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

ORDER PO-1874

Appeal PA-000182-1

Ministry of the Solicitor General

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NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Solicitor General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the full report of the investigation into the drowning death of his brother. The request included access to "a copy of any and all notes, drawings, sketches, photographs, interviews, interview summaries, preliminary or draft reports, or any other writing or document related to this investigation that is not included in the final report of investigation".

The Ministry identified 89 pages of responsive records. The Ministry notified an individual who was present at the scene of the drowning death (the witness) and invited his comments on disclosure of the records to the appellant. The witness did not consent to disclosure of his statement. The Ministry then issued its decision to the appellant and granted partial access to the records. The Ministry denied access to the remaining records, in part or in whole, on the basis of the exemptions provided by sections 14(1)(l) and 49(a) (facilitate commission of an unlawful act/discretion to refuse requester's own information), and 21(2)(f), 21(3)(b) and/or in conjunction with 49(b) (invasion of privacy) of the *Act*. The Ministry also indicated that some portions of the withheld records were not responsive to the request.

The appellant appealed the Ministry's decision on the basis that he believes the deceased's family's rights to information pertaining to the death should outweigh the privacy rights of an individual who "voluntarily" gave a statement to the police, in this case, the Ontario Provincial Police (the OPP).

During mediation, the appellant indicated that he was not interested in pursuing access to police codes withheld under section 14(1)(l) of the *Act* nor the information withheld by the Ministry on the basis that it was not responsive to the request. Accordingly, sections 14(1)(l), 49(a) and the responsiveness of the records are no longer at issue in this appeal.

The appellant indicated further that he was only interested in obtaining access to the statement of the witness, being pages 7 to 11 of the record and on this basis, the scope of the appeal was narrowed to pages 7 to 11, withheld under section 49(b) and with reference to sections 21(2)(f) (highly sensitive information) and 21(3)(b) (compiled as part of an investigation into a possible violation of law) of the *Act*.

Also during mediation, the Mediator contacted the witness for the purpose of obtaining consent to disclosure of his statement. The witness declined to give consent.

This appeal was subsequently moved into Inquiry. I sent a Notice of Inquiry to the appellant, initially. The appellant submitted representations in response. After reviewing them, I decided that it was not necessary to hear from the Ministry or the witness.

RECORD:

The record at issue is titled "Interview Report" and consists of a five-page witness statement given to the OPP by the witness. The record contains a description of the witness's observations regarding the

circumstances surrounding the death of the appellant's brother and his responses to questions asked by the investigating officer.

DISCUSSION:

PERSONAL INFORMATION

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.

Section 2(2) of the *Act* provides that personal information does not include information about an individual who has been dead for more than thirty years.

The appellant submits that the record does not contain the personal information of either the witness or the appellant's deceased brother. In this regard, the appellant states:

> Concerning the witness, at best it can be argued that Section 2(1)(h) would protect the individual's name or other personal information. However, I specifically withdrew my request for any information that may be considered a personal identifier of the witness...

With respect to his deceased brother, the appellant notes that he has received some information about him relating to the circumstances of his death and believes that withholding any other information about him would lead to an absurdity as that principle has been applied by this office (see, for example: Order PO-1715).

The record contains information relating to the witness, his relationship to the deceased and his observations/involvement with the deceased around the time of his death. I find that this record contains the personal information of the witness and the deceased primarily, as well as other individuals referred to in it. The appellant is not referred to in the record. Moreover, as the statement given by the witness pertained to the circumstances of the incident which resulted in the appellant's brother's death, and the appellant was not present or involved in this incident, I find that it does not relate to the appellant in any way and does not contain his personal information.

There have been occasions in previous orders where a finding has been made that once a name is removed from a record, the remaining information can no longer be characterized as "personal information" (Order M-264, for example). This would be the case, for example, where the parties are complete strangers and there is nothing in the remaining portions of the record or in the circumstances that could reasonably allow the reader to infer the person's identity.

However, in Order P-230, former Commissioner Tom Wright stated:

> I believe that provisions of the *Act* relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

I agree with former Commissioner Wright's view.

It is apparent from the records and communications between the Mediator and the witness during mediation that the appellant would either be aware of the identity of the witness, or this information would be readily obtainable by him. Therefore, it is reasonable to expect that despite the removal of his name and other personal identifiers from the record, the witness could still be identified from the remaining information. Therefore, in the circumstances of this case, the record contains the witness's personal information whether his name and personal identifiers are removed or not.

I do not agree with the appellant's position that it would be absurd to find that the records contain his deceased brother's personal information based on the fact that he has already received some information from the Ministry. This principle may be considered in determining whether disclosure of the deceased's personal information would constitute an unjustified invasion of the deceased's privacy. However, it does not change the characterization of the information as something other than "personal". The *Act* recognizes in section 2(2) that individuals retain their personal privacy rights for 30 years after death. Since the appellant's brother died in 1999, any information in the records about him constitutes his personal information.

However, since the appellant has raised the possible application of the absurd result principle to the facts in this case, I will consider it below.

INVASION OF PRIVACY

Section 47(1) of the *Act* gives individuals 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 appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

However, where the record only contains the personal information of other individuals, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

The Ministry claimed that the record was exempt pursuant to section 49(b) in conjunction with sections 21(2)(f) and 21(3)(b). Because I found that the record only contains the personal information of individuals

other than the appellant, section 49(b) cannot apply. Accordingly, I will consider whether the personal information in the record is exempt under section 21(1) of the *Act*.

In the circumstances, the only exception to section 21(1) which could apply is section 21(1)(f) which 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 disclosure of personal information would result in an unjustified invasion of the personal privacy of the individuals to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 23 exemption.

As I indicated above, the Ministry relies on the presumption in section 21(3)(b) and the factor weighing against disclosure at section 21(2)(f) to withhold the personal information from disclosure. These sections state:

> (2) 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,
>
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (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.

Section 21(3)(b)

Many previous orders of this office have considered the application of the presumption in section 21(3)(b) or its municipal equivalent in appeals concerning the sudden death of an individual, in many cases, of a family member (Orders M-1039, M-1072, M-1079, MO-1196, MO-1256, PO-1692, PO-1715, for example). These orders have recognized that when there is a "sudden death", the police are called in to determine whether there was any "foul play". Further, these orders have consistently found that the presumption in section 21(3)(b) or its municipal equivalent applies to information recorded by the investigating police force during their investigation into the circumstances of the death.

The appellant was asked to explain why he believes that disclosure of the statement would not constitute an unjustified invasion of privacy. Referring to Order PO-1715, he notes that while the rights of deceased individuals are recognized, the rights afforded their families are not. The focus of his submissions rests on his belief that the records do not contain personal information and the fact that he has already received some information about his deceased brother.

In reviewing all of the records in this appeal, it is apparent that the appellant's brother died suddenly while boating. The OPP conducted an investigation into the circumstances of the death, which included an interview with the witness who, as I indicated above, was present at the time of the incident. I am satisfied, based on my review of the records in their entirety, that, consistent with routine police practices in relation to sudden deaths, the purpose of the OPP investigation was conducted with a view to determining whether there was a possible violation of law. Therefore, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and its disclosure would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b). Further, this presumption applies, even if, as in the present case, no charges were laid (Orders P-223, P-237 and P-1225).

Absurd Result

As I indicated above, the appellant believes that since he has already been given some information regarding his brother's death, to withhold the rest would result in an absurdity. In part, the appellant appears to believe that the Ministry may have inappropriately disclosed some of the deceased's personal information to him (based on his understanding that all of the information in the records would presumably fall under the presumption in section 21(3)(b)) and, in these circumstances, argues that it would be absurd for the Ministry to now claim that other information about the deceased would constitute an unjustified invasion of his privacy.

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 reasoning has been applied in a number of subsequent similar orders of this Office 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 (eg. MO-1196, P-1414 and PO-1679).

In my view, the fact that the Ministry provided some information relating to the appellant's brother's death to him does not mean that withholding other information pertaining to him would necessarily result in an absurdity. Rather, the specific facts of each case must be examined, bearing in mind that the protection of personal privacy is one of the fundamental purposes of the *Act*. In this case, the fact that the record does not contain the appellant's personal information presents a significant hurdle for the appellant to overcome in arguing the application of this principle (see: Order MO-1323 for a complete discussion of the application of the absurd result principle in situations where a record does not contain the appellant's personal information).

It may well be that some of the information, such as the autopsy report, is information to which the appellant is entitled, for example pursuant to the *Coroners Act*. In this regard, section 18(2) of the *Coroners Act* states:

> Every coroner shall keep a record of the cases reported in which an inquest has been determined to be unnecessary, showing for each case the identity of the deceased and the coroner's findings of the facts as to how, when, where and by what means the deceased came by his or her death, including the relevant findings of the post mortem examination and of any other examinations or analyses of the body carried out, and such information shall be available to the spouse, same-sex partner, parents, children, brothers and sisters of the deceased and to his or her personal representative, upon request.

It may also be that some of the records originally responsive to the appellant's request contained both his personal information as well as that of the deceased and the Ministry exercised its discretion under section 49(b) to disclose this information to him.

In Order PO-1757, I considered whether the absurd result principle applied to information in a witness statement provided by a stranger to the deceased and the appellant once all information which would identify the witness was removed. In that case, although the remaining information was about the appellant's deceased son, it was similar to information that had already been provided to him. In concluding that this principle applied, I stated:

> In my view, the reasoning in this line of orders is equally applicable to portions of the witness statement in the present appeal. In reviewing the portion of this record which does not contain the witness's personal information, I note that although perhaps worded differently, the information is essentially the same as that which has been provided to the appellant through the disclosure of other records or through information which was provided to him by the Coroner's office. I find that applying the section 21(3)(b) presumption to deny access to information which the appellant is clearly aware of would, according to the rules of statutory interpretation, lead to an "absurd result". Further, in my

> view, this reasoning would apply to the application of any of the provisions in sections 21(2) or (3) in the circumstances of this appeal.
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> On this basis, I find that the disclosure of the body of the witness statement would not constitute an unjustified invasion of personal privacy and the exception in section 21(1)(f) applies to this information. Accordingly, this portion of the record should be disclosed to the appellant.

In this case, the information in the record pertains not only to the deceased, but to the witness, primarily, and to a lesser extent to other individuals referred to in it. The information in this record about the deceased is provided, contextually, from the perspective of the witness. Even if portions of the record were to contain information about the deceased that is similar to that which has already been provided, I find that the information pertaining to the deceased and the witness in the context of the statement is so intertwined that it is not severable and to disclose any information about the deceased would, in effect, disclose information about the witness. This situation is very different from that which I was faced with in Order PO-1757. In these circumstances, I find that withholding the information in the record from disclosure would not result in an absurdity.

I find that none of the circumstances outlined in section 21(4) apply. The appellant has not raised the possible application of the so-called "public interest override" in section 23 of the *Act* and I find, independently that it does not apply in the circumstances of this appeal.

I am sympathetic to the appellant's concerns regarding the lack of information provided to family members in these circumstances. This sentiment has been expressed many times in orders concerning deceased family members. However, my role is to interpret and apply the provisions of the *Act*, even if the result may seem unfair to the appellant.

In Order MO-1330, Assistant Commissioner Tom Mitchinson commented on the issue of access to the personal information of deceased family members as follows:

> In the 1999 *Annual Report* of the Information and Privacy Commissioner, Commissioner Ann Cavoukian recommended statutory changes which would recognize the needs of grieving families, and remove restrictions from the *Act* preventing them from having greater access to information about the death of a loved one. The Report states:
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> > Of the various types of appeals processed by the IPC, those involving a request for information about a deceased family member are among the most sensitive. Requests of this type are submitted to institutions (most often to local police forces or the Ontario Provincial Police) by immediate family members, or their representatives, in order to obtain information surrounding the circumstances of the relative's death.

> Except in certain limited circumstances, institutions must deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the provincial and municipal Acts.
>
> In 1999, the IPC undertook a study on the impact of the legislation on individuals seeking access to information about deceased loved ones. We surveyed appellants for their experience and view of the legislation; contacted professionals with expertise in the field of bereavement counseling; looked at the legislative history, including the reports of the provincial and municipal three-year review committees; and reviewed freedom of information and privacy legislation across Canada. We also consulted broadly with freedom of information professionals in the police community, since they are most frequently the point of first public contact by grieving family members.
>
> A broad consensus emerged from our discussions: the *Acts* do not serve the interests of relatives of deceased family members in these circumstances.

After highlighting a number of findings from this review, the Report goes on to state:

> A statutory amendment to address this sensitive and compelling issue is clearly required, and would be supported by a broad cross section of stakeholders: requesters and appellants; Freedom of Information and Privacy Co-ordinators in both the provincial and municipal sectors, including the police community; professionals in the field of grief counseling; and [the Commissioner's Office].
>
> Specific language for a new subsection for section 21 (section 14 of the municipal *Act*) is included in the *Commissioner's Recommendations* section, which follows this review of key issues.

In future, the *Act* may be amended to reflect the recommendations of the Commissioner. However, for present purposes, I must apply the *Act* as it stands today.

I am similarly required to apply the *Act* as it stands today in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: February 28, 2001
Laurel Cropley
Adjudicator