



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2042**

**Appeal MA-040273-1**

**City of Toronto**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This is an appeal from a decision of the City of Toronto (the City), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), in response to a request, dated June 28, 2004, for records relating to the requester's deceased husband's admission to a named nursing home operated by the City.

In its decision letter, the City denied access in full to the responsive records pursuant to section 14(1) (personal privacy) of the *Act*. The City's decision also refers to section 54(a) (access by personal representative).

The requester (now the appellant) appealed the City's decision to this office.

At various stages in this appeal, the appellant has authorized other individuals to act on her behalf, including family members and legal counsel. For ease of reference, however, all references to the appellant or any of her representatives in this order will be to "the appellant".

During mediation, the appellant was informed that she would need to demonstrate that section 54(a) of the *Act* was applicable. This section permits a deceased individual's "personal representative" to exercise any right or power of the deceased under the *Act* if the exercise of the right or power "relates to the administration" of his or her estate. The appellant was also advised that if she could not bring herself within section 54(a), her appeal would be addressed as if one individual was requesting the information of another under the section 14(1) personal privacy exemption claimed by the City. This appeal could not be resolved at mediation and it proceeded to adjudication.

A Notice of Inquiry was sent to the City and representations were received. A modified Notice of Inquiry, enclosing the City's representations was sent to the appellant, seeking representations. The appellant requested an extension for the submission of representations, which the previously assigned Adjudicator, Stephanie Haly, granted. Shortly thereafter, this appeal was put on hold to afford the appellant an opportunity to obtain documentation related to the adjudication.

This appeal remained on hold until Adjudicator Haly sent a letter to the appellant, dated January 31, 2006, reactivating the appeal and seeking representations in response to the Notice of Inquiry. Soon after, I assumed carriage of this appeal from Adjudicator Haly.

Correspondence was exchanged between this office and the appellant on a preliminary issue relating to the possible application of the *Personal Health Information Protection Act, 2004* (*PHIPA*) to the records. In a February 17, 2006 letter, the appellant contended that the records at issue contained personal health information, that *PHIPA* should apply, and that the records should be disclosed since, in part, *PHIPA* contained no requirement like the one found in section 54(a) of the *Act*, that the access be for the purpose of the "administration of the estate".

By letter dated March 13, 2006, I advised the appellant that *PHIPA* did not apply in the circumstances of this appeal because the access request predated the enactment of *PHIPA* and the statute could not apply retrospectively. (See section 8(5), *PHIPA*.)

The appellant subsequently advised this office that she wished to pursue this appeal under the *Municipal Freedom of Information and Protection of Privacy Act* and submit representations on the issues raised under that statute. I have now received these representations.

## **RECORDS:**

The records consist of various documents relating to the health and care of the appellant's deceased husband, located in his nursing home file, which is maintained by the Homes for the Aged Division of the Community and Neighbourhood Services Department of the City. The records include the nursing home's admission and discharge records, resident plans, assessments, medical administration records, medical orders, progress notes, consultation notes, resident incident reports and medical tests.

The City indicated in its representations that it was no longer denying access to pages 12, 13, 15, 20 and 23-33 in Group 1 of the records.

Therefore, the records remaining in dispute are as follows:

1. Group 1 – pages 1-11, 14, 16-19, and 21-22
2. Group 2 – pages 1-63
3. Group 3 – pages 1-9
4. Group 4 – pages 1-30
5. Group 5 – pages 1-22
6. Group 6 – pages 1-3
7. Group 7 – pages 1-15
8. Group 8 – pages 1-28
9. Group 9 – pages 1-3
10. Group 10 – pages 1-4
11. Group 11 – pages 1-6

## **DISCUSSION:**

### **RIGHT OF ACCESS BY A PERSONAL REPRESENTATIVE**

#### **Introduction**

I will first consider whether, under section 54(a) of the *Act*, the appellant is entitled to exercise the rights of her deceased husband under 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, the appellant can exercise the rights of the deceased under the *Act* if she can demonstrate that (a) she is the personal representative of the deceased, and (b) the rights she wishes to exercise relate to the administration of the deceased's estate. If the appellant meets the requirements of this section, then she is entitled to have the same access to the personal information of the deceased as the deceased would have had; her request for access to the personal information of the deceased will be treated as though the request came from the deceased himself under section 36(1) of the *Act* (see, for instance, Orders M-927 and MO-1315).

### **Personal Representative**

In Order M-919, former Inquiry Officer Anita Fineberg reviewed the law with respect to section 54(a) and came to the following conclusions:

The meaning of the term "personal representative" as it appears in section 66(a) of the *Freedom of Information and Protection of Privacy Act*, the equivalent of section 54(a) of the *Act*, was considered by the Divisional Court in a judicial review of Order P-1027 of this office. In *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-19, the court stated:

Although there is no definition of "personal representative" in the *Act*, when that phrase is used in connection with a deceased and the administration of a deceased's estate, it can have only one meaning, which is the meaning set out in the definition contained in the *Estates Administration Act*, R.S.O. 1990, c. E.22, s.1, the *Trustee Act*, R.S.O. 1990, c. T.23, s.1; and in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s.1:

1(1) "personal representative" means an executor, an administrator, or an administrator with the will annexed.

Based on the court's analysis set out above, I am of the view that a person, in this case the appellant, would qualify as a "personal representative" under section 54(a) of the *Act* if he or she is "an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate".

Past practice of this office had been to require the appellant to provide a Certificate of Appointment of Estate Trustee in order to establish that he or she was the deceased's personal representative. Representations provided by the City on this point reflect this former approach and cite the reasoning in previous orders such as M-919, excerpted in part above, and MO-1365.

The City states:

Although it appears from the records that the appellant held power of attorney both for property and for care while her husband was alive, the appellant has not provided the City with a certificate of appointment as Estate Trustee. Therefore, the City submits, in accordance with the decision in Order M-919, that she is not her husband's personal representative for the purposes of this request.

The appellant's representations on the issue of "personal representative" refer to principles of estate administration and recent developments in this office's approach to the issue.

In Order MO-2025, dated March 7, 2006, Adjudicator John Swaigen considered whether a Certificate of Appointment was required, or whether a will could provide sufficient evidence of being a personal representative. He found that:

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.

In this appeal, the appellant has provided a notarized copy of her deceased husband's Last Will and Testament, dated May 30, 1978, appointing her as executor and I am, therefore, satisfied that the appellant qualifies as the "personal representative" of her husband for the purposes of section 54(a) of the *Act*.

### **Relates to the Administration of the Individual's Estate**

In Order M-1075, Assistant Commissioner Tom Mitchinson reviewed the scope of the access rights of a personal representative under section 54(a):

The rights of a personal representative under section 54(a) are narrower than the rights of the deceased person. That is, the deceased retains his or her right to personal privacy except insofar as the administration of his or her estate is concerned. The personal privacy rights of deceased individuals are expressly recognized in section 2(2) of the *Act*, where "personal information" is defined to specifically include that of individuals who have been dead for less than thirty years.

In order to give effect to these rights, I believe that the phrase "relates to the administration of the individual's estate" in section 54(a) should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate.

In that order, Assistant Commissioner Mitchinson accepted the argument of a personal representative that access to certain police records was required in order to determine whether

the major beneficiary of the estate was disentitled from benefiting under the will by contributing to the death of the testator. He found that access to the records was required in order for the personal representative to make an informed decision about matters relating to the beneficiary's entitlement to assets of the estate, meeting the second requirement under section 54(a).

Other orders have applied section 54(a) in circumstances where access to the records was required in order to defend a claim being made against an estate (Order M-919), to exert a right to financial entitlements being denied to the estate or said to be due to the estate (Orders M-934 and MO-1315) or to investigate allegations of fraud which might affect the size of the estate (Order MO-1301).

Section 54(a) has been held not applicable in cases where the only monetary claim being investigated was one the estate was clearly not entitled to pursue. In Order MO-1256, section 54(a) was found not to apply where the only action contemplated was a wrongful death suit on the part of family members, under the *Family Law Act*, since damages from such a suit do not form part of the estate of the deceased, but go to the individual family member plaintiffs [referring to the decision in *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4<sup>th</sup>) 12 (Div. Ct.).]

In this appeal, the City has cited Order MO-1256, referred to above, and several others (for example, M-400, MO-1260, and MO-1424) to support the assertion that section 54(a) of the *Act* may not be used by a personal representative who is seeking records for the purpose of pursuing some kind of action connected to the death of an individual.

The appellant's representative has submitted a copy of a Statement of Claim naming the estate as a plaintiff, noting that:

The appellant wishes to exert her right as the named executrix to bring legal action on behalf [of] the estate of her late husband for pain and suffering, and other injury and damages suffered by him *during his lifetime*, on the basis of tort and contract claims... Legal action is available to the estate for tort causes [and contract claims] and [grounds for] such actions are unaffected by survival action legislation contained in the *Trustee Act*. [emphasis added]

In Order MO-1525, Adjudicator Sherry Liang considered the issue where the appellant had made a claim to the Saskatchewan Workers' Compensation Board (the Board) in his capacity as estate trustee for his deceased mother for any benefits that might have been available to her. In finding that the appellant's purpose satisfied this second requirement of section 54(a) of the *Act*, Adjudicator Liang stated:

I have found that the estate has made a claim to the Board based on the deceased's medical/psychiatric condition preceding her death and arguably leading to her death. The records at issue relate to that condition. Section 54(a) does not require the appellant to demonstrate that without access to those records, his claim will be rejected. Its application also does not depend on whether the authority that will

decide that claim has made a specific demand for the information in these records. It may be difficult to determine at this stage how important (or not) the information in those records may be to the claim. However, they are certainly relevant, and the appellant is entitled to have access to them under section 54(a) in order to make his own determinations on their significance to the claim.

I agree with the reasoning of Adjudicator Liang in Order MO-1525 and adopt it for the purposes of this appeal. In particular, I agree that the application of the section does not depend on the importance of the records at issue to the claim made on behalf of the estate, since the extent of their importance can only be determined upon review of them. In my view, it is sufficient that I am satisfied that the appellant is pursuing a claim that is, at law, one it is entitled to pursue as plaintiff, and that the records are relevant to this purpose.

On the basis of the material before me, including the Statement of Claim, I find that the request for access is "related to the administration" of the deceased's estate and that the appellant has met the requirements of section 54(a). Accordingly, she is entitled to have the same access to the information in the records as the deceased would have had.

The result of my finding is that the appellant's right to have access to the records is to be determined as a request for her own information and as well, as if the request came from the deceased himself. I must now determine whether any exemptions under the *Act* restrict that access.

### **PERSONAL INFORMATION/INVASION OF PRIVACY**

The City maintains that sections 14(1) and 38(b) of the *Act* apply to justify denying access to the undisclosed records. Where a record contains the requester's personal information, the relevant personal privacy exemption is section 38(b), and where it does not, section 14(1) may apply (Order M-352). To determine which of these provisions may apply, I must first assess whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined as recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual. It also includes information relating to the medical, psychiatric, or psychological history of the individual.

Based on my review of the records, there is no doubt that they contain the personal information of the deceased, as they relate to his health and care, and include the nursing home's admission and discharge records, resident plans, assessments, medical administration records, medical orders, progress notes, consultation notes, resident incident reports and medical investigations. Because the appellant stands in the shoes of the deceased for the purposes of this request, the records must be seen as containing the requester's information, and the relevant personal privacy exemption is therefore section 38(b).

I also find that there is personal information in the records about individuals other than the deceased. Most of this consists of the names of persons identified as his next-of-kin, along with information such as telephone numbers, addresses and relationship to the deceased. Some of this type of information is about the appellant and some of it is about other family members.

The appellant provided no representations on the personal information issue or the possible application of the personal privacy exemption.

On the other hand, the City's representations are based primarily on the assertion that the appellant has not satisfied the threshold in section 54(a) of the *Act* and that she is required to seek access to the information as if a stranger to it. Accordingly, the City claims section 14(1) of the *Act*, citing several of the presumptions in section 14(3) to establish that the disclosure of the information is presumed to constitute an unjustified invasion of the deceased's personal privacy.

The City claims section 38(b) (the discretion to refuse access to appellant's own personal information) in relation to page 12 of Group 4 of the records to deny access to the appellant to personal information about her appearing on that page. As previously noted, the City decided to release to the appellant other records found in Group 1 which contained her personal information because that information had either been provided by her, or sent to her. The City also remarks, as I have, that some records contain references to the deceased's other family members which would constitute personal information.

However, section 36(1) of the *Act* gives individuals a right of access to their own personal information and since I have found that the appellant is entitled to exercise the rights of her deceased husband, the appellant is accordingly entitled to any personal information about him in the records. She is also entitled to any information relating to her. Because it does not relate to other individuals, the disclosure of this information to the appellant cannot be an "unjustified invasion of another individual's personal privacy" as required for exemption under section 38(b).

Section 38 does provide certain exceptions to the section 36(1) right of access. Under section 38(b), where a record contains the personal information of both the deceased (or the appellant) and of other individuals, the City has the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Sections 14(2) and (3) provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for consideration in making this determination. Section 14(3) lists types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The City has not taken a position on the application of any of the section 14(3) presumptions to the personal information of individuals other than the appellant and her deceased husband in the



records. Accordingly, the information that remains to be evaluated is the personal information of other family members of the appellant and her husband. I am satisfied that the disclosure of the "contact information" in the records (i.e. identity of next of kin and address) to the appellant would not constitute an unjustified invasion of the personal privacy of these family members. Having reviewed the records, I find that the information does not fall under any of the presumptions in section 14(3), and the application of the criteria in section 14(2) does not lead to the conclusion that its disclosure would constitute an unjustified invasion of personal privacy.

I find that none of the records at issue in this appeal are exempt under section 38(b), which is the personal privacy exemption that was under consideration in the circumstances of this case, as outlined above. I will order the records disclosed to the appellant.

**ORDER:**

1. I order the City to release the records to the appellant in their entirety **no later than May 2, 2006.**
2. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records sent to the appellant.

Original Signed By: \_\_\_\_\_

Daphne Loukidelis  
Adjudicator

\_\_\_\_\_  
April 18, 2006