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

ORDER PO-1819

Appeal PA-990354-1

Ministry of the Attorney General

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NATURE OF THE APPEAL:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act). The request was made to the Ministry's Special Investigations Unit (the SIU) for access to records relating to the SIU investigation into the circumstances surrounding the death of a young boy in a motor vehicle accident. The requester is a lawyer representing the boy's family and I will refer to his parents as the appellants in this decision. The SIU became involved because the driver of the vehicle which struck and killed the boy was an on-duty police officer with the Ottawa-Carleton Regional Police Service (the Police).

The appellants are specifically seeking access to the:

1. Accident Reconstruction Report;
2. Police Communication Tape;
3. Photographs of the accident scene and the police cruiser;
4. All civilian witness statements;
5. The statement of the subject police officer;
6. Any and all written statements, statements reduced to writing and documents relied upon in the investigation.

The Ministry located 122 pages of records responsive to the request, along with a 16-minute videotape, six audiotapes of witness interviews, an audiotape of the police communications for the pertinent time period and 66 photographs. The Ministry denied access to all of the records, claiming the application of the exemptions in sections 14(2)(a) (law enforcement report) and 21(1) and 49(b) (invasion of privacy) with reference to the presumption in section 21(3)(b) (information compiled as part of an investigation into a possible violation of law). The appellants appealed the Ministry's decision to deny access to the requested information.

During the mediation stage of the appeal, the Mediator assigned by this office obtained the consent of seven witnesses to the disclosure of their statements, in whole or in part, to the appellants. The subject officer refused to consent to the disclosure of her statement. The consents from the witnesses were provided to the Ministry by the Mediator but the Ministry refused to disclose those portions of the requested records which contained the witnesses' statements.

I provided a Notice of Inquiry to the Ministry and the subject police officer (the affected person) initially, seeking their representations on the application of the exemptions claimed. Because the records for which the Ministry claimed the application of section 14(2)(a) also appeared to contain the personal information of the appellants, I requested that the Ministry also address the possible application of section 49(a) to those records.

I received submissions from the Ministry which were shared, in part, with the appellants. Portions of the Ministry's representations were withheld from the appellants due to confidentiality concerns. The Ministry submits that all of the records at issue, with the exception of Records 2, 3, 4, 5, 6, 7, 7a, 22 and 24, are exempt under section 14(2)(a) and that all of the records also qualify for exemption under section 21(1) as

they were compiled and are identifiable as part of investigation into a possible violation of law (section 21(3)(b)).

The affected person advised this office, through her counsel, that she would not be making any representations in response to the Notice.

I then provided the appellants with a Notice of Inquiry and received their submissions, which were shared, in their entirety, with the Ministry. I note that the appellants acknowledge in their representations that Record 4, the SIU's report to the Attorney General, is properly exempt under section 14(2)(a) and is not, therefore, subject to the "public interest override" provisions in section 23 of the Act. Accordingly, I will not be addressing this document further in this order. Because the appellants' representations made reference to the possible application of section 23 to the other records, the Ministry was given the opportunity to make submissions by way of reply to this issue alone. The Ministry provided me with reply representations addressing this section.

DISCUSSION:

PERSONAL INFORMATION

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 records to determine if they contain personal information and, if so, to whom the personal information relates, and I make the following findings:

1. Records 1, 6, 7, 18 and 18a contain the personal information of the appellants, along with that of other identifiable individuals, including the deceased and the affected person. Record 7a contains only the personal information of the appellants.

2. Records 2, 3, 8, 10/11, 12/13, 15, 16, 17, 20, 21, 22, 23 and 26 and photographs 25 to 45 in Records 14 and 27 contain the personal information of the affected person, the deceased and various other identifiable individuals, though not that of the appellants.

3. Records 5, 9, 14 (other than photographs 25 to 45), 19, 24, 25 and 27 (other than photographs 25 to 45) do not contain any information which qualifies as "personal information" within the definition of that term in section 2(1).

I note that Records 5 and 24 do not contain any personal information. Accordingly, they do not qualify for exemption under sections 21(1) or 49(b). As no other exemptions have been applied to these records by the Ministry and no mandatory exemptions apply I will order that they be disclosed to the appellants.

I have found above that Record 7a contains only the personal information of the appellants. Accordingly, the disclosure of this record would not result in an unjustified invasion of another identifiable individual's personal privacy under either section 21(1) or 49(b). As no other exemptions have been claimed for this record, I order that it be disclosed to the appellants.

In addition, I have found above that Records 1, 6, 7, 18 and 18a contain the personal information of the appellants, as well as that of other identifiable individuals. I find that the information contained in these records which relates solely to the appellants is severable from the remaining portions. The disclosure of this information to the appellants would not be an unjustified invasion of the personal privacy of any other identifiable individuals. Accordingly, I will order that those portions of Records 1, 6, 7, 18 and 18a containing only the personal information of the appellants be disclosed to them.

The application of the exemptions in sections 21(1) or 49(b) to the remaining information contained in these records which relates to the deceased or to the affected person is addressed below.

Effect of Consent to Disclosure

In addition, as noted above, a number of individuals who were witnesses to the accident which gave rise to the investigation have consented to the disclosure to the appellants of the contents of the statements which they provided to the SIU investigators, in whole or in part. I have found above that the witness statements obtained from these individuals which are referred to as Records 15, 16 and 18, as well as the audiotaped interviews which comprise Record 26, contain the personal information of the witnesses, the affected person and the deceased. Section 21(1)(a) provides an exception to the general principle which precludes the disclosure of personal information to individuals other than the individual to whom the information relates. The exception applies where the individual to whom the information relates provides his or her written consent to its disclosure.

In the present situation, 6 of the 7 witnesses who provided statements to the SIU have provided their consent to the disclosure of their personal information to the appellants, in whole or in part. I find that the disclosure of the personal information of these witnesses, which is contained in Records 15, 16 and 18, falls within the exception contained in section 21(1)(a) and that the disclosure of this information would not be an unjustified invasion of their personal privacy. I have highlighted on a copy of the records which I have provided to the Ministry with this order those portions of Records 15, 16 and 18 which contain the personal information of the witnesses for which consent to disclosure has been obtained.

In my view, it would not be possible, however, to edit the audiotaped interviews which comprise Record 26 in such a way as to separate the personal information of the witnesses from that of the deceased and the affected person. I find that the information on the audiotapes is intertwined to such an extent as to make their severance impossible.

INVASION OF PRIVACY

Section 47 of the Act gives an individual a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of **both the appellants and other individuals**, and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information. Accordingly, for the remaining personal information in Records 1, 6, 7, 18 and 18a, I will consider whether disclosure would be an unjustified invasion of the personal privacy of other individuals under section 49(b).

Where, however, a record **only contains the personal information of other individuals**, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits the Ministry from releasing this information. Therefore I will consider whether the disclosure of Records 2, 3, 8, 10/11, 12/13, 15, 16, 17, 20, 21, 22, 23 and 26 and photographs 25 to 45 in Records 14 and 27 would be an unjustified invasion of personal privacy under section 21(1)(f).

Under both sections 21(1) and 49(b), sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where 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 [John Doe v. Ontario (Information and Privacy Commissioner] (1993), 13O.R. (3d) 767].

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Ministry states that the personal information was compiled as part of the SIU investigation into a possible violation of law, i.e. the potential commission of criminal offences by the police officer who was involved in the motor vehicle accident. Accordingly, the Ministry argues that the presumption in section 21(3)(b) applies to exempt this information from disclosure. This section provides:

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

The Ministry submits in a general way that records compiled as part of an investigation into the conduct of police officers are inherently highly sensitive in nature (section 21(2)(f)) and that the information is provided with an expectation that it will be treated in a confidential manner (section 21(2)(h)).

Based on the submissions of the Ministry and my review of the records, I find that the personal information contained in Records 8, 10/11, 12/13, 15, 16, 17, 20, 21, 22, 23 and 26 and photographs 25 to 45 in Records 14 and 27, as well as those portions of Records 1, 6, 7, 18 and 18a which are not highlighted on the copies provided to the Ministry with this order which relates to the deceased, the affected person and other identifiable individuals was compiled and is identifiable as part of an investigation into a possible violation of law, the Highway Traffic Act or the Criminal Code, for example. The information does not fall within the types of information listed in section 21(4).

I find that the disclosure of the information to which the section 21(3)(b) presumption applies would be an unjustified invasion of the personal privacy of these individuals. For this reason, with the exception of those portions of the records for which consent to disclosure was obtained, the information in Records 1, 6, 7, 18 and 18a is exempt under section 49(b), and the information in Records 8, 10/11, 12/13, 15, 16, 17, 20, 21, 22, 23 and 26 (both the Police communications tape and the tape-recorded witness statements) and photographs 25 to 45 in Records 14 and 27 is exempt under section 21(1).

I note that Records 2 and 3 were prepared after the investigation by the SIU was complete. Record 2 is the covering letter dated June 28, 1999 to the Director's Report to the Attorney General (Record 4) which is no longer at issue in this appeal. Record 3 is a letter to the Chief of the Ottawa-Carleton Regional Police Service of the same date advising as to the completed status of the SIU investigation. I find that these records were not "compiled as part of an investigation into a possible violation of law" as required under section 21(3)(b). At the time these records were created, the investigation was complete. The presumption in section 21(3)(b) cannot, therefore, apply to these records [Orders M-1086, M-734 and M-841]. In addition, I find that the information contained in these records was not supplied to the Ministry with an expectation of confidentiality (section 21(2)(h)); nor is highly sensitive within the meaning of section 21(2)(f).

While Records 2 and 3 do not contain any personal information relating to the appellants, Record 7a indicates that an SIU investigator informed the appellants of the results of the investigation. Records 2 and 3 similarly contain a statement as to the result of the investigation. Because the contents of these documents has already been communicated to the appellants, would a denial of access to them give rise to an absurd result? This principle has been applied in many previous orders of the Commissioner's office (Orders M451, M-613, MO-1196, P-1414, P-1457, PO-1679 and MO-1341) where a record contains the personal information of the requester. It has not, however, generally been applied to a situation where the record does not contain the personal information of the requester. In Order MO-1323, Adjudicator Laurel Cropley thoroughly canvassed the application of the "absurd result" principle. She held that:

> In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first

place would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders and has been extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).

In Order M-444, former Adjudicator Higgins also noted that it is possible that, in some cases, the circumstances would dictate that the "absurd result" principle should not be applied even where the information was supplied by the requester to a government organization. I agree and find that all of the circumstances of a particular case must be considered before concluding that withholding information to which an exemption would otherwise apply would lead to an absurd result.

The reasoning in Order M-444 was based on the principle that individuals should have access to records containing **their own personal information** unless there is a compelling reason for non-disclosure. The circumstances of this appeal raise the question whether the "absurd result" may also apply to a record which contains another individual's personal information despite the fact that the record does not contain the appellant's personal information. In examining this issue, I have considered the rationale behind the findings in Order M-444 and the purposes of the Act.

As noted above, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the Act in recognition of these competing interests.

In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial Act). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the Act and section 14(2)(a) of the provincial Act) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).

In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where

> information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).
>
> In all cases, the "absurd result" has been applied **only** where the record contains the appellant's personal information. In these cases, it is the contradiction of this higher right of access which results from the application of an exemption to the information. In my view, to expand the application of the "absurd result" in personal information appeals beyond the clearest of cases risks contradicting an equally fundamental principle of the Act, the protection of personal privacy. In general, I find that the fact that a record does not contain the appellant's personal information weighs significantly against the application of the "absurd result" to the record. However, as I indicated above, all of the circumstances must be considered in determining whether this is one of those "clear cases" in which the absurdity outweighs the privacy protection principles.
> . . .
>
> Having said that, I leave open the possibility that the absurd result principle may be considered and found applicable in other circumstances in appeals involving personal information or in appeals which do not involve records which contain personal information.

In the present appeal, I have noted above that Record 7a clearly indicates that the appellants were informed in person of the results of the SIU investigation and that this is precisely the information conveyed in Records 2 and 3. In my view, the appellants are aware of the information being communicated in Records 2 and 3 and this is one of those "clear cases" referred to by Adjudicator Cropley in Order MO-1323. I find that, considering all of the circumstances surrounding the investigation and the demonstrated extent of the knowledge of the appellants of the results of that investigation, the absurdity in not disclosing the information clearly outweighs the privacy protection principles at stake. I will, therefore, order that Records 2 and 3 be disclosed to the appellants.

By way of summary, I find that Records 2, 3, 5 and 7a and those portions of Records 15, 16, 18, 18a, 22 and 23 for which consent to disclosure have been obtained are not exempt under sections 21(1) or 49(b).

DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION

Under section 49(a), the Ministry has the discretion to deny access to records which contain an individual's own personal information where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include section 14 (law enforcement).

LAW ENFORCEMENT REPORT

The Ministry claims that all of the records at issue, with the exception of Records 2, 3, 4, 5, 6, 7, 7a, 22 and 24, are exempt from disclosure on the basis of section 14(2)(a), which states:

A head may refuse to disclose a record,

> that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

For a record to qualify for exemption under this section, the Ministry must satisfy each part of the following three-part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[See Order 200 and Order P-324]

In Order 221, former Commissioner Tom Wright made the following comments about part one of the test:

> The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

I agree with this approach and will apply it to those records, or parts of records, which I have found above to be not exempt under sections 21(1) or 49(b).

Record 9 is a letter dated May 3, 1999 from the SIU's Executive Officer to the Ontario Provincial Police (the O.P.P.) requesting a copy of a Technical Collision Report prepared by an O.P.P. Accident Reconstructionist (Record 20). This document does not qualify as a report within the meaning of section 14(2)(a) as it does not represent a formal statement or account of the results of the collation and consideration of information. As I have found that this document does not contain any personal information and no other exemptions apply to it, I will order that it be disclosed to the appellants.

Record 14 consists of a one-page handwritten "Vehicle Check Technical Report" which also appears at page 1 of Record 19. Pages 2 and 3 of Record 19 consist of a schematic drawing obtained from the manufacturer of the police vehicle indicating the carburetor and throttle linkage unit on the vehicle. Attached to Record 14 are 12 pages of handwritten notes describing in detail the 66 photographs taken of the accident scene (photographs 1 to 24), the deceased (photographs 25 to 45) and the police cruiser involved

in the accident (photographs 46 to 66), which form Record 27. I have found that only the descriptions and the photographs listed as items 25 to 45 of Records 14 and 27 contain personal information and thereby qualify for exemption under section 21(1).

I find that the remaining portions of Records 14, 19 and 27 do not qualify for exemption under section 14(2)(a). They contain only factual information which was compiled in the course of the SIU investigation and do not include a formal statement or account of the results of the collation and consideration of information. As no other exemptions apply to this information, I will order that they be disclosed to the appellants.

Record 26 is a 16-minute videotape taken at the scene of the accident by an investigator on behalf of the SIU. I have found above that this record does not contain any personal information within the meaning of section 2(1) of the Act. I also find that the videotape does not qualify as a "report" for the purposes of section 14(2)(a). It does not represent the results of the consideration of information, rather, it simply records the surroundings where the accident took place. As no other exemptions apply to this record, I will order that it too be disclosed to the appellants.

PUBLIC INTEREST IN DISCLOSURE

In the inquiry stage of the appeal, the appellants raised the possible application of the "public interest override" contained in section 23 of the Act to those records or parts of records which are found to be exempt under sections 21(1) or 49(b).

Section 23 of the Act reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

It has been established in a number of orders of the Commissioner's office that in order for section 23, "the public interest override", to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the personal information and third party exemptions [Order P-1398, upheld on judicial review in Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner), [1998] O.J. No. 420, 107 O.A.C. 341, 5 Admin. L.R. (3d) 175 (Div. Ct.), reversed (January 27, 1999), Docs. C29916, C29917 (C.A.)].

In Order P-984, former Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

> In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities

> of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

Former Adjudicator Big Canoe went on to address the second component of the "public interest override" as follows:

> Once a compelling public interest is established, it must be balanced against the purpose of the exemption which has been found to apply. Section 23 (the equivalent provision to section 16 in the provincial Act) recognizes that each of the exemptions listed therein, while serving to protect valid interests, must yield on occasion to the public interest in access to government information. Important considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.

I adopt the approach to the interpretation of the "public interest override" articulated by former Adjudicator Big Canoe for the purposes of this appeal.

Is there a compelling public interest in disclosure?

In Order P-1398, former Adjudicator John Higgins stated:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In upholding former Adjudicator Higgins's decision in Order P-1398, the Court of Appeal for Ontario in Minister of Finance (above) stated:

> . . . in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the inquiry officer was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

In light of the Court of Appeal's comments, I am adopting former Adjudicator Higgins's interpretation of the word "compelling" contained in section 23.

The appellants argue that the circumstances giving rise to the SIU investigation in this case received substantial coverage in the local press and attached a series of clippings to demonstrate this fact. The appellants further suggest that by refusing to disclose the records at issue, the Ministry is reinforcing the public's perception that investigations conducted by the SIU are "just a means of covering up allegations of police wrongdoing". The appellants submit that there exists a public interest in maintaining public confidence in the fairness of SIU investigations and that they have a very personal "public interest" in being allowed access to information relating to the death of their son.

The Ministry points out that the appellants have tendered no evidence in support of their allegation that there exists a public perception that SIU investigations serve to "cover up" police wrongdoing. The Ministry submits that at the very least, the appellants are required to provide evidence of a bona fide public, as opposed to their own private, interest in the disclosure of these records. In addition, the public interest must be one which is found to be compelling in nature.

I note that the press clippings provided by the appellants indicate that at the time of the accident in which the appellants' son was killed, there was indeed local interest in the circumstances surrounding his death. That interest revolved around the tragedy of a young boy's death and the public's shock and horror over that occurrence. I have not been provided with any evidence to substantiate a compelling public interest in the manner in which the SIU investigation was conducted or the conclusions which it reached. At no time was the SIU investigation itself the subject of public interest. In my view, the interest which exists in the disclosure of the subject records is purely a private one involving the appellants as the parents of the deceased boy.

As a result, I find that section 23 does not apply in these circumstances to outweigh the purpose of the section 21(1) and 49(b) exemptions. In light of the amount of information which has been made available to the appellants prior to and as a result of this order, I cannot agree that there exists a sufficiently compelling public interest in the disclosure of the remaining information.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 8, 10, 11, 12, 13, 17, 20, 21, 22, 23 and 26 in their entirety, those portions of Records 1, 6, 7, 15, 16, 18 and 18a which are highlighted on the copy of these records which I have provided to the Ministry and the descriptions and photographs numbered 25 to 45 in Records 14 and 27 respectively.

2. I order the Ministry to disclose to the appellants Records 2, 3, 5, 7a, 9, 19, 24 and 25 in their entirety, those portions of Records 1, 6, 7, 15, 16, 18 and 18a which are **not** highlighted on the copy of these records which I have provided to the Ministry and the descriptions and photographs numbered 1 to 24 and 46 to 66 in Records 14 and 27 respectively by providing them with a copy by **November 3, 2000** but not before **October 30, 2000**.

3. In order to verify compliance with Provision 2 of this order, I reserve the right to require the Ministry to provide me with a copy of the records which it discloses to the appellants.

Original signed by: September 29, 2000
Donald Hale
Adjudicator