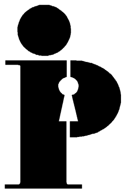


# ORDER PO-2339

## Appeal PA-030223-1

## Ministry of Public Safety and Security

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## NATURE OF THE APPEAL:

The requester made a request to the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an investigation by the Ontario Fire Marshal's Office (the OFM) into a fire in Orillia. In particular, the requester sought access to "the notes, coloured photographs, and final report prepared by [a named investigator]." The requester is a consulting engineer retained by the insurer of the owner of the property where the fire occurred.

The Ministry issued a decision to the requester denying access to the responsive records, relying on the following exemptions in the *Act*:

- sections 14(1)(a), 14(1)(b), 14(1)(f) and 14(2)(a) (law enforcement); and
- section 21(1) (invasion of privacy) with specific reference to sections 21(2)(f) (highly sensitive) and 21(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law).

The requester (now the appellant) appealed the Ministry's decision.

Mediation did not resolve this appeal, and the file was transferred to adjudication. I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting it to make written representations. The Ministry submitted representations in response to the Notice. In its representations the Ministry took the position (among other things) that page 38 is not responsive to the appellant's request. At the same time, the Ministry issued a new decision to the appellant, advising that the investigation into the fire was no longer ongoing and granting the appellant partial access to the records. The Ministry withdrew its reliance on sections 14(1)(a), 14(1)(b), 14(1)(f) and 14(2)(a), and these exemption claims are therefore no longer at issue. In its new decision, the Ministry also claimed for the first time the discretionary exemption at section 14(1)(l) (law enforcement) as an additional ground for denying access to the "ten-codes" in the records. I then sent a Notice of Inquiry to the appellant, together with a copy of the Ministry's representations. The appellant, in turn, provided representations.

## RECORDS:

The records consist of internal correspondence, fire investigation reports, occurrence reports and handwritten notes. The undisclosed portions remain at issue.

## BRIEF CONCLUSION:

Page 38 is not responsive to the appellant's request. Of the responsive information, some portions are exempt from disclosure under section 21(1), while the remaining portions are not exempt and must be disclosed.

## DISCUSSION:

### PRELIMINARY MATTERS

**Duplicate Records**

Pages 34-37 are duplicates of pages 1-4. For simplicity's sake, I will only be dealing with pages 1-4 in this order.

**Is page 38 responsive to the appellant's request?**

In its representations, the Ministry takes the position that page 38 is not responsive to the appellant's request. It submits:

> … page 38 is an administrative record created following receipt of the appellant's request. The record relates to the records collection process necessitated by the receipt of the appellant's [request under the *Act*]. This record is not reasonably responsive to the appellant's request for information.

The appellant submits that page 38 "forms part of the document brief pertaining to this matter and therefore has relevant information."

Previous orders of this office have established that in order for a record to be responsive, it must be "reasonably related" to the request (for example, Order P-880).

I find that page 38 is not "reasonably related" to the appellant's request. In his request, the appellant specified that he was seeking access to "the notes, coloured photographs, and final report prepared by [a named investigator]." Page 38 is an administrative document that the Ministry created after receiving the appellant's request, for the specific purpose of processing the request. It does not contain any of the information the appellant requested, and it is therefore not responsive to the appellant's request.

I will therefore uphold the Ministry's decision to deny access to page 38.

**Should the Ministry's late claim under section 14(1)(l) be allowed?**

Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

Claiming discretionary exemptions promptly is necessary in order to maintain the integrity of the appeals process. Unless the parties know the scope of the exemptions being claimed at an early stage in the proceedings, effective mediation of the appeal will not be possible. In addition, claiming a discretionary exemption for the first time after a Notice of Inquiry has been issued could necessitate re-notifying the parties to give them an opportunity to make representations on the exemption, and delay the appeal. In many cases the value of the information requesters seek diminishes with time, and requesters may be prejudiced by delays arising from late exemption claims (Orders P-658, PO-2113).

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113).

The Ministry submits:

> … the raising of the new discretionary exemption[ ] from disclosure in the circumstances of this particular appeal does not compromise the integrity of the appeals process and does not prejudice the interests of the appellant. Also, as the appellant has not yet been invited to submit written representations, the raising of this new additional discretionary exemption at this point in the appeals process should not result in delay arising from the necessity of re-notification of the parties. As a result of the Ministry's [new decision], the appellant has now been provided with access to a number of records that were previously withheld in their entirety.

The appellant submits, among other things:

> … insurance policies contain "statutory conditions" as required by section 148 of the Insurance Act. Statutory condition number 12 states that a loss is payable within 60 days after the completion of the proof of loss. Therefore, timing is critical considering that insurers must treat insureds with the "utmost good faith". Insurers are also cognisant of recent punitive damages claims and that claims must be settled or denied in the timeframe specified by the Insurance Act.
>
> … the integrity of the appeals process will have been compromised if the Ministry is allowed to apply its additional discretionary exemption[ ]. …

I have decided to allow the Ministry's late section 14(1)(l) claim in this case.

The Ministry has claimed section 14(1)(l) only for the "ten-codes" in the records. "Ten-codes" are used by police officers in their radio communications with each other, and this office has consistently found that they qualify for exemption under section 14(1)(l). In this case, the ten-codes represent only a fraction of the information remaining at issue. It is also significant that at

the same time that the Ministry claimed section 14(1)(l), it withdrew a number of its other exemption claims and it disclosed a considerable portion of the records to the appellant.

The Ministry claimed section 14(1)(l) well past the 35-day period for claiming additional discretionary exemptions. While not ideal, the Ministry's timing in claiming section 14(1)(l) in this case did not result in any significant delay in the proceedings or compromise the integrity of the process. In the circumstances, I find that the prejudice to the Ministry in disallowing its section 14(1)(l) claim for the ten-codes would outweigh any prejudice to the appellant in allowing it.

**DOES THE LAW ENFORCEMENT EXEMPTION AT SECTION 14(1)(L) APPLY TO THE TEN-CODES?**

Because I have decided to allow the Ministry's section 14(1)(l) claim, I must now review whether the ten-codes qualify for exemption under that section.

Section 14(1)(l) reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
>> facilitate the commission of an unlawful act or hamper the control of crime.

Because section 14(1)(l) is a discretionary exemption, even if the information falls within the scope of this section, the institution must nevertheless consider whether to disclose the information to the requester.

The Ministry submits, among other things:

> … release of [the ten-codes] may reasonably be expected to facilitate the commission of an illegal act and/or hamper the control of crime.
>
> "Ten" codes are routinely used by police and other law enforcement officers in their communications with each other, dispatchers and other parties. … release of the "ten" codes would compromise the effectiveness of radio communications and possibly jeopardize the safety and security of police and other law enforcement officers.
>
> …
>
> … Release of the "ten" codes … in the records at issue would leave police and other law enforcement officers more vulnerable and compromise their ability to provide effective policing and other law enforcement services. For example, if individuals engaged in illegal activities were monitoring radio communications and had access to the meanings of the various "ten" codes it would be easier for

> them to carry out criminal activities and would jeopardize the safety of police and other law enforcement officers. Intimate knowledge of the whereabouts of a given law enforcement officer and of the activities that he/she is involved with at any given time would be a powerful aid to individuals involved with criminal activities.

The appellant submits:

> … there cannot be a "reasonable expectation of harm" from the release of the "Ten-Codes". The "Ten-Codes" are readily available through the internet and from books and are also readily available from Police, Fire Departments, and ambulance service Guidelines and Standards (see attached Ten-codes). In their representations, the Ministry has not provided detailed and convincing evidence to establish a "reasonable expectation of harm".

The appellant also includes in his representations a list of ten-codes for the Oklahoma Association of Bail Enforcement Agents.

As noted above, this office has consistently found that ten-codes qualify for exemption under section 14(1)(l) (for example, Orders M-393, M-757, PO-1665). While ten-codes in certain other jurisdictions may be publicly available, the evidence before me does not establish that they are identical to those in Ontario. Accordingly, in keeping with this office's previous orders, I find that the ten-codes at issue qualify for exemption under section 14(1)(l) because disclosing them could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. In addition, I am satisfied that the Ministry did not err in exercising its discretion to withhold them.

**DO THE RECORDS CONTAIN PERSONAL INFORMATION?**

I must now decide whether the remaining information at issue qualifies as personal information, and if so, whose personal information it is.

Section 2(1) of the *Act* defines personal information as "recorded information about an identifiable individual," including the individual's age (section 2(1)(a)), the individual's address or telephone number (section 2(1)(d)) or the individual's name if 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(1)(h)).

The Ministry submits that some of the information at issue qualifies as personal information, and it points to the contents of the records in support of its position.

The appellant submits:

> … a distinction must be made between the individual's personal information and the individual's professional official government capacity information. The

> records contain[ ] information that was produced in a professional or official government capacity.

I have reviewed the records and I find that they contain the personal information of the deceased individual, the property-owner and other individuals, including their name, age, address, telephone number and other personal information. The fact that the records were created by individuals acting in a professional capacity does not mean that the records cannot contain personal information.

I also find that certain information on pages 12, 28, 42, 59 and 63 does not qualify as personal information. Some of this information consists of the name, occupation and address of individuals acting in a professional capacity and it therefore constitutes professional, rather than personal, information; in addition, the Ministry has already disclosed the name, occupation and address of these individuals to the appellant elsewhere in the records.

**WOULD DISCLOSING THE PERSONAL INFORMATION RESULT IN AN UNJUSTIFIED INVASION OF PRIVACY UNDER SECTION 21(1)?**

The Ministry initially relied on section 21(1), with specific reference to sections 21(3)(b) and 21(2)(f). In its representations, the Ministry relies on sections 21(3)(a), 21(3)(b) and 21(2)(f) in support of its section 21(1) claim. Section 21 reads, in part:

> (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
> >
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
>
> (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,
>
> > (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.
>
> (3) 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;

Section 21(1) is a mandatory exemption protecting information whose disclosure constitutes an unjustified invasion of another individual's privacy. Where a requester seeks access to another individual's personal information, section 21(1) prohibits an institution from disclosing this information unless any of the exceptions at sections 21(1)(a) through (f) apply. If any of these exceptions apply, the information cannot be exempt from disclosure under section 21(1). Section 21(1)(f), in particular, permits disclosure only where it "does not constitute an unjustified invasion of personal privacy."

Sections 21(2) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy. Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

I will begin by reviewing whether the exception at section 21(1)(a) (consent) applies in this case. In his representations, the appellant provides copies of two documents, both entitled "Authorization for Release of Information," from the owner of the property where the fire occurred. In these documents, the property-owner authorizes an all-encompassing list of people and entities to disclose "information" or "any information" to a named insurance company or its agents. Both authorizations are very broadly worded; neither of them specifically refers to the appellant's request under the *Act* or the information at issue in this appeal. In my view, these authorizations are not specific enough to serve as consents for the purpose of section 21(1)(a) (see also Order P-867).

I will next review whether any of the presumptions and criteria in sections 21(3) or 21(2) apply.

With respect to the section 21(3)(a) presumption, the Ministry submits that "parts of the personal information remaining at issue contain medical information relating to an identifiable individual."

With respect to the section 21(3)(b) presumption, the Ministry submits, among other things:

> The requested records document the investigation undertaken by the OFM and [the Ontario Provincial Police – the "OPP"] in regard to the circumstances of the … fatal fire. … parts of the [information at issue] contain highly sensitive personal information that was compiled and is identifiable as part of the OFM and OPP investigation into a possible violation of law. Fire investigations may reveal possible violations of law relating to federal *Criminal Code* offences, such as arson, and provincial offences, such as violations of the *Fire Code*. …

With respect to section 21(2)(f), the Ministry submits:

> … parts of the … records may be viewed as highly sensitive personal information within the meaning of section 21(2)(f) of [the *Act*]. … release of this information would cause other identifiable individuals excessive personal distress.

In response, the appellant submits:

> The records … would certainly not be considered to be "highly sensitive personal information". The records contain observations and opinions expressed by the OFM as a result of the examination and testing of the physical evidence. This physical evidence was examined and tested with the view of determining the cause and origin of the fire. Physical evidence cannot be misconstrued to be "highly sensitive personal information".
>
> …
>
> The Ministry has suggested that the OFM and the police investigations are somehow intertwined, however, nothing could be further from the truth. The police and the Crown must maintain an impartiality when considering the evidence which forms part of a criminal brief. The OFM simply provides a statement of facts and opinions which must be considered by the Crown. It is not necessary for the Crown to act on the opinions provided by the OFM.

In order for section 21(3)(b) to apply, the personal information must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

On their face, all the records clearly relate to an investigation by the OFM into a fatal fire. The Ministry submits that the OPP also conducted an investigation, but it does not give details about

the nature or scope of the OPP's investigation or specify exactly which records the OFM provided to the OPP.

Previous orders of this office have found that in conducting an investigation into the cause of a fire, the OFM is not performing a law enforcement function. As a result, section 21(3)(b) cannot apply to the personal information in records forming part of such an OFM investigation, unless the evidence indicates that the information was compiled and is identifiable as part of an investigation into a possible violation of law by an agency performing a law enforcement function (Orders PO-2066 and PO-2271).

The evidence before me (and in particular the contents of the records themselves) shows that the OFM provided its Initial Fire Investigation Report (pages 5-26) to the OPP to facilitate the OPP's criminal investigation. Accordingly, I find that all the personal information at issue in pages 5-26, as well in the covering letter at page 4, was compiled and is identifiable as part of an investigation into a possible violation of law, thereby triggering the presumption of an unjustified invasion of privacy at section 21(3)(b). In addition, some of the personal information in the Initial Fire investigation Report relates to the medical condition of an identifiable individual, and disclosing it is presumed to constitute an unjustified invasion of this individual's privacy under section 21(3)(a). These presumptions are not rebutted by section 21(4) in this case.

It is not clear from the materials before me, however, whether the OFM provided any of the remaining records (pages 1-3, 27-33 and 39-68) to the OPP, and if so, which ones. In the circumstances, the Ministry has not provided sufficient evidence to persuade me that the personal information in these records was compiled and is identifiable as part of an investigation into a possible violation of law under section 21(3)(b).

I do find, however, that some of the personal information in pages 1-3, 27-33 and 39-68 relates to the medical condition of an identifiable individual and that the section 21(3)(a) presumption applies to it. Again, this presumption is not rebutted by section 21(4) in this case.

In addition, I find that much of the personal information in pages 1-3, 27-33 and 39-68 is "highly sensitive" within the meaning of section 21(2)(f) because its disclosure could reasonably be expected to cause an individual excessive personal distress (see Orders M-1053, PO-1736). I also find that disclosing any of the personal information in these records would expose one or more individuals unfairly to pecuniary or other harm (section 21(2)(e)) or unfairly damage the reputation of one or more individuals (section 21(2)(i)). Finally, I find that on balance, the factors favouring privacy-protection at sections 21(2)(e), 21(2)(f) and 21(2)(i) outweigh any factors favouring disclosure in this case.

Thus, subject to my discussion below on the "compelling public interest" override, I find that disclosing the personal information in pages 1-33 and 39-68 would constitute an unjustified invasion of personal privacy under section 21(1), and this information is therefore exempt under that section.

I found, above, that certain information on pages 12, 28, 42, 59 and 63 does not qualify as personal information. Because this information does not constitute personal information, it cannot be exempt under section 21(1), and I will order the Ministry to disclose it.

**PUBLIC INTEREST IN DISCLOSURE**

In his representations, the appellant raises the possible application of the "public interest override" at section 23, which reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In order for section 23 to apply, two requirements must be met: first, a compelling public interest in disclosure must exist; and secondly, this compelling public interest must clearly outweigh the purpose of the exemption (here, section 21(1)) (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)).

The appellant submits:

> … For this case, there is a compelling public interest to ensure that individuals guilty of breaking a law are prosecuted to the full extent of the law, both civilly and criminally. … in the majority of cases, civil prosecution is more harmful than criminal prosecution and this is especially true when dealing with arson cases. The public stakeholders that pay for increased insurance premiums are victims of fraudulent insurance claims. There is a public interest to ensure that insurance companies are not victims of fraudulent claims, bad faith claims, and claims involving punitive damages.

In this instance, the appellant's interest in obtaining access to the information relates to an insurance matter and it is private in nature; it does not amount to a "public interest" within the meaning of section 23. Accordingly, I find that the "public interest override" at section 23 does not apply (see also Order PO-1833).

I am enclosing with the copy of this order being sent to the Ministry a copy of pages 12, 28, 42, 59 and 63 highlighting those portions that the Ministry must not disclose. I will order the Ministry to disclose the remaining information on pages 12, 28, 42, 59 and 63.

## ORDER:

1. I order the Ministry to disclose to the appellant the information on pages 12, 28, 42, 59 and 63 that is not exempt by **November 19, 2004**. I am providing the Ministry with a highlighted version of pages 12, 28, 42, 59 and 63 with this order, identifying the portions that it must not disclose.

2. I uphold the Ministry's decision to deny access to the remaining information at issue.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of pages 12, 28, 42, 59 and 63 that are disclosed to the appellant.

_______________________________ October 29, 2004

Shirley Senoff
Adjudicator