

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-012

August 23, 2000

ALBERTA JUSTICE

Review Number 1765

I. BACKGROUND

[para. 1.] In 1999, the person whose records are at issue in this inquiry (the “Deceased”) died unexpectedly in Alberta.

[para. 2.] The Office of the Chief Medical Examiner subsequently examined the physical remains of the Deceased and prepared an autopsy report, which included a number of test results.

[para. 3.] On October 21, 1999, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Office of the Chief Medical Examiner, a branch of Alberta Justice (the “Public Body”), for “access to a copy of an autopsy report on [the Deceased].” The Applicant wrote: “[the Deceased] was a public figure... and... there is a great deal of interest in [the Deceased’s] life and death. As no other legislation applies to an individual following death ... we feel entitled to this information.”

[para. 4.] On October 28, 1999, the Public Body denied access to the autopsy report on the grounds that disclosure would be an unreasonable invasion of the Deceased’s personal privacy, as provided by sections 16(1), 16(4)(a), 16(4)(g) (i) and (ii) of the Act.

[para. 5.] On November 30, 1999, the Applicant wrote to my Office to request a review of the decision of the Public Body to deny access to the autopsy report.

[para. 6.] Mediation was authorized, but was unsuccessful. The matter was set down for inquiry.

[para. 7.] A written inquiry began on May 3, 2000, and was concluded on May 4, 2000.

[para. 8.] This Order proceeds on the basis of the Act as amended on May 19, 1999.

II. RECORDS AT ISSUE

[para. 9.] The records at issue consist of an autopsy report and attached documents, including toxicology results, prepared by the Office of the Chief Medical Examiner. In this inquiry, I will refer to those documents as the “Records”.

III. ISSUES

[para. 10.] There are two issues in this inquiry:

- A. Does section 16 apply to the Records?
- B. Does section 31(1)(b) of the Act require the Public Body to disclose the Records?

IV. DISCUSSION OF THE ISSUES

Issue A. Does section 16 apply to the Records ?

(i.) Do the Records contain “personal information”?

[para. 11.] The Public Body’s argument that it can rely on the presumptions available under each of section 16(4)(a), (g) (i) and (ii) rests upon the view that the Records constitute personal information of a third party under the Act. Therefore, I must first determine if the severed information is personal information of a third party under the Act. If it is, I must then proceed to examine the section 16 arguments and determine whether section 16 applies so that the Public Body must refuse to disclose the Records.

[para 12.] “Personal information” is defined in section 1(1)(n) of the Act. The relevant parts read:

1(1) In this Act ...

(n) 'personal information' means recorded information about an identifiable individual, including

(i) the individual's name...

(ii) the individual's race... colour ...

(iii) the individual's age, sex, ...

...

(vi) information about the individual's health and health care history, including information about a physical or mental disability...

[para. 13.] The parties do not dispute that the Records contain personal information of the Deceased. The Public Body's summary of the contents of the Records at page 3 of its submission is apt:

As is clear on the record, the autopsy report is complete and extensive. It does not focus only on the cause of [the Deceased's] death. It includes every physical finding of the autopsy, a review of [the Deceased's] past medical history, and some information about the scene of the death.

[para. 14.] The Records contain the Deceased's name, race, age, colour, sex, and a fairly complete discussion of the Deceased's physical condition at the time of death. There is little else in the Records. The Records are largely made up of personal information, as defined by the Act. Once the Public Body severed all personal information from the Records, there would be little left but the signatures of officials and the boilerplate of standard forms.

[para. 15.] I have repeatedly said that health and medical information is "personal information," as that phrase is defined in the Act. I note that in Order P-362, the Ontario Information and Privacy Commissioner found that post-mortem forensic tests relate to the medical condition of a deceased individual at the time of death, and so fall within the scope of "personal information" for the purposes of the Ontario Act. I agree with this analysis. The Records contain "personal information" of a third party (the Deceased).

[para. 16.] Having made this finding, I must now consider whether disclosure of the personal information would be an unreasonable invasion of the third party's (the Deceased's) personal privacy.

(ii.) Would disclosure of the personal information be an unreasonable invasion of the third party's personal privacy?

(a.) The Act

[para. 17.] The relevant portions of section 16 are these:

16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

...
(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if...

(a) the personal information relates to a medical...history, diagnosis, condition...or evaluation,

....

(g) the personal information consists of the third party's name when
(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party...

[para. 18.] Section 16(1) is a mandatory (“must”) section of the Act that directs the head of a public body to refuse to disclose the personal information of a third party if that disclosure would be an unreasonable invasion of that third party’s personal privacy. Sections 16(4)(a), (g)(i) and (ii) each create a statutory presumption of unreasonable invasion of personal privacy.

(b.) Analysis

[para. 19.] There is no dispute that the Records withheld by the Public Body contain the Deceased’s name, information about the circumstances in which the Deceased lived at the time of death, and medical or health information pertaining to the Deceased.

[para. 20.] Therefore, I find that, on the face of the Records, the Records meet the requirements of both section 16(4)(a) and section 16 (4)(g)(i), raising the statutory presumption that disclosure would be an unreasonable invasion of the third party’s personal privacy.

(iii.) What relevant circumstances did the Public Body consider under section 16(5)?

[para. 21.] When determining whether disclosure of personal information constitutes an unreasonable invasion of personal privacy, the head of a public body must look to all relevant circumstances, including those set out in section 16(5) of the Act.

[para. 22.] The relevant portions of section 16(5) read:

16(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's

personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety ...

(a.) Summary of the positions of the parties

[para. 23.] The Applicant alleges that the Deceased was a physically disabled person who at some time sought financial support from the provincial government as a result of being disabled. These allegations are the basis upon which most of the Applicant's section 16 arguments are founded.

[para. 24.] The Applicant argues that the relevant circumstances under section 16(5)(a) and (b) outweigh the principles found in section 16(1) and (4), such that the Records should be released. The Applicant says that "the circumstances of [the Deceased's] death and [the Deceased's] physical condition prior to [the Deceased's] death are relevant to determining [the] competency of [the Deceased's] caregivers, [the] adequacy of regulations governing qualifications of caregivers and the role of government in establishing those qualifications". Disclosure of the Records could lead to a review of public health regulations concerning personal caregivers, and to possible scrutiny of "a department of the government of Alberta with respect to the issues of financial support and caregiver qualifications."

[para. 25.] The Applicant also argues that, since the Deceased had willingly provided the media with general information about the Deceased's precarious financial situation just months before the Deceased died, the Deceased would have disclosed information of a personal nature, relating to the Deceased's physical condition, to the Applicant. The Applicant also says that, because the Deceased had been estranged from family members since childhood, the Commissioner should not consider the absence of the consent of blood relatives to release the Records as a factor weighing against disclosure. In light of all of these circumstances, the release of the Records would not unreasonably invade the privacy of the Deceased.

[para. 26.] The Applicant says that section 16(2)(i) of the Act, which indirectly provides a degree of protection for the personal information of a deceased individual for a period of 25 years after that individual's death, is inconsistent with the common law of defamation, which holds that the

reputation of a person dies with that person. By implication, the Applicant suggests that no privacy rights should survive death.

[para. 27.] The Public Body says that it had already released as much information as it could to the Applicant about the Deceased's death, and the Applicant had not obtained the consent of a next of kin to access a copy of the Records, as required by the Chief Medical Examiner. The Public Body says that the death of the Deceased was treated as one section 16(5) consideration among others, and not as a determinative factor.

[para. 28.] The Public Body denies there is any public interest component at issue in this inquiry. The Applicant's concerns about government action are "vaguely expressed" rather than specific. The Applicant provided no specific evidence in support of the Applicant's allegations of improper physical care or some systemic failure of the social welfare system.

[para. 29.] Finally, the Public Body says that the common law of defamation has no connection to the provisions of the Act. Insofar as the Act changes the common law concerning the privacy of a deceased person, that change is intentional and lawful.

(b.) Analysis

[para. 30.] At this stage, I must consider the nature and quality of the privacy rights of a deceased person who may or may not have received social welfare benefits, and weigh those rights against the relevant circumstances that are asserted by the Applicant.

[para. 31.] The Act strikes a complex balance between the privacy rights of the dead and the needs of the living. The Act is clear that privacy rights do not end when a person dies. The definition of "personal information" in the Act does not limit the protection of the Act to persons who are alive: it includes all "identifiable persons", whether alive or dead.

[para. 32.] The Applicant has indirectly challenged the Public Body's decision to consider the privacy rights of the Deceased under section 16(5) by challenging the validity of section 16(2)(i) of the Act. The Applicant says that this section, which provides a degree of protection to personal information for 25 years after the death of the individual to whom it pertains, contravenes the common law of defamation. By implication, the Applicant suggests that the decision of the Public Body to recognize the statutory privacy rights of the Deceased is wrong in law. I disagree.

[para. 33.] Section 16(2)(i) of the Act says that where an individual has been dead for 25 years or more, disclosure of personal information would no longer be an unreasonable invasion of a third party's personal privacy under the Act. By implication, this section of the Act extends privacy rights to deceased persons. But such rights are not absolute. In Order 98-004, at paragraph 171, I stated that the Act does not say that it is always an unreasonable invasion of a deceased's personal privacy to disclose the deceased's personal information before 25 years have passed from the date of death. During that 25-year period, a public body has to determine whether relevant circumstances exist, such that it would not be an unreasonable invasion of the deceased's personal privacy to disclose the personal information.

[para. 34.] I also disagree with the Applicant's argument about the common law. The Act is provincial legislation. Legislation is distinct from the body of non-statutory principles known as the common law. The common law, as defined in Black's Law Dictionary (6th Edition) at page 276, is "a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments. It consists of those principles, usage and rules of action...which do not rest for their authority upon any express and positive declaration of the will of the legislature." Statutes such as the Act are free to modify or depart from the common law. Moreover, the common law of defamation, which focuses on a person's reputation and whether it has been impugned, has no application in this inquiry. This inquiry concerns the weighing of competing privacy and access rights as they have been specifically created under the Act.

[para. 35.] I find that the Applicant's challenge to section 16(2)(i) is without merit. The Public Body properly considered the death of the Deceased under the Act as a relevant circumstance, and that the Deceased's privacy rights continued after death under the Act.

[para. 36.] Having discarded the legal challenge to the Public Body's decision, I am left to consider the relevant circumstances raised by the Public Body and the Applicant.

[para. 37.] At inquiry, the Public Body filed an affidavit from an employee of the Public Body who dealt with the Applicant's request, setting out in detail the circumstances that were considered by the Public Body before it denied the Applicant's request. The employee deposed that the Public Body does not release autopsy reports to the media (the Applicant works in the media field). The only personal information of a deceased person that it routinely discloses to the media is the name of the deceased, his

or her age, the date of death, the place of residence of the deceased, and the cause of death of the deceased.

[para. 38.] The employee deposed that the Applicant was verbally provided with that information. The employee deposed that when the Applicant asked for a copy of the Records, the Applicant was told that a copy of the Records could not be released to the Applicant, unless the Applicant obtained the consent of the Deceased's next of kin.

[para. 39.] The employee deposed that she then discussed the Applicant's request with the Chief Medical Examiner, who denied the Applicant's request, as the Applicant is not a relative of the Deceased and had not obtained the consent of a next of kin to receive a copy of the Records.

[para. 40.] I note in passing that the Chief Medical Examiner has a discretionary practice of providing access to autopsy reports to persons who have the written authorization from a next of kin. This practice is pursuant to section 31 of the *Fatality Inquiries Act*, R.S.A. 1980 c. F-6, and is consistent with the Act.

[para. 41.] The Applicant does not dispute that the Applicant obtained information from the Public Body pertaining to the Deceased's death. The Applicant argues that the Applicant is entitled to the Records, because of public scrutiny and public safety circumstances, as referenced in sections 16(5)(a) and (b) respectively.

[para. 42.] The Applicant's arguments under section 16(5)(a) and (b) rest upon the allegation that the provincial social safety net may have failed for the Deceased. This sets the stage for the Applicant's request and the Applicant's large public policy-based section 16(5) arguments.

[para. 43.] In Order 98-004, I considered the public scrutiny issue under section 16(3)(a), now numbered as section 16(5)(a). In Order 98-004, at paragraph 147, I summarized my interpretation of what was then section 16(3)(a). For a circumstance to fall within the subsection, I said that (i) the activities of the public body must have been called into question by more than one person; (ii) the applicant's concerns must be about the actions of more than one person within the public body; (iii) where the public body had previously disclosed a substantial amount of information, the release of personal information was not likely to be desirable for the purpose of subjecting the activities of the public body to public scrutiny.

[para. 44.] In this inquiry, despite the press clippings presented by the Applicant which attest to a level of concern about the circumstances in which the Deceased died, it not clear that anyone other than the

Applicant has decided that public scrutiny of the Public Body's actions is needed. The Applicant has failed to state concerns about the actions of anyone in the Office of the Chief Medical Examiner. And as the Public Body has released to the media the usual amount of information about the Deceased's passing, I do not see that compelling the release of the intimate details of the Deceased's condition at death is desirable to subject the activities of the Public Body to scrutiny.

[para. 45.] I find that section 16(5)(a) is not a relevant circumstance weighing in favour of disclosing the Deceased's personal information.

[para. 46.] After considering all of the evidence and the submissions, I further find that disclosure of the Records would likely do nothing to promote public health or safety. I find that section 16(5)(b) does not weigh in favour of disclosure.

[para. 47.] As for the balance of the considerations raised by the Applicant, although I accept the Applicant's argument that, where matters of public interest are concerned, the recent nature of the third party's death may weigh in favour of disclosure, I reject the Applicant's remaining arguments. In particular, I will not speculate about whether the Deceased would have likely consented to the disclosure of such sensitive information as the Deceased's own autopsy report to the Applicant. I find that the Applicant's own evidence is that an immediate biological relative of the Deceased is opposed to further public discussion about the Deceased's death is a more compelling relevant circumstance weighing against disclosure.

[para. 48.] It seems to me that the Applicant's real concern is not with the actions of the Office of the Chief Medical Examiner. At the end of the day, the Applicant wants to reach beyond this inquiry and probe the actions of the public bodies who were charged with administering the social benefits that the Deceased may or may not have received.

[para. 49.] I have no doubt that altruistic intentions motivate the Applicant, but the Applicant's arguments are without a basic evidentiary foundation.

[para. 50.] In summary, I have carefully examined the Records, and agree with the Public Body's argument that there is nothing in the Records that could be construed as evidence of conduct by a public body, or the government, that ought to be disclosed to subject the activities of those bodies to public scrutiny. I further find that there is nothing in the Records that could directly assist in scrutinizing the competency of the Deceased's caretakers, the adequacy of the relevant provincial

regulations, or the adequacy of the conduct of a government department.

[para. 51.] As the Public Body properly concluded that the relevant circumstances weighed in favour of not disclosing the Deceased's personal information, the burden of proof shifts to the Applicant to prove that disclosure of the information would not be an unreasonable invasion of the Deceased's personal privacy.

(iv.) Did the Applicant meet the burden of proof under section 67(2)?

[para 52.] Section 67(2) speaks to the burden of proof under section 16 in this inquiry:

67(2) ...if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[para. 53.] The Applicant's case is speculative. There is nothing in the records that persuades me that the public has a right to know, in more detail than previously disclosed, the intimate facts of the Deceased's medical condition and living circumstances at the time of death. The Applicant has not provided anything to support the argument that disclosure of the Records would be justified under the Act.

[para. 54.] Accordingly, the Applicant has failed to discharge the burden of proof under section 67(2).

c.) Conclusion under section 16

[para. 55.] I conclude that disclosure of the Deceased's personal information contained in the Records would be an unreasonable invasion of the Deceased's personal privacy under the Act. Therefore, as section 16 applies, the Public Body must not disclose the Deceased's personal information to the Applicant.

[para. 56.] As the information remaining after the Deceased's personal information has been severed would be useless information to the Applicant (i.e. the signatures of officials and the boilerplate of standard forms), I do not require the Public Body to disclose that information to the Applicant. The result is that the Applicant does not get access to the Records.

ISSUE B. Does section 31(1)(b) of the Act require the Public Body to disclose the Records?

(a.) The Act

[para. 57.] Section 31(1)(b) reads:

31(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant...

(b) information the disclosure of which is...clearly in the public interest.

[para. 58.] The Act is silent on the issue of who bears the burden of proof when section 31(1) is at issue in an inquiry. In Order 97-009, I said that the party who asserts that information should be disclosed under this section bears the burden of proving that disclosure is justified. Therefore, the burden of proof lies on the Applicant to justify disclosing information from the Records in this inquiry.

[para. 59.] Order 96-011 states that section 31 is an override provision that will be narrowly interpreted. It imposes an obligation on a public body to release information under “emergency-like” circumstances, or where there is a matter of “compelling public interest” at stake. In Order 96-011, I also said that, for section 31(1)(b) to apply, the matter must be of “compelling public interest”.

(b.) Summary of the positions of the parties

[para. 60.] The Applicant’s arguments under section 16 weigh in under this section as well. I will not repeat those arguments.

[para. 61.] The Public Body says that although there has been some public interest in the tragic death of the Deceased, this death is not a matter of compelling public interest under section 31(1)(b). The public interest has been satisfied by the Public Body’s public release of the cause of death and other basic information.

[para. 62.] The Public Body says that if it is wrong, and section 31(1)(b) applies, I would not have to release the Records. I could simply summarize any relevant information in the Records. This would minimize the invasion of the Deceased’s personal privacy.

(c.) Analysis

[para. 63.] I find that there is nothing before me in the Records that indicates an urgent situation that ought to be addressed in the public interest. The limited and largely medical information in the Records simply cannot substantiate the systemic public interest concerns raised by the Applicant.

(d.) Conclusion under section 31(1)(b)

[para. 64.] There is nothing before me that would lead me to find that the Records, or that information in the Records, should be disclosed on the basis that there is a compelling public interest under the Act. I find that the Applicant has failed to discharge the burden of proof as required under section 31(1)(b).

V. ORDER

[para. 65.] Under section 68 of the Act, I make the following order:

1. Disclosure of the Deceased's personal information contained in the Records would be an unreasonable invasion of the Deceased's personal privacy. Therefore, section 16 applies, and I uphold the Public Body's decision to refuse the Applicant access to the Deceased's personal information. I order the Public Body to refuse to disclose the Deceased's personal information.
2. As the information remaining after the Deceased's personal information has been severed would be useless information to the Applicant, I do not require the Public Body to disclose that information to the Applicant.
3. I find that section 31(1)(b) does not require the Public Body to disclose the Records.

Robert C. Clark
Information and Privacy Commissioner