



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-945

Appeal P-9500052

Ministry of the Solicitor General and Correctional Services



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant, represented by counsel, submitted a request to the Ministry of the Solicitor General and Correctional Services (the Ministry). The request was for copies of any and all reports in the Ministry's possession respecting the death of a named individual (the affected person) who died in an automobile accident which also resulted in the death of the appellant's wife and daughter, who were riding bicycles. In particular, the request sought access to copies of the coroner's report pertaining to the affected person, dated May 8, 1994, and any medical records relevant to the condition of the affected person before death and at the time of death.

The Ministry responded by denying access pursuant to the following exemption in the Act:

- invasion of privacy - section 21(1).

The appellant, by his counsel, filed an appeal from this denial of access.

The records at issue are as follows (page numbers are those assigned by the Ministry):

- Record 1: Post Mortem Examination Report re affected person (record pages 8-13)
- Record 2: Morgue Death Report re affected person (record page 14)
- Record 3: Report of the Centre of Forensic Sciences (record page 16)
- Record 4: Coroner's Investigation Statement and attached Supplementary Statement form (record pages 20 and 21)
- Record 5: Coroner's Investigation Statement and attached Supplementary Statement forms (record pages 24, 25 and 26).

Pages 22 and 23 are identical to Record 4, and accordingly, I will not consider them in this order.

A Notice of Inquiry was sent to the appellant and the Ministry. It was not possible to notify anyone on behalf of the affected person, because he is deceased and no personal representative has been appointed.

The Notice of Inquiry raised the possible application of section 49(b), which provides an exemption regarding invasion of privacy in circumstances where the records contain the appellant's personal information.

In response to the Notice of Inquiry, representations were received from the appellant and the Ministry.

**DISCUSSION:  
INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean 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.

One of the categories enumerated in the definition of personal information is "information relating to the ... medical ... history of the individual ...".

On the question of whether the records should be found to contain the affected person's personal information, the appellant submits that

... the definition of "identifiable individual" should not be extended to deceased persons where there is no legal representative unless the legislation says so in clear and explicit terms. In such circumstances s. 2(2) should be read as applying only to deceased persons who have had a legal representative.

Section 2(2) of the Act, which the appellant refers to in the submission just quoted, states as follows:

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

In my view, section 2(2) makes it abundantly clear that the legislature intended to extend the Act's privacy protection provisions to deceased individuals, unless they have been dead for more than thirty years. I am not at all convinced by the appellant's argument that this should only apply to individuals for whom a personal representative has been appointed. I am unable to find any provision in the Act to support such a view. Moreover, it would result in an uneven and unfair application of the Act's privacy protection provisions regarding deceased persons, favouring those whose circumstances warrant the appointment of a personal representative.

I have reviewed the records at issue to determine whether they contain personal information, and if so, to whom the personal information relates.

Record 1, the Postmortem Examination Report, contains information relating to the medical history of the affected person. It does not contain any personal information pertaining to other individuals. On this basis, I find that Record 1 contains the personal information of the affected person only.

Records 2, 4 and 5 also contain information relating to the medical history of the affected person. In addition, they include brief references to other individuals involved in the accident. I find that these records contain the personal information of the affected person and several other individuals.

Record 3 contains the identities of the individuals killed in the accident. I find that this constitutes the personal information of the affected person, as well as the appellant's wife and daughter.

I also find that none of the personal information in any of the records pertains to the appellant.

As previously noted, the Notice of Inquiry raised the possible application of the exemption provided by section 49(b) of the Act. That section can be claimed to prevent unjustified invasions of personal privacy with respect to records containing a requester's personal information. In this case, I have found that the records do not contain the appellant's personal information. Accordingly, section 49(b) is not applicable in this appeal.

The other exemption relating to personal privacy which is at issue in this appeal is section 21(1). Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in section 21(1)(a) through (f) applies. In this appeal, the only one of these exceptions which could apply is section 21(1)(f), which provides an exception to this mandatory exemption "if the disclosure does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

### **Section 21(3)**

The Ministry submits that the information in the records at issue gives rise to a presumed unjustified invasion of personal privacy on the basis of sections 21(3)(a) and (b). These sections state:

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, almost all of the information in Record 1, and parts of Records 2, 4 and 5 relate to the medical history of the affected person. The information which falls into this category pertains to the cause of the affected person's death and the condition of his body as described by a medical practitioner. In my view, such information forms part of the affected person's medical history for the purposes of section 21(3)(a), and I find that the presumed unjustified invasion of personal privacy referred to in this provision applies to it.

The appellant's representations indicate that he is particularly interested in obtaining access to the blood alcohol level of the affected person. In this regard, Orders P-362, P-412 and P-482 have all concluded that blood alcohol analysis forms part of the medical history of a deceased person, and that the presumption in section 21(3)(a) applies to this information. I agree with this conclusion, and to avoid any confusion in this regard, I wish to state explicitly that the parts of the records to which I have applied the presumption in section 21(3)(a) include the passages which would reveal this information.

With regard to section 21(3)(b), I note that Record 3, the Report of the Centre of Forensic Sciences, is addressed to the Crown Attorney with copies to the Police. In my view, it is reasonable to conclude from this that Record 3 was compiled and is identifiable as part of an investigation into possible violations of law (i.e. possible violations of the Criminal Code and the Highway Traffic Act), and I find that the presumption in section 21(3)(b) applies to it.

With regard to Records 1, 2, 4 and 5, the Ministry submits that these records document the police investigation into the accident. I agree with the Ministry that parts of each of these records document the investigation, and in my view it is reasonable to conclude that this information was compiled and is identifiable as part of the police investigation, which was an investigation into possible violations of the Criminal Code and the Highway Traffic Act. Accordingly, the presumption in section 21(3)(b) applies to those parts of Records 1, 2, 4 and 5 which contain information obtained as part of the police investigation.

However, there are parts of these records which do not relate to the affected person's medical history, and which do not appear to have been compiled as part of the police investigation. This information consists of the coroner's conclusions about whether an inquest or other further action was required, and other non-medical information which the coroner gathered directly as part of his own investigation.

In this regard, the Ministry submits that coroners' investigations are also "investigations into a possible violation of law" and that section 21(3)(b) applies on that basis. The Ministry states that:

... coroners are mandated under the Coroners Act to investigate and determine the identity of individuals and the facts as to how, when, where and by what means death occurred. As coroners investigate sudden and unexpected deaths, it is routine for coroners ... to uncover possible violations of law".

The Ministry refers to a number of sections of the Coroners Act to support its position in this regard. However, the Ministry has not advanced any evidence to indicate that coroners are specifically mandated to conduct investigations into possible violations of law, nor do any of the provisions of the Coroners Act support such a conclusion. While it is possible that the evidence or authority to support such a position exists, it has not been provided to me and for this reason, I am unable to conclude that the application of the presumption in section 21(3)(b) has been established with respect to these records on the basis that they were prepared in the course of a coroner's investigation.

To summarize, I have found that parts of Records 1, 2, 4 and 5, including passages which would reveal the affected person's blood alcohol level, are subject to the presumed unjustified invasion of personal privacy in section 21(3)(a). I have also found that Record 3, in its entirety, and the parts of the other records which contain the information compiled as part of the police investigation, are subject to the presumed unjustified invasion of personal privacy in section 21(3)(b).

In John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767, the Divisional Court ruled that where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information. A combination of factors in section 21(2) will not rebut such a presumption.

It is clear that none of the factors in section 21(4) applies to the information which I have found to be subject to a presumption under section 21(3). Although the public interest override in section 23 was expressly raised in the Notice of Inquiry, the appellant has not made any representations to substantiate its application, nor does the evidence before me indicate in any way that this provision could apply in the circumstances of this appeal. For this reason, I find that section 23 does not apply to the information I have found to be subject to a presumption under section 21(3).

Accordingly, based upon the interpretation of the Divisional Court in the John Doe case referred to above, I find that the application of sections 21(3)(a) and (b), as noted in my findings above, has not been rebutted. Accordingly, the exemption in section 21(1) applies to the information in the records which I have found to be subject to the presumed unjustified invasion of privacy in section 21(3)(a) or (b).

### **Section 21(2)**

I must still consider whether the exception in section 21(1)(f) applies to the information in the records which is **not** subject to a presumption under section 21(3). This consists of information which is not part of the affected person's medical history, and any information which was not compiled as part of an investigation of a possible violation of law. In other words, this discussion relates to the coroner's conclusions about whether an inquest or other further action was required, and other non-medical information obtained directly

by the coroner. In this regard, I will consider whether any of the factors listed in section 21(2) applies to this information, and all other relevant circumstances which may affect its disclosure.

In the letter of appeal, the appellant's counsel indicates that the appellant and his surviving children are suing for the death of the appellant's deceased wife and daughter (which I will refer to as "the appellant's lawsuit").

This raises the possible application of the factor favouring disclosure mentioned in section 21(2)(d) (fair determination of rights). For this reason, the Notice of Inquiry stated as follows:

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. (Order P-312)

Despite the fact that the requirements to establish the application of this section were specifically outlined in the Notice of Inquiry, the appellant's representations did not include any further information about his lawsuit or any information to explain how the information at issue meets any part of this test. For this reason, I find that the application of section 21(2)(d) has not been established in this case.

In this regard, it might be argued that information about the blood alcohol analysis of the affected person has obvious relevance to the appellant's lawsuit. However, I have found above that this particular information is subject to the presumption in section 21(3)(a). As a result of the John Doe decision, referred to above, even if I found that the factor in section 21(2)(d) applied to that information, this would not rebut the presumption and the information would still be exempt.

Another possible factor favouring disclosure of information pertaining to the deceased affected person, which is not a listed factor in section 21(2) but which could be argued to arise from the circumstances of this appeal, was mentioned in Order M-50. In that order, Commissioner Tom Wright stated as follows:

In the circumstances of this appeal, I feel that one such unlisted factor is that one of the individuals whose personal information is at issue is deceased. Although the personal

information of a deceased individual remains that person's personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.

As I stated in the discussion of "personal information" on page 2, section 2(2) of the Act makes it abundantly clear that the legislature intended to extend the Act's privacy protection provisions to deceased individuals, unless they have been dead for more than thirty years.

Similarly, while section 66(a) of the Act permits a personal representative to exercise the rights or powers of a deceased individual under the Act (which would include access to the deceased individual's personal information), the personal representative is only able to exercise such a right or power if it "... relates to the administration of the individual's estate". In my view, this restriction is another clear indication of the legislature's intention to protect the privacy rights of deceased individuals.

In view of the fact that the Act makes explicit provision for the protection of the privacy of deceased individuals, it is my view that the unlisted factor identified in Order M-50 should only apply in exceptional circumstances. Nothing in the appellant's representations persuades me that the circumstances of this case would warrant the application of this unlisted factor.

In my view, no factors favouring disclosure have been established with respect to the parts of the records which are not subject to a presumption, and the exception in section 21(1)(f) has not been established. I also find that section 21(4) does not apply to this information. Accordingly, I find that this information is also exempt from disclosure under section 21(1) of the Act. For the same reasons outlined earlier with respect to the information which I found to be subject to a presumption under section 21(3), section 23 has also not been established with respect to the remaining parts of these records.

Accordingly, I find that the records at issue are entirely exempt under section 21(1).

### **Statutory Interpretation**

The appellant argues that, if the result of this appeal is that he is not given access to the blood alcohol level of a deceased person (i.e. the affected person) who was involved in an accident in which the appellant's wife and daughter were killed, this result is absurd and does not carry out the legislature's intention. In this circumstance, according to the appellant's counsel, the principles of statutory interpretation would require me to order disclosure of this information.

In Order M-444, considering the application of the exemption in section 38(b) of the Municipal Freedom of Information and Protection of Privacy Act, I found that applying a presumed unjustified invasion of personal



privacy to prevent disclosure of the same information which the requester had provided to a government body would be, in the circumstances of that case, a manifestly absurd result, particularly in view of the purposes of that statute (which are also in the provincial Act) relating to the ability of an individual to obtain access to records containing that individual's own personal information. As a result, I ordered the disclosure of that information.

In the circumstances of this appeal, the appellant was not the individual who supplied the information to which he seeks access; it appears that, in fact, he is not familiar with the contents of the records, and his interests may well be at odds with the interests of the affected person's estate. In this situation, I am unwilling to conclude that a result which protects the privacy of the affected person is absurd. In my view, it is fully consistent with the legislature's intention in enacting section 21.

Moreover, the appellant's argument in this regard appears to be based on a view that his difficulty in obtaining this information under the Act is unfair and unreasonable. In my view, this argument must be considered in the context of the appellant's ability to obtain relevant information in the course of his lawsuit. The appellant's rights in this regard are expressly preserved by section 64 of the Act, which states:

- (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
- (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

In my view, this section indicates that where, as here, access is denied under the Act, information properly available on discovery or by subpoena may still be obtained by those methods. This being the case, I am of the view that my finding under the Act is consistent with the legislature's intention in enacting section 21, which is the protection of personal privacy, and the legislature has expressly preserved other mechanisms to permit the appellant to obtain the information he requires in connection with his lawsuit.

I sympathize with the appellant's frustration at his difficulty in obtaining the information he is seeking in this case. However, as noted above, the application of the presumptions in sections 21(3)(a) and (b) to the information most actively sought by the appellant is clearly established. Moreover, when the findings of the Divisional Court in the John Doe case (referred to above) are applied to the circumstances of this appeal, it is equally clear that these presumptions have not been rebutted. Nor am I prepared to find that the application of the exemption provided by section 21(1) is an absurd result, given the privacy protection provisions of the Act, and the express provisions in the Act to protect those rights for individuals who are deceased.

**ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_

John Higgins  
Inquiry Officer

\_\_\_\_\_ June 28, 1995