



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-2137**

**Appeal MA-040359-1**

**City of Greater Sudbury**



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## **NATURE OF THE APPEAL:**

This appeal concerns a decision of the City of Greater Sudbury (the City) made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in response to a request for access to information concerning a named deceased individual (the deceased).

The request was made by the deceased's two daughters on behalf of her estate on July 15, 2004. Attached to the request was a copy of the deceased's last will and testament (the will), dated February 10, 1998, which appoints the deceased's two daughters as estate executrices.

The request was for access to the entire medical and financial records relating to the deceased's stay at an identified long-term care facility (the facility) operated by the City, until her death, on November 4, 2003.

After having sought further clarification on the nature of the request, the City provided the requesters with a fee estimate of \$257.00 and an Index of Records. In the fee estimate letter, the City raised the possible application of the mandatory exemption in section 14(1) (personal privacy). In addition, the City considered whether 54(a) (rights of the deceased) of the *Act* might apply and asked the requesters to demonstrate that the records were required in order to administer the deceased's estate, as set forth in that section.

Under section 54(a), where a requester can establish that it is the deceased's personal representative and that the request for access to records relates to the administration of the deceased's estate, the requester is entitled to exercise the deceased's right of access to his or her personal information.

The requesters responded to the City's correspondence with a letter, which provided additional information to the City in support of their request and a cheque for \$257.00 in satisfaction of the fee estimate.

The City subsequently issued a decision letter advising as follows:

...there is no access to the records you have requested as they contain the personal information of a third party according to section 54 of the *Municipal Freedom of Information and Protection of Privacy Act*. As you have not provided any representations that indicate that the records are required for the administration of the estate, your request is being denied...

The City also indicated that it was returning the requesters' cheque in the amount of \$257.00.

The requesters (now the appellants) appealed the City's decision.

During the mediation stage, the City confirmed that it was denying access to the information contained in the responsive records pursuant to section 14(1) of the *Act*. The City also clarified that while it recognizes that the appellants are the personal representatives of the deceased's

estate within the meaning of section 54(a) of the *Act*, it is not satisfied that the records are required for the administration of the estate.

No further mediation was possible and the file was transferred to the adjudication stage for an inquiry.

I commenced my inquiry by first seeking representations from the appellants on the application of section 54(a). The appellants submitted representations which they agreed to share, in their entirety, with the City.

I then sought representations from the City on the application of section 54(a) to the particular circumstances of this case, as well as the application of section 38(b), read in conjunction with section 14 (right of access to one's own personal information/personal privacy of another individual) or, alternatively, the application of section 14(1) (personal privacy) alone, to the information at issue. I provided the City with a complete copy of the appellants' representations. With regard to section 54(a), since the City had already conceded that the appellants are the deceased's personal representatives, I asked it to focus its representations on whether or not the information requested is required for the administration of the deceased's estate. The City provided detailed representations on section 54(a). Regarding the application of section 38(b) the City states in its representations that section 38(b) does not apply in the circumstances of this case. The City did not comment on the application of the exemption in section 14(1).

I next sought and received reply representations from the appellants in response to the City's position on the application of section 54(a). I then sought sur-reply representations from the City on the appellants' interpretation of section 54(a). The City addressed the appellants' arguments regarding section 54(a) and also commented on the application of sections 38(b) and 14(1) to the records at issue.

Finally, I sought supplementary representations from the appellants on the application of section 38(b), read in conjunction with section 14(1) or, alternatively, the application of section 14(1) alone. I included a complete copy of the City's sur-reply representations. The appellants declined to provide further representations.

## **RECORDS:**

There are 103 records at issue in this appeal totaling 764 pages. They are categorized in the City's Index of Records as either "Financial Records" and "Medical Records". The financial records include admission records, account balance reports, transaction history reports and a long-term care facility admission agreement. The medical records include laboratory service reports, medical reports, physician's orders, nursing progress notes, hospital records, emergency transfer forms, admission record, neurological observation records, various internal facility documents, drug information and drug prescriptions

## **DISCUSSION:**

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

#### **Introduction**

I will first consider whether, under section 54(a) of the Act, the appellants are entitled to exercise the access rights of their deceased mother 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 appellants can exercise the rights of the deceased under the *Act* if they can demonstrate that (a) they are the personal representatives of the deceased, and (b) the rights they wish to exercise relate to the administration of the deceased's estate. If the appellants meet the requirements of this section, then they are entitled to have the same access to the personal information of the deceased as the deceased would have had; their request for access to the personal information of the deceased will be treated as though the request came from the deceased herself under section 36(1) of the *Act* (see, for instance, Orders M-927 and 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 someone is a deceased's personal representative, a requester should provide written evidence of their authority to deal with the estate of the deceased, including a certificate of appointment of estate trustee [Order MO-1449]. A will alone may not be sufficient [Order MO-1365].

As stated above, the appellants have provided a copy of the deceased's will, appointing themselves as the executrices of her estate. In support of their position, the appellants state in accordance with the deceased's will they are the deceased's personal representatives. The appellants further state that they have "not applied for a certificate of estate trustee as this was not a requirement for the administration of this estate."

In response, the City concedes that the appellants should be recognized as the personal representatives of the deceased's estate.

In this case, despite the fact the appellants have not provided formal evidence of their appointment as the deceased's personal representatives, there is no dispute that they qualify as such. The appellants have produced a copy of the deceased's will reflecting their appointment as executrices. Additionally, the parties' representations concur that the appellants are the deceased's personal representatives in this case. Accordingly, I am satisfied that the appellants qualify as the deceased's "personal representatives" for the purposes of section 54(a) of the *Act*.

### **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 requirement, 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)*].

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

- sought to assist in prosecuting a civil claim brought on behalf of the estate for damages that would be recoverable by the estate rather than the surviving family members [MO-1803, MO-2042]
- required in order to defend a claim against the estate [Order M-919]
- 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]

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

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

The appellants state that as the deceased's personal representatives it is their "obligation to ensure that all financial records can be reconciled." The appellants state that they are seeking a

“proper accounting to the estate” regarding “services paid for and received” by the deceased at the facility.

The appellants also state that they “may wish to prosecute a claim” against the deceased’s “healthcare providers” for damages resulting from injuries or harm incurred by her prior to her death. In regard to this possible action, the appellants emphasize that this would not be a claim for wrongful death but rather a “possible malpractice suit.” The appellants also submit that a review of the medical file would permit them to “determine whether or not the proper medical care was provided given the language barriers and possible lack of communication.” The appellants submit that the records at issue would provide sufficient information to determine whether or not a medical malpractice suit should be pursued.

In response, the City states that despite being given an opportunity to do so, the appellants have not demonstrated that they need the information contained in the records to discharge their responsibilities as the deceased’s personal representatives. The City submits that the appellants have simply relied on their appointment as personal representatives as sufficient to establish a right to receive the records requested. In support of its position, the City makes reference to Orders MO-1196, MO-1449 and MO-1563, regarding the onus on a personal representative to demonstrate a sufficient connection between the information in question and the administration of a deceased’s estate.

The City also distinguishes the circumstances in this case from those in Order MO-1803, in which Adjudicator Donald Hale found the requester had established that her request “relates to the administration of the estate”, where an action for damages had been brought by the estate and any damages recovered would be received by the estate, rather than surviving family members. In contrast, the City argues that the appellants claim is “purely speculative” as a statement of claim has not been issued. It contends that the appellants are motivated by a desire to satisfy “themselves” not the “estate” and the appellants have not indicated how the deceased’s affairs or the manner in which she was treated would be relevant to the administration of the estate.

### **Analysis and findings**

In Order MO-1525, Adjudicator Sherry Liang considered the application of section 54(a) in circumstances where the requester 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 requester had demonstrated that his request relates to the administration of his mother’s estate, 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.

Adjudicator Liang's analysis was recently adopted and applied by Adjudicator Daphne Loukidelis in Order MO-2042, in which the requester sought access to records relating to her deceased husband's estate. In applying Adjudicator Liang's reasoning, Adjudicator Loukidelis stated:

[...] 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.

Turning to the present appeal, I acknowledge that the City has offered compelling submissions in support of its view that the appellants' request does not relate to the administration of the deceased's estate. In particular, the City argues that the appellants' interest is speculative since a statement of claim has not been issued and that the appellants are motivated by a desire to satisfy "themselves" not the "estate" in their pursuit of this information. In making its submissions, the City has distinguished the circumstances in this case from those in Order MO-1803, a case in which the estate had actually commenced a civil action.

In my view, while the initiation of a claim or action may be relevant in determining the second requirement, as it was in Orders MO-1525, MO-1803 and MO-2042, the absence of such a claim or action is not determinative. I find that in the present appeal the appellants, in their role as the personal representatives of the deceased's estate, are contemplating legal action and that the information that is responsive to the request may be relevant to a determination of whether or not they proceed with an action on behalf of the estate.

Following and expanding on the reasoning of Adjudicator Liang in Order MO-1525, in my view, where there is some reasonable basis for considering a record or records relevant to a determination of whether the estate should undertake litigation, the requester is entitled to have access to them under section 54(a) in order to make his/her own determination on their possible significance to such a claim.

The appellants in this case have asserted allegations of wrongdoing against the deceased's "healthcare providers" and they are contemplating a tort claim on behalf of the deceased's estate in regard to these allegations. Clearly, they are now looking for evidence to support their allegations and, in their view, the information at issue may be relevant to a determination of whether or not the estate will ultimately proceed with such a claim. In my view, the application of the section does not depend on the relative importance of the records to the allegations being asserted on behalf of the estate, since the extent of their importance can only be determined upon a review of them by the appellants, in their capacities as estate executrices, possibly with the assistance of their legal counsel. Finally, the claim contemplated by the appellants is one that they are entitled to pursue, at law, as plaintiffs. I am satisfied that the records sought are potentially relevant to a determination of whether or not the estate will proceed with such a claim.

Therefore, based on all of the evidence before me, I find that the appellants' request for access is "related to the administration" of the deceased's estate and that the appellants have met the requirements of section 54(a). Accordingly, the appellants are 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 appellants' right of access to the records is to be determined as both a request for their own information and that of the deceased. I must now determine whether any exemptions under the *Act* restrict that access.

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

Where a record contains the requester's personal information [or, in this case the personal information of the deceased, having found that section 54(a) applies], 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, if so, to whom that personal information relates.

### **Personal information defined**

Under section 2(1) of the *Act*, "personal information" is defined as recorded information about an identifiable individual, including the individual's age, information relating to the medical history of the individual, information relating to financial transactions in which the individual has been involved, any identifying number assigned to the individual, the personal views of an 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.

The City states that the records at issue contain the personal information of the deceased, including medical and financial information. The City also states that the records contain the personal information of other individuals, including the appellants. The appellants do not address this issue in their representations.



Based on my review of the records, there is no doubt that they contain primarily the personal information of the deceased, as they relate to her financial matters and health care. The records include references to her age, information pertaining to her financial affairs, the facility's admission records, medical reports, physician's orders, nursing progress notes, hospital records, emergency transfer forms, neurological observation records and information relating to the deceased's medications and drug prescriptions. Because the appellants stand in the shoes of the deceased for the purposes of this request, these records must be seen as containing the appellants' information, and the relevant personal privacy exemption to be considered is, therefore, section 38(b), and not section 14(1) read on its own.

I also find that there is a limited amount of personal information in the records about individuals other than the deceased, specifically the appellants and the deceased's grand-daughter (who is also the daughter of one of the appellants). This information includes the appellants' telephone numbers and addresses and their opinions or views regarding the deceased's care or medical condition prior to her death, as well as the name and telephone number of the deceased's grand-daughter.

### **Personal privacy exemptions**

The appellants provide no representations on the possible application of the personal privacy exemptions in section 38(b) or section 14(1).

The City's representations are based primarily on the assertion that the appellants have not satisfied the threshold in section 54(a) of the *Act* and that they are required to seek access to the information as if they were merely a stranger to it. The City also takes the position that since the appellants' have not requested their own personal information, but rather only that of the deceased, section 38(b) has no application. However, as stated above, having found that section 54(a) does apply, I am required to consider the application of section 38(b) since the appellants now stand in the deceased's shoes. Additionally, the fact the appellants' did not specifically seek their own personal information in their request is irrelevant. While the appellants' interest may, in fact, be focused on gaining access to the deceased personal information, section 38(b) is not intended to deny a requester access to his/her own information that is contained in the same records.

The City claims section 14(1) of the *Act*, citing the presumptions in sections 14(3)(a) (medical history) and 14(3)(f) (finances) to establish that the disclosure of the information is presumed to constitute an unjustified invasion of the deceased's personal privacy.

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 appellants are entitled to exercise the rights of the deceased, the appellants are accordingly entitled to any personal information about her in the records. They are also entitled to any information relating to themselves. Because this information does not relate to other individuals, the disclosure of it to the appellants 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 appellants) 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.

Although it raised section 14(3)(a) and (f) in regard to the deceased’s personal information, 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 appellants and the deceased in the records. Accordingly, the information that remains to be evaluated is the personal information of the deceased’s grand-daughter. I am satisfied that the disclosure of the grand-daughter’s name and telephone number to the appellants would not constitute an unjustified invasion of her personal privacy. 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 under consideration in the circumstances of this case, as outlined above. Accordingly, I will order all of the records disclosed to the appellants.

**ORDER:**

1. I order the City to release the records at issue in this appeal to the appellants **no later than January 22, 2007**.
2. I remain seized of this matter in order to verify compliance with provision 1 of this order.

Original signed by: \_\_\_\_\_  
Bernard Morrow  
Adjudicator

December 21, 2006  
\_\_\_\_\_