



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER P-412

Appeal P-9200738

Ministry of the Solicitor General



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# ORDER

## BACKGROUND:

The Ministry of the Solicitor General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the record relating to the investigation of a boating accident in which two persons were killed. In particular, the requester was seeking access to any information relating to the blood alcohol and tetrahydrocannabinol (THC) levels of the two deceased persons.

The Ministry denied access to portions of the record, including the blood alcohol and THC levels, pursuant to section 21 of the Act. The requester appealed the Ministry's decision.

During mediation, the scope of the appeal was narrowed to include only the results of the blood alcohol and THC analyses of the two deceased persons which had been severed from a one page document identified as "Report of the Centre of Forensic Sciences". The Ministry claimed section 21 as the basis for exempting this information.

Further mediation was not successful and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Written representations were received from the Ministry and the appellant.

## ISSUES:

The issues arising in this appeal are:

- A. Whether the record at issue qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether the record at issue qualifies as "personal information" as defined in section 2(1) of the Act.**

"Personal information" is defined in section 2(1) of the Act in part, as "recorded information about an identifiable individual...".

Section 2(2) of the Act states:

Personal information does not include information about an individual who has been dead for more than thirty years.

The record at issue is the post-mortem forensic test results of the blood and urine analyses of the blood alcohol and THC concentration of two persons who were killed in a boating accident. In my view, this information consists of recorded information about identifiable individuals, and qualifies as "personal information" as defined in section 2(1) of the Act. Section 2(2) of the Act does not apply as the deaths occurred within the past thirty years.

**ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.**

Once it has been determined that a record contains personal information, section 21 of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f), reads:

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

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of the personal privacy of an individual. Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy. The Ministry relies on sections 21(3)(a) and (b) which read:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (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;

In my view, the post-mortem forensic test results of the blood and urine analyses of blood alcohol and THC concentration relate to the medical condition of the two deceased persons at the time of their death. Accordingly, the requirements for a presumed unjustified invasion of personal privacy under section 21(3)(a) have been established.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must consider whether any other provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the record at issue in this appeal does not contain information relevant to section 21(4).

Section 21(2) provides some criteria for the Ministry to consider in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling as to outweigh a presumption under section 21(3); however, such a case would be extremely unusual.

In his representations, the appellant does not specifically refer to section 21(2)(d) though his representations reflect the contents of this section. Section 21(2)(d) reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

In Order P-312, Assistant Commissioner Tom Mitchinson stated:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

In his representations, the appellant states:

... the presence or absence of alcohol and/or drugs in the blood and urine of [the two deceased persons] is the primary issue in the civil law suit against [the appellant's client].

...

At the examinations for discovery of the surviving parties, oral evidence can be given with respect to the amount of alcohol and/or drugs consumed by the various parties. There is only one method of ascertaining the amounts of alcohol and/or drugs consumed by [the two deceased persons], and that is the results of the Toxicology report.

For the purposes of this appeal, I acknowledge that the appellant is involved in a civil proceeding, and that the personal information he is seeking access to may have some bearing on the determination of the right in question. I am not satisfied, however, that the personal information being requested is required by the appellant in order to prepare for trial or ensure impartial adjudication should the legal action in which his client is involved proceed to that stage. Therefore, in the circumstances of this appeal, I find that section 21(2)(d) is not a relevant consideration.

I have carefully considered the record at issue, the representations which have been provided, and the provisions of the Act, including any factors which could rebut the presumption of an unjustified invasion of personal privacy. In my view, the presumption raised by section 21(3)(a) of the Act has not been rebutted. Accordingly, I find that disclosure of the record at issue would constitute an unjustified invasion of the personal privacy of the two deceased persons, and section 21 applies.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ February 17, 1993