



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

ORDER P-1208

Appeal P-9500734

Ministry of the Solicitor General and Correctional Service



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BACKGROUND:

In September 1990, a boating accident occurred in which two individuals were killed and a third was seriously injured. The accident was investigated by the Ontario Provincial Police, and resulted in two persons being charged with offences under the Criminal Code. In 1992, the Chief Coroner determined that an inquest into the circumstances of the deaths should be held, and assigned two members of the Metropolitan Toronto Police to conduct the investigation on behalf of the Coroner's office and to prepare the Coroner's Brief.

Following the conclusion of the Coroner's Inquest, a number of civil litigation actions were commenced by the families of the accident victims. The Plaintiffs in these actions have claimed a total sum in excess of \$10,000,000 against the Defendants.

One of the Defendants named in the actions is a licensed establishment which is alleged to have served liquor to the driver of one of the boats on the night of the boating accident to the extent that the driver's ability to operate a vessel was impaired. This Defendant's insurance company claims to have had no knowledge of the boating accident nor any information as to the potential liability of their insured until some months after the conclusion of the Coroner's Inquest.

After being served with the Statements of Claim relating to the civil actions, the insurance company retained the services of a private investigation firm to make inquiries into the boating accident.

NATURE OF THE APPEAL:

The private investigator requested access to the investigation briefs prepared for the Coroner's Inquest into the boating accident. The Ministry of the Solicitor General and Correctional Services (the Ministry) processed the request under the Freedom of Information and Protection of Privacy Act (the Act) and, nearly seven months after the Ministry received the request, denied access to the responsive records under the following exemptions:

- invasion of privacy - section 21
- law enforcement - sections 14(1) and 14(2)(a)

In a telephone conversation with the requester, and again later with the Appeals Officer, the Ministry indicated that the following mandatory exemption might also apply to some parts of the record:

- third party information - section 17(1)

The requester (now the appellant) appealed the Ministry's decision. A Notice of Inquiry was sent to the appellant and the Ministry. Representations were received from both parties.

While this inquiry was underway, the Ministry disclosed pages 1-66, 71-71, 179-201, 203, 664-676, and 1034-1057 of the Coroner's Brief to the appellant. The Ministry confirmed with me by telephone that each of these pages has been disclosed in its entirety to the appellant.

In its representations, the Ministry withdrew its reliance on sections 14(1) and 14(2)(a) of the Act.

THE RECORD:

At the time the Notice of Inquiry was prepared, the Ministry had not forwarded a copy of the record to this office. Accordingly, an order to produce the record accompanied the Ministry's copy of the Notice of Inquiry.

The record which the Ministry has identified as responsive to the request consists of 1242 pages of material bound into four volumes.

In correspondence with the Ministry, the appellant confirmed that she was not seeking access to any medical or health information. Accordingly, I find that the call reports completed by the members of the ambulance service called to the accident scene (pages 627-636, 660-663), the statement of the medical doctor called to the scene (page 73), and the Reports of Post Mortem Examination (pages 639-644, 655-659) are not responsive to the request and are not at issue in this appeal.

The information which the Ministry has disclosed to the appellant consists of:

- the verdict of the Coroner's Jury and the Coroner's Inquiry Recommendations;
- the Witness List (which includes names, addresses, telephone numbers and remarks regarding their relationship to the inquest);
- an exhibit list;
- photographs and background information regarding the two deceased, the injured victim and the driver of the vessel in which the injured and deceased individuals were passengers;
- a synopsis of the events surrounding the accident;
- information regarding the professional qualifications of a Crime scene Draftsman employed by the Metropolitan Toronto Police;
- verdicts and recommendations resulting from a number of other inquests into deaths which occurred under similar circumstances;
- a draft submission to the inquest by an association of residents who possess lake shore properties in the vicinity of the accident location;
- biographical information about a witness who, as a member of the Ontario Legislature, introduced a Private Member's Bill aimed at regulating the operation of motor boats on Ontario's waterways, a copy of the Private Member's Bill and information associated with it; and
- a position paper on boating safety, operator licensing and education written by the Council of Boating Organizations of Canada.

The Ministry has denied access to:

- transcription of interviews with 10 members of the Ontario Provincial Police who assisted in the investigation of the accident;
- notes from a Police Officer's notebook;

- transcription of interview with the Fire Chief whose department responded to the accident scene;
- statements regarding the qualifications of the pathologists who performed the post mortem examinations;
- report of the Centre of Forensic Sciences on material recovered from the accident scene;
- information about the qualifications of 14 individuals who were contacted in anticipation of their being called to testify as witnesses; and
- transcription of interviews or statements of 21 individuals who were interviewed or contacted in anticipation of their being called to testify as witnesses.

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. I have reviewed the record and, with a few exceptions, I find that it contains the personal information of a number of individuals other than the appellant.

Pages 161-168, 171, 174, 308, 311-317, 969-971, 973-974 and 977 do not contain personal information, other than information which has already been disclosed to the appellant by the Ministry. Additionally, only the first paragraph on page 70 and the first three paragraphs on page 160 contain personal information -- the remaining parts of these pages do not. In my view, it would not be an unjustified invasion of privacy to disclose page 70 (with the exception of the first paragraph), page 160 (with the exception of the first three paragraphs), and pages 161-168, 171, 174, 308, 311-317, 969-971, 973-974 and 977, and the section 21(1) exemption does not apply to these records.

The appellant submitted that personal identifiers could be severed from the record to “depersonalise” the remaining information. The Ministry, however, has disclosed the names of all witnesses identified in the brief and their relationship to the inquest. Given the level of publicity this accident and the inquest received and the appellant’s proximity to the case, I find that severing names or other personal identifiers would not render any of the individuals whose personal information is contained in the record unidentifiable. The remaining information, therefore, continues to qualify as personal information.

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 the section applies. While not specifically making reference to the particular exception in her representations, the appellant alludes to sections 21(1)(a), which states:

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

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

I do not agree with the appellant's submission that because the information contained in the record was disclosed to parties during the inquest in 1992, it should be disclosed to the appellant now because by allowing others to access their personal information, the individuals identified in the record have consented to the disclosure of and have waived any right to privacy which the Act purports to protect.

First, the appellant is relying on an implied form of consent, not written consent, and has not, in my view, established that the individuals whose personal information is contained in the record are entitled to have access to the record.

Second, for the purposes of section 21(1)(a), in order to determine if consent to the disclosure of the information has been given, three questions should be asked: 1. Does each individual know what information about him or her is contained in the record? 2. Is it reasonable to assume that each individual had knowledge of all of the institutions' planned uses of the record containing his or her personal information? 3. Does an individual have a choice regarding whether the personal information about him or herself is included in the record? (Order 180)

It is not clear that each individual knows what personal information about themselves is contained in the record, since not all of this information was provided by the individual him/herself. Further, it is not clear who has received a copy of the brief, who attended which parts of the inquest, which witnesses were actually called upon during the inquest, and what was included in their testimony. As well, I am not confident that each individual would have expected that the information included in the brief would be disclosed four years after the inquest concluded to parties not in attendance at the inquest. Therefore, in my view, the individuals identified in the record cannot be taken to have consented to the disclosure of their personal information to the appellant for the purpose of section 21(1)(a) of the Act.

The only remaining exception which may apply is section 21(1)(f). This section permits disclosure if it "... does not constitute an unjustified invasion of personal privacy." Since section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **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. 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.

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 which are relevant in the circumstances of the case.

The appellant relies on section 21(2)(d) to support disclosure of the record. The Ministry relies on sections 21(2)(e), (f) and (i) to support privacy protection in this case. These sections state:

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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The appellant has established that her client and its insured are involved in ongoing legal proceedings, during which questions of liability and damages will be determined. While the inquest was not aimed at finding fault or determining liability, I believe that the details and analysis contained in the record would be relevant to a determination of these issues.

Accordingly, I am satisfied that this factor is a relevant consideration favouring disclosure in this appeal. However, in determining the weight this factor should be given in my analysis, I have considered the fact that a complete list of the witness names, addresses, telephone numbers and their relationship to the inquest has been disclosed to the appellant.

In the context of section 21(2)(f), the Ministry submits that the accident resulted in the deaths of two individuals, left another severely injured, and resulted in the other two individuals involved being charged with offences under the Criminal Code. The Ministry points out that this tragic accident is described in detail in the witness statements, and the personal privacy of the individuals involved and their family members should be considered, as disclosure may cause personal distress to the families. As well, the views and opinions of persons with respect to the conduct of the individuals involved in the accident and its investigation are presented in a candid manner. Witnesses trace the involved parties prior to, during and after the accident, and discuss associates and reputations of these individuals. The record also describes the events leading up to the accident, the evidence secured for the criminal code charges which were laid, and describes the employment history of several witnesses.

I am satisfied that disclosure of the personal information contained in this record would cause a number of individuals excessive personal distress. Accordingly, I find that the personal information is highly sensitive. This consideration weighs in favour of privacy protection.

Having balanced these two competing considerations, it is my view that the consideration favouring disclosure is outweighed in the circumstances of this appeal by the consideration in favour of privacy protection. Accordingly, it is not necessary for me to consider the Ministry's position on sections 21(2)(e) or (i), or whether the record contains personal information whose disclosure would constitute a presumed unjustified invasion of privacy under sections 21(3)(a) (medical information), 21(3)(b) (law enforcement) or 21(3)(d) (employment history).

As the appellant has failed to convince me that disclosure would not constitute an unjustified invasion of personal privacy, I find that the section 21(1)(f) exception to the mandatory exemption for personal information does not apply, and the personal information withheld by the Ministry is properly exempt under section 21.

THIRD PARTY INFORMATION

Although section 17(1) of the Act was included as an issue in the Notice of Inquiry, the Ministry has not submitted representations which address its application in this appeal.

The introductory wording of section 17(1) requires that the record reveal a trade secret or scientific, technical, commercial, financial or labour relations information supplied to the Ministry in confidence, implicitly or explicitly. I have reviewed the information which I have found not to qualify for exemption under section 21 of the Act, and I am satisfied that it does not meet these requirements. Accordingly, I find that section 17(1) of the Act does not apply.

ORDER:

1. I order the Ministry to disclose page 70, with the exception of the first paragraph, page 160, with the exception of the first three paragraphs, and pages 161-168, 171, 174, 308, 311-317, 969-971, 973-974 and 977 to the appellant. I order this disclosure to take place on or before **July 19, 1996** but not earlier than **July 15, 1996**.
2. I uphold the Ministry's decision not to disclose the remaining parts of the record.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ June 14, 1996