore apply, rather than the provisions in Part I (including section 9), which relate to requests for access to general records. I will therefore determine whether the records qualify for exemption under section 9(1)(b) in order to determine whether the discretionary exemption at section 38(a) applies.

The purpose of the section 9 exemption is "to ensure that governments under the jurisdiction of the *Act* will continue to obtain access to records which other governments could otherwise be unwilling to supply without having this protection from disclosure" [Order M-912].

The Police state that records 64 and 66 through 71 were received in confidence from the Office of the Chief Coroner for the Ministry of the Community Safety and Correctional Services and submit:

Information is routinely exchanged between the Office of the Chief Coroner and [the Police] during investigations relating to sudden death and homicide investigations. This exchange of information is done so in confidence for the sole purpose of assisting in the law enforcement investigation. It is not shared with the expectation that such information will routinely be disclosed by the TIPS to the public for a non-law enforcement purpose.

I have reviewed the records for which sections 9(1)(b) is claimed. I note that records 64 and 66 through 71 were faxed by the Coroner's office to the Police. I am satisfied that the fax cover sheets from the Office of the Coroner clearly indicate the information faxed to the Police was faxed "in confidence" by the government of Ontario's Ministry of Community Safety and Correctional Services' Office of the Chief Coroner.

The appellant states that the *Coroners Act* requires at section 18 that "...where a Coroner concludes that an inquest is unnecessary, the coroner provide the family or personal representative of the deceased with findings of fact about the cause of the deceased's death. Therefore, the Appellant submits that it stretches the concept of 'in confidence' ... to engage the exemption in section 9(1)(b) of the [Act]". In my view, this provision does not mandate disclosure of all records relating to how the findings were arrived at, but instead, requires the findings themselves to be communicated to the family or personal representative. I categorically reject the appellant's argument that section 18 of the *Coroner's Act* means that records given by the Coroner to the Police were not provided in confidence. Moreover, in any event, I am satisfied that the records at issue (64 and 66 through 71) do not directly relate to any findings of fact about the cause of the deceased's death.

Because the Coroner's office is part of the government of Ontario, I therefore find that Records 64 and 66 through 71 qualify for exemption under section 9(1)(b), and they are therefore exempt under section 38(a).

PUBLIC INTEREST IN DISCLOSURE

The appellant takes the position that there exists a public interest in the disclosure of the records as contemplated by section 16. This section states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the information contained in the records and the Act's central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO- 1564]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1999] O.J. No. 488 (C.A.)]

- the integrity of the criminal justice system has been called into question [Order P-1779]
- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]
- disclosure would shed light on the safe operation of petrochemical facilities [Order P- 1175] or the province's ability to prepare for a nuclear emergency [Order P-901]
- the records contain information about contributions to municipal election campaigns [Gombu v. Ontario (Assistant Information and Privacy Commissioner) (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellant submits as follows concerning the public interest override:

The compelling public interest override applies where there is a compelling public interest in the disclosure of the records and where the interest clearly outweighs the purposes of the exemption in issue.

...

The Appellant needs the requested information in order to pursue a request for reconsideration of the Coroner's decision not to hold an inquest [into the deceased's death], as well as to determine whether to pursue civil litigation.

Both a Coroner's inquest and a civil proceeding have the *potential* to raise issues of compelling public interest... [emphasis added]

As a result of the disclosure ordered in this decision, the appellant will receive significant portions of the records and will be provided with a great deal of information. The remaining undisclosed portions of the records pertain only to the personal information of other identifiable individuals, as well as the records withheld under section 38(a). In my view, any public interest in disclosure is met by what I have ordered disclosed, and this interest would not extend to the information exempted under section 38(a) or (b). I therefore find that section 16 does not apply.

EXERCISE OF DISCRETION

Sections 38(a) and (b) are discretionary exemptions.

The Police state that because section 9 is a mandatory exemption, "no exercise of discretion pursuant to [section] 38(a) is required...".

I reject this submission. Because I have found that the records contain the appellant's and deceased's personal information, they are subject to analysis under Part II of the *Act*, including the discretionary exemptions at sections 38(a) and (b), and *not* under Part I (including section 9). As noted in my discussion of section 38(a), above, my assessment of sections 9(1)(b) and (d) was in order to determine whether the records *qualified* for exemption under those sections in order to determine whether they are subject to the *discretionary* exemption at section 38(a).

Therefore, it is necessary to review the exercise of discretion by the Police in claiming both sections 38(a) and (b).

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)].

Having reviewed the records and the representations of the parties, I am satisfied that in exercising their discretion to withhold the information that I have exempted from disclosure under sections 38(a) and (b) in this order, the Police did not act in bad faith. They took relevant

considerations into account and did not consider irrelevant ones. I therefore find nothing inappropriate in the exercise of discretion by the Police in this case.

ORDER:

1. I uphold the decision of the Police to deny access to pages 64 and pages 66-71 inclusive, and those portions of the other records which I have highlighted on the copies provided to the Police Freedom of Information and Protection of Privacy Co-ordinator.
2. I order the Police to give the appellant access to the unhighlighted portions of the records (other than pages 64 and 66-71 inclusive) by sending copies to her by **December 22, 2005** but not before **December 15, 2005**.
3. In order to verify compliance with Provision 2, I reserve the right to require the Police to provide me with copies of the records that are disclosed to the appellant.

Original signed by: _____
Beverley Caddigan
Adjudicator

November 17, 2005 _____