



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2473**

**Appeal PA-050234-1**

**Ministry of Community Safety and Correctional Services**



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## **NATURE OF THE APPEAL:**

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a complete copy of the investigation file compiled by the Ontario Provincial Police (the OPP) into the sudden death of the requester's daughter.

The Ministry located a number of responsive records and granted partial access to them. Access to the remaining records or parts of records was denied on the basis that the information contained in them was exempt under the following exemptions contained in the *Act*:

- section 49(a) (discretion to refuse requester's own information), in conjunction with the discretionary exemptions in sections 14(2)(a) (law enforcement report), 15(b) (relations with other governments) and 19 (solicitor-client privilege); and
- section 49(b) (invasion of privacy), with reference to the consideration in section 21(2)(f) (highly sensitive information) and the presumption in section 21(3)(b) (compiled as part of a law enforcement investigation).

The requester (now the appellant) appealed the Ministry's decision. Mediation was not successful in resolving any of the issues in the appeal and the matter was moved to the adjudication stage of the process. I sought and received the representations of the Ministry, initially. In its submissions, the Ministry withdrew its reliance on the exemption in section 15(b) to pages 261 to 268 of the records. I then provided the appellant with a complete copy of the Ministry's representations, along with a Notice of Inquiry setting out the facts and issues in the appeal. The appellant also provided me with representations.

## **RECORDS:**

The records remaining at issue consist of a Table of Contents, a Synopsis, a large number of Witness Statements and Equivocal Death Analysis Questionnaires, Assignment and Action Taken Forms, an Ambulance Call Incident Report, a Report of The Centre of Forensic Sciences and a Criminal Investigative Analysis prepared by another law enforcement agency.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

#### **General principles**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

### **Representations of the parties**

The Ministry argues that the records contain information which falls within the ambit of the definition of personal information set out above. It submits that this information relates to the appellant, her deceased daughter and a number of other identifiable individuals.

The appellant submits that, as the deceased individual was her daughter, she ought to be entitled to information about her death.

### **Findings**

Following my review of the records, I find that all of the records contain the personal information of the deceased, including her age, sex and family status (paragraph (a)), medical history (paragraph (b)), address and telephone numbers (paragraph (c)), the views of other individuals about the deceased person (paragraph (g)), and the deceased's name along with other personal information relating to her (paragraph (h)).

In addition, some of the records also contain the personal information of other identifiable individuals, specifically, those who provided statements to the OPP during the course of the investigation into the death of the appellant's daughter. This information qualifies as the personal information of these individuals as it includes information about their age, sex and marital or family status (paragraph (a)), their addresses and telephone numbers (paragraph (c)) and their names along with other personal information about their activities and interactions with the deceased (paragraph (h)).

Finally, I find that portions of a number of the records contain the personal information of the appellant, in addition to the personal information of the deceased. These records contain information such as the appellant's marital or family status (paragraph (a)), address and telephone numbers (paragraph (c)), her personal views and opinions (paragraph (e)) and her name, along with other personal information relating to her (paragraph (h)), including statements she made to the Police. I note that the appellant has been granted access to those portions of the records that contain exclusively her own personal information.

Previous orders have established that if a record contains the personal information of individuals other than the requester (in this case, the appellant), but does not contain the requester's personal information, a decision regarding access must be made in accordance with the exemption at section 21(1) of Part II of the *Act* [Orders M-352 and MO-1757-I]. However, in circumstances where a record contains both the personal information of the requester and another individual, the request falls under Part III of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b) [Order M-353]. Some exemptions, including the invasion of privacy exemption at section 21(1), are mandatory under Part II but discretionary under Part III, and thus in the latter case an institution may disclose information that it could not disclose if Part II is applied [Order MO-1757-I].

Furthermore, the correct approach is to review the entire record, not only the portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part II or Part III of the *Act* [Order M-352].

Accordingly, for those records which I have found contain the personal information of the deceased and/or other individuals, as well as the personal information of the appellant, I will

review whether they qualify for exemption under the discretionary exemption at section 49(b) of Part III of the *Act*. However, with respect to the remaining records which do not contain the personal information of the appellant, I will review whether they qualify for exemption under the mandatory exemption at section 21(1) of Part II of the *Act*.

## **INVASION OF PRIVACY**

### **General principles**

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right. Section 49(b) is one of those exceptions to that right. That section reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information, if the disclosure would constitute an unjustified invasion of other individual's personal privacy.

Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution has the discretion refuse to disclose that information to the requester. In my discussion on personal information I found that some of the records at issue contained both the information of the appellant and other individuals, including the deceased. I will therefore consider whether the disclosure of the personal information in these records would be an unjustified invasion of the personal privacy of other individuals and is exempt from disclosure under section 49(b).

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

Under section 21(1), where a record contains the personal information of an individual other than the appellant and does not include any of the personal information of the appellant, the Ministry must refuse to disclose the information unless disclosure would not constitute an "unjustified invasion of privacy". As I found that a number of the records did not contain the personal information of the appellant, I will consider whether the disclosure of personal information in these records would be an unjustified invasion of the personal privacy of the individuals to whom the information relates and is, therefore, exempt from disclosure under section 21(1).

Unlike section 49(b), section 21(1) is a mandatory exemption, and if it is found that disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates, that ends the matter. The institution does not balance competing interests and does not have the discretion to disclose the information to the requester.

Accordingly, the analyses under both sections 49(b) or 21(1) require that I determine whether disclosure of the remaining information would result in an unjustified invasion of the personal privacy of the individuals to whom the information relates. In both these situations sections 21(2), (3) and (4) provide guidance in determining whether “unjustified invasion of privacy” threshold is met.

Section 21(2) lists criteria for the institution to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which 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.

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case. If a presumption listed in section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A presumption can, however, be overcome if the personal information is found to fall 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 that clearly outweighs the purpose of the section 21 exemption [*John Doe v. Ontario (Information and Privacy Commissioner)*(1993), 13 O.R. (3d) 767].

### **Representations of the parties**

The appellant indicates that many of the individuals she has spoken to who were interviewed by the OPP in the course of its investigation are agreeable to the disclosure of their statements to her. Unfortunately, the appellant did not provide me with any written form of consent or release from these individuals, as is required by section 21(1)(a) (which operates as an exception to the prohibition against disclosure to permit the release of personal information when the individual to whom it relates consents to its disclosure to the requester). Accordingly, because I have not been provided with the written consent of the individuals to whom the personal information relates, I cannot apply the exception in section 21(1)(a) to any of the personal information contained in the records.

The Ministry submits that the records, and parts of records remaining at issue contain personal information that is “highly sensitive” within the meaning of the factor listed in section 21(2)(f). They further argue that the personal information in the records was compiled and is identifiable as part of an investigation by both the OPP and the Office of the Chief Coroner into the circumstances surrounding the death of the appellant’s daughter, including whether there may have been a possible violation of law, thereby qualifying under the presumption in section 21(3)(b). This section states that:

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 representations of the Ministry specifically state:

In the course of their investigation into the circumstances of the appellant's daughter's death, the OPP interviewed a number of identifiable individuals. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. As confirmed by page 16 of the record, a primary focus of the OPP Criminal Investigation Bureau investigation was to determine whether foul play was a factor in respect to the appellant's daughter's death. The Ministry submits that release of the exempt personal information is presumed to constitute an unjustified invasion of the personal privacy of other individuals.

The appellant indicates that she is seeking access to the records in order to address her unanswered questions about her daughter's death. She states that "[A]ny findings that would re-open this file and find justice into the death of my daughter, and it would be turned over to the OPP so that they in turn could make an arrest."

### **Findings**

I have examined the records at issue and find that the information contained in all of the records that remain at issue was compiled and is identifiable as part of an investigation by the Police into a possible violation of law, specifically, the *Criminal Code*. The fact that no criminal proceedings were subsequently undertaken has no bearing on this issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law [Order PO-1849]. Accordingly, I find that the undisclosed personal information contained in the records falls within the presumption in section 21(3)(b) of the *Act*.

In addition, I find that certain portions of the records also contain information which falls under the presumption in section 21(3)(a) of the *Act*, as it relates to the examinations of the body of the deceased by the ambulance attendants who removed her body. In my view, disclosure of this information would constitute a presumed unjustified invasion of the deceased's personal privacy under section 21(3)(a), which states:

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

relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

I have found that the presumptions in sections 21(3)(a) and (b) apply to the information at issue in this appeal. In the circumstances, none of the provisions of section 21(4) apply. The appellant has not raised the possible application of the public interest override at section 23 of the *Act*. Accordingly, based on the application of sections 21(3)(a) and (b), I make the following findings:

- Disclosure of the records which do not contain the personal information of the appellant would constitute a presumed unjustified invasion of the privacy of the appellant's deceased daughter and/or the other individuals whose personal information is contained in these records. Therefore, the mandatory section 21(1) exemption applies and the Ministry is precluded from disclosing these records to the appellant.
- Disclosure of the severed portions of those records which contain the personal information of the appellant as well as that of the deceased and other individuals would also constitute a presumed unjustified invasion of the privacy of the appellant's deceased daughter and/or the other individuals whose personal information is contained therein. Accordingly, the information remaining at issue in these records qualifies for exemption under discretionary exemption under section 49(b) of the *Act*. As noted above, the appellant has been granted access to all of the information that relates solely to her.

## **ABSURD RESULT**

The absurd result principle applies in instances where the requester originally supplied the information or is otherwise aware of it. In such instances the information may be found not to be exempt because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]. With respect to the absurd result principle, the Ministry submits:

The Ministry is aware that some of the exempt personal information relating to other individuals is clearly or likely to be within the appellant's knowledge. The Ministry submits that release of such information would be inconsistent with the purpose of the section 49(b) exemption in the circumstances of the appellant's request. The exempt personal information is highly sensitive and has been withheld in accordance with other exemptions from disclosure.

## **Findings**

I have carefully considered the circumstances of this appeal including the representations of the Ministry on the application of the absurd result principle, and have carefully reviewed the contents of the records in light of this principle. In previous orders, the absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451, M-613]



- the requester was present when the information was provided to the institution [Order P-1414]
- the information was clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755].

None of these situations are present in the current appeal and I agree with the position taken by the Ministry. On the face of the records and based on the evidence before me, other than the appellant's own personal information to which she has already been granted access, it is difficult to discern what information would have clearly been within the appellant's knowledge or otherwise known to her. I am, therefore, unable to distinguish between information that is within the knowledge of the appellant and information that is not. One of the primary purposes of the *Act* is the protection of the privacy of individuals. Regardless of the compelling nature of the appellant's reasons for seeking this personal information, I am cognizant of the privacy protection provisions in the *Act* and must consider them when making a determination such as this. As I am unable to categorically determine what information may be within the knowledge of the appellant, I am unable to apply the absurd result principle in the circumstances of this appeal.

#### **EXERCISE OF DISCRETION**

With respect to those records which contain the personal information of the appellant, I must now determine whether the Ministry properly exercised its discretion under section 49(b) to withhold the information at issue in those records.

Turning to the balancing of interests under section 49(b), as discussed above, the section 49(b) exemption is discretionary and permits the Ministry to disclose information despite the fact that it could be withheld. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so [Orders PO-2129-F and MO-1629].

In support of its decision not to exercise its discretion in favour of disclosing the contents of the records to the appellant, the Ministry submits:

The Ministry is mindful of the major purposes and objects of the *FIPPA*. The Ministry considers each request for access to information on an individual, case-by-case basis.

...

The Ministry carefully weighed the appellant[s] right of access to records that contain her personal information against the rights to privacy protection of other individuals. Given the highly sensitive nature of the responsive records, the

Ministry was satisfied that release of additional information would cause personal distress to these other individuals. The Ministry was also satisfied that the personal information remaining at issue is subject to the presumption contained in section 21(3)(b) for information compiled and identifiable as part of an investigation into a possible violation of law.

...

In [its] exercise of discretion, the Ministry carefully considered the potential benefit to the appellant should the exempted information be disclosed in response to her request. The Ministry considered the fact that the appellant would appear to have a sympathetic or compelling need to obtain access to information concerning the OPP investigation into the circumstances of her daughter's death. The Ministry has provided the appellant with partial access to the requested record[s].

The Ministry claims discretionary exemptions from disclosure only as necessary. The historic practice of the Ministry when responding to personal information requests for police records is to release as much information as possible in the circumstances. The Ministry claims discretionary exemptions from disclosure relating to sensitive police records only as necessary. In this particular instance, the Ministry provided the appellant with partial access to the requested record[s].

The Ministry ultimately came to the conclusion in its exercise of discretion that the release of additional information in the circumstances of the appellant's request was not appropriate.

I have carefully considered the representations of the Ministry and the appellant's reasons for seeking access, as well as the contents of the records. I find that the Ministry has properly exercised its discretion under section 49(b) not to disclose those portions of the records which contain the personal information of the appellant and other identifiable individuals, in accordance with the requirements of the *Act*. I find nothing in the manner in which the Ministry exercised its discretion that would warrant my sending the matter back for a re-exercise of discretion. I therefore uphold the Ministry's exercise of discretion in this case.

In summary, I have found that all of the withheld information is exempt under sections 21(1) or 49(b) of the *Act*. Because of the manner in which I have addressed the application of sections 21(1) and 49(b) to the records, it is not necessary for me to also consider whether they qualify for exemption under sections 49(a), 14(2)(a) and/or 19.

## CONCLUSION

I understand the appellant's desire to know more details surrounding her daughter's death, and realize that she will be disappointed that she is not entitled to access to her daughter's personal

information under the *Act*. 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:

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.

Pending the implementation of proposed changes to the *Act* found in Bill 190, which is currently before the Ontario Legislature, I too am bound to interpret the provisions as they now stand.

**ORDER:**

I uphold the Ministry's decision to deny access to the records.

Original Signed By: \_\_\_\_\_

May 26, 2006

Donald Hale  
Adjudicator