



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2516

Appeal PA-050002-1

Ministry of the Attorney General



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NATURE OF THE APPEAL:

The requesters are the parents of a man who died in the presence of four Toronto Police Service officers. They submitted a request to the Ministry of the Attorney General (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to their son's death. Specifically, the requesters sought the following information:

[T]he full SIU [Special Investigations Unit] REPORT as well as THE FINAL DECISION of a Crown Attorney regarding the death of [an identified individual].

I am also requesting a COPY of all the supporting documentation such as:

1. pictures of the left and right wounds on [identified individual's] head
2. names and statements of 'WITNESSES'
3. ballistic report which contains information about the bullet which should have been retrieved from scene and should contain the rifle grooves which correspond the alleged gun
4. toxicology report
5. [named individual's] clothes
6. fingerprints obtained from the alleged gun

and all other the fact that you might have and will help us to understand on which grounds you have made your decision.

The Ministry located records responsive to the request and granted partial access to them. Access was denied to some records or portions of the records pursuant to section 14(2)(a) (law enforcement report) and section 21(1) (invasion of privacy) in conjunction with section 21(3)(b) (information compiled as part of a law enforcement investigation).

The requesters' lawyer appealed the Ministry's decision on behalf of the requesters (now the appellants). For ease of reference I will refer to all actions taken by the lawyer as those of the appellants. In the letter of appeal, the appellants clarified the information sought as follows:

- The written or audio transcribed statements of the attending Toronto Police Services members.
- The statement(s) of an identified individual and any other independent witnesses who heard or saw the incident.
- The origin or circumstances of how the appellants' son came into possession of what has been described as a "Glock 9mm handgun".

At the beginning of the mediation stage of the appeal process, the appellants contacted the mediator and requested that the file be placed on hold pending the outcome of negotiations with the SIU to receive relevant information outside of the *Act*. Accordingly, the appeal file was placed on hold while the appellants had an opportunity to receive and review records through this alternative access process.

The appellants subsequently advised the mediator that upon review of the information provided to them by the SIU, there remained additional information that they wished to pursue through the Freedom of Information process. The appellants narrowed the request, identifying the records that were to remain at issue in this appeal as follows:

- The four subject officer's statements to the SIU
- The four subject officer's statements to their own police force if they were amongst records at issue in this appeal
- Police officers' notes of the four subject officers

During the mediation process, the mediator advised the appellants that the records did not contain statements made by the four subject officer's to their own police force. The appellants indicated that they would not pursue this type of record in this appeal.

The mediator told the appellants that among the relevant records provided to the Commissioner's office there appeared to be police officer's notes of three subject officers, written statements from two subject officers, and the audio statements of the four subject officers. The appellants indicated that they were satisfied to narrow the records in this appeal to those records.

Also during mediation, the Ministry advised the mediator that it had contacted all four police officers to obtain their consent to disclose the information related to them and that all four officers refused to give their consent.

As no further mediation was possible, the file was forwarded to adjudication.

Upon her review of the appeal file, the adjudicator initially assigned to the file observed that since the requesters are the parents of the deceased person whose information is at issue, section 66(a) might apply in the circumstances of this appeal. Under section 66(a), if the requester meets the requirements of this section, then he/she is entitled to have the same right of access to the personal information of the deceased as the deceased would have had; and the request will be treated as having coming from the deceased himself. Accordingly, she added section 66(a) as an issue in this appeal.

The previous adjudicator decided to first seek representations from the appellants on the application of section 66(a) only. The appellants responded with representations with respect to the application of section 66(a), in which they advised that section 66(a) has no application in the circumstances of this appeal.

The previous adjudicator then sent a copy of the Notice of Inquiry, modified to remove section 66(a) as an issue, to the Ministry. She also sent a copy of this Notice of Inquiry to the four police officers, seeking their representations regarding the disclosure of their police notes and/or statements. The four police officers collectively provided one set of representations prepared on their behalf by their lawyer. The Ministry also provided representations in response.

After reviewing the representations of the Ministry and the four police officers, the previous adjudicator sought representations from the appellants, and attached a copy of the Ministry's representations, in their entirety, and the non-confidential portions of the representations of the four police officers to the Notice of Inquiry that was sent to their lawyer. The appellants submitted representations in response. In their representations, the appellants raised, for the first time, the possible application of the public interest override in section 23. The previous adjudicator did not seek reply submissions from the Ministry and the four police officers regarding the possible application of this section.

The file was subsequently transferred to me. During the intervening time between the receipt of submissions until the file was transferred to me, the *Act* was amended to provide for a limitation to the section 21 exemption in cases where family members are seeking information about a deceased relative (section 21(4)(d)). Since this request was made prior to the enactment of this section, it does not apply in the circumstances. Nevertheless, I asked an adjudication review officer to contact the Ministry to determine whether it would amend its decision in this matter. The Ministry responded that after reviewing the circumstances, it determined that there was no basis for a change in its position.

RECORDS:

The records that remain at issue are four audio tapes of interviews conducted with the four subject police officers, two SIU two-page follow up reports related to two of the subject officers, and the police officer's notes taken by three of the subject officers. I have detailed these records in the table below:

Record Number	Description	Ministry ID#	Number of pages
1	Audio tape of police officer #1 statement	140	N/A
2	Audio tape of police officer #2 statement	141	N/A
3	Audio tape of police officer #3 statement	142	N/A
4	Audio tape of police officer #4 statement	145	N/A
5	SIU follow up report related to police officer #3	Pgs 000099 to 000100	2
6	SIU follow up report related to police officer #1	Pgs 000101 to 000103	3
7	Fax cover sheet to SIU attaching police officer notes for police officers #4, #3, and #1	Pgs 000227 to 000250	24

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:

The police officers' notes (Record 7) relate directly to the incident in which the appellants' son died. They contain information about him that meets the definition of "personal information" in section 2(1), including his name, information about his actions and the views and opinions of others about him. The audiotapes (Records 1-4) and SIU follow-up reports (Records 5-6) also describe the deceased person and his activities at the time of the incident. Accordingly, I find that all of the records at issue contain the personal information of the appellants' deceased son.

In addition, many of the records also contain the personal information of other identifiable individuals who witnessed the events involving the deceased person. This information qualifies as the personal information of these individuals as it includes their names, along with other personal information about their activities on the night in question.

The Ministry and the four subject police officers submit that the records also contain the personal information of the police officers who were the subject of the SIU investigation. The Ministry argues that because the information pertains to an examination of the conduct of the officers, it falls within the ambit of the definition of personal information as it relates to the officers in their personal, rather than their professional, capacities. The appellants take the contrary position, arguing that the information in the records only relates to the subject police officers in their professional, and not their personal, capacity. They submit that the police officers were issued with notebooks and trained to record and report their observations and conduct and that this is a public duty that has nothing to do with their personal identities or opinions. As a result, they submit that the information does not qualify as the "personal information" of the police officers within the meaning of section 2(1).

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Nevertheless, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R- 980015, PO-2225].

The SIU is established by section 113 of the *Police Services Act* and is charged with the investigation of "... the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers" (section 113(5)). The Ministry states that, in the

event of such an incident, SIU investigators are dispatched to conduct an independent investigation into the incident with a view to determining whether any police officer may have committed a criminal offence in the circumstances. When the investigation is complete, a comprehensive brief is submitted to the Director for review and determination. The Director, if reasonable grounds exist to do so, may cause informations to be laid against police officers in connection with the matters investigated and would refer such informations to the Crown Attorney for prosecution. The Director is required to provide a report of the results of the investigation to the Attorney General (section 113(8)).

In my view, because the information in the records was created for the purpose of or used as part of an examination into the conduct of the subject officers, it has taken on a different, more personal quality. As such, I find that its disclosure would reveal something personal about the individual officers, specifically whether their conduct in dealing with the deceased person was appropriate. Therefore, I find that those records which include an examination of the manner in which the subject officers conducted themselves also contain the personal information of those officers within the meaning of paragraph (h) of the definition of that term in section 2(1). This includes the audiotapes which contain the interviews of the subject officers by the SIU investigators and the SIU investigators' reports based on those interviews. It also includes the police officers' notes made following the incident, which in isolation, would appear to have been made in the officers' official capacity. However, I find that the nature of these documents changed character at the time that they were collected and used in the context of the SIU investigation.

None of the records at issue contain the appellants' personal information.

INVASION OF PRIVACY

Under section 21(1), where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an "unjustified invasion of privacy". Sections 21(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met.

Section 21(2) provides some criteria for the head 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 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 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767], though it 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 21 exemption. (See Order PO-1764)

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 all other considerations that are relevant in the circumstances of the case.

Representations of the parties

The Ministry and the four police officers submit that the disclosure of the personal information contained in the records would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b), which reads:

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 that the personal information was compiled and clearly is identifiable as "part of an investigation into a possible violation of law", particularly the *Criminal Code*. The Ministry argues that the SIU (as described above) is a law enforcement agency which conducts, as in this case, criminal investigations surrounding the circumstances of incidents in order to determine whether there are reasonable grounds to believe a criminal offence has been committed by the involved officers, and to lay criminal charges in cases where such evidence is found to exist. The Ministry notes further that the application of section 21(3)(b) is not dependent upon whether charges are actually laid (see: Order P-1849, for example). As a result, the Ministry argues that the disclosure of the records at issue in this appeal would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b).

The appellants argue that because the records do not contain "personal information" as defined by section 2(1), their disclosure cannot constitute an unjustified invasion of personal privacy under section 21(1).

Findings

Many previous orders have found that the presumption in section 21(3)(b) applies to records containing personal information that were compiled by the SIU in the course of an investigation (Orders PO-2414, PO-1849, PO-1959 and P-1315, for example). In my view, the reasoning in these orders is similarly applicable to the facts in this case and I adopt it for the purposes of this appeal.

Based on the submissions of the Ministry and the four police officers, and my review of the records, I find that the personal information contained in them was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Criminal Code*. The fact that no criminal proceedings were commenced thereafter has no bearing on the issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849). Therefore, I find that because the section 21(3)(b) presumption applies, the disclosure of the personal information in the records is presumed to constitute an unjustified invasion of personal privacy.

PUBLIC INTEREST IN DISCLOSURE

The appellants take the position that the "public interest override" provision in section 23 of the *Act* applies to those records that I have found to be exempt under section 21(1).

General principles

Section 23 states:

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.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, and P-1439]. However, where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in non-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- * the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]
- * the integrity of the criminal justice system has been called into question [Order P-1779]
- * public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]
- * disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]
- * the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found not to exist where, for example:

- * another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
- * a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- * a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]
- * there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The appellants argue that there exists a compelling public interest in the disclosure of the information contained in the records as follows:

- a) The Toronto Police Service made public disclosure to the news media and detailed the circumstances. The identity of the victim was disclosed by the police and the public was left to believe, as in the police version, that the cause of death was suicide.

- b) The intricate details of how the appellant's son died remain undisclosed and unresolved. Instead of a candid and forthright disclosure of what happened, the police have chosen to secret their conduct from grieving parents. It is in the public interest to have the facts of this situation released. The criteria must be given a broad interpretation to include situations such as the one with which these parents are faced.

- c) In the absence of disclosure, the public and parents, are entitled to speculate:
 - i) Did the police shoot the deceased?

 - ii) Why are the police so sensitive about a seemingly routine incident? The police routinely testify in court and give media interviews about tragic events. What is so special or indifferent about this situation?

 - iii) This opposition by the police, in itself, creates suspicion. Police accountability in a free and democratic society is necessary to preserve public confidence in the administration of justice. As it stands now we have a death in circumstances of secrecy. The right to know far outweighs an administrative inconvenience to the police.

Although not specifically addressing the application of section 23 in the circumstances, the Ministry has made representations as to its policy reasons for the non-disclosure of the personal information contained in the records. Among other things, it states that it is necessary that an investigative law enforcement agency be able to protect personal information compiled in the course of an investigation into potentially criminal conduct. It states further that, central in any such investigation is the willingness of witnesses to come forward and provide information that they may have which is relevant to an investigation. This type of information, particularly in the context of a criminal investigation involving potential criminal liability on the part of police officers, is often of a very sensitive nature whose provision is only forthcoming where confidentiality can be assured.

The Ministry submits that the concern is shared equally between police officers and civilians. It states that in respect of the former, it should be noted that pursuant to section 113(9) of the Police Services Act, all members of police forces are required to cooperate fully with the SIU in the conduct of a SIU investigation. In order to ensure that cooperation from police officers in the course of SIU investigations continues to be fostered, it is necessary, it is submitted, that police officers retain a measure of confidence that their cooperation with the SIU, in the form of information they provide, will remain confidential and will not be disclosed to third parties.

The Ministry attached a pamphlet to its submissions regarding the SIU. According to this document:

The SIU strives to maintain community confidence in Ontario's police services by assuring the public that the actions of the police are subject to independent investigations.

We are completely independent of the police and have an arms-length relationship with the government. This means that although the SIU Director reports to the Attorney General, the decision-making on cases and our day-to-day activities are independent of the government.

Although insinuating that there might be more behind the death of the appellants' son than was disclosed to them, the appellants have not raised any serious allegations of wrongdoing by the police or cover-up by the police or the SIU. The integrity of the criminal justice system in this case has not been called into question *via* the appellants' submissions. The Ministry's evidence supports a conclusion that there is a public interest in non-disclosure of the personal information of the police officers, as it is in the public interest to provide an environment in which the SIU, an independent oversight body, can conduct its investigations into the actions of the police in the conduct of their duties. I am also mindful that the appellants have received some information relating to the death of their son to help them deal with their loss and are, therefore, not completely in the dark about the circumstances surrounding these events.

Based on my review of the contents of the records, and the parties' submissions, I cannot agree that there exists any compelling public interest in their disclosure. I find that the records are being sought by the appellant for a primarily private reason, that is, to help them understand how and why their son died. Accordingly, in my view, there does not exist any public interest, compelling or otherwise, in their disclosure. As a result, I find that section 23 has no application in the present appeal.

Accordingly, the records are exempt from disclosure under the mandatory exemption in section 21(1) of the *Act*.

ORDER:

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

Original signed by: _____
Laurel Cropley
Adjudicator

October 30, 2006 _____

POSTSCRIPT:

The recent amendment to the *Act* in section 21(4)(d) was intended to provide grieving family members with access to the personal information of their deceased close relatives for compassionate reasons. In appealing the Ministry's decision, the appellants stressed that this request was made by the grieving parents of a young man who died in the presence of the police, to help them understand how he died. In this case, the very information relating to the last moments of his life that may help them understand how and perhaps why he died is exempt under section 21. As I noted above, the exception in section 21(4)(d) has no application in the circumstances of this appeal as the request was made prior to its enactment. Although the Ministry has indicated an unwillingness to review its decision with respect to this request, the appellants may wish to pursue another request to the Ministry and/or the Toronto Police Service and explain their views about compassionate grounds for disclosure under section 21(4)(d). I would strongly encourage the Ministry to take into consideration the mischief this new provision was intended to address and to give it a liberal interpretation in responding to any future requests for records which pertain to the circumstances surrounding the appellants' son's death.