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

ORDER PO-2805

Appeal PA08-254

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* for access to toxicology reports pertaining to four named individuals who died in a construction accident. Specifically, the request read:

> On [identified date] there was a construction accident on the St. Catharine's Garden City Skyway, when the scaffold collapsed due to worker error. On the advice of the Ombudsman of Ontario's Office, I am asking for the Toxicology Reports for: [four named individuals]. You may release my name, address and phone number to their families with my request.

The Ministry located the four toxicology reports and denied access to them pursuant to the mandatory exemption in section 21(1) (personal privacy), relying on the factor in section 21(2)(f), and the presumptions at sections 21(3)(a) and 21(3)(b), of the *Act*.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the appellant confirmed that she believes there is a compelling public interest in the disclosure of the records. Accordingly, the possible application of the public interest override provision at section 23 of the *Act* was added as an issue in this appeal.

As no further mediation was possible, the file was transferred to the adjudication stage of the appeal process for an inquiry.

I began my inquiry by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the Ministry, initially. The Ministry responded with representations.

I then sent a Notice of Inquiry, together with a complete copy of the Ministry's representations, to the appellant. The appellant provided representations in response.

RECORDS:

The records at issue contain four, 2-page, toxicology reports prepared by the Ministry of the Attorney General's Centre for Forensic Sciences.

DISCUSSION:

SCOPE OF THE REQUEST

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,

> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

Following my receipt of her representations, the appellant contacted this office to advise that she wishes to expand the scope of her request. She advised that rather than seeking access to the toxicology reports of the four individuals originally identified, she seeks access to the toxicology reports of a total of eleven individuals. Subsequently, she sent a letter requesting that two paragraphs of her previously submitted representations, which referred to the four construction workers who died, be replaced with paragraphs which referred to eleven construction workers.

Having reviewed a copy of the original request submitted to the Ministry by the appellant, I find that it clearly identifies that she seeks access only to the toxicology reports of four named individuals who died as a result of an accident on a specified date. Additionally, in the Mediator's Report which was prepared at the close of the mediation stage of the appeal process, the request is described as being for access to the toxicology reports pertaining to four named individuals who died in a specific construction accident. Also in the Mediator's Report, the responsive records are described as "four toxicology reports." Prior to the issuance of the Mediator's Report, the appellant was provided with an opportunity to review it and to advise the mediator of any errors or omissions. At no time did the appellant advise that she was seeking toxicology reports for more than four individuals.

Accordingly, I find that the scope of the appellant's request is clear. The records to which she sought access through her original request were the toxicology of four named individuals. Should she wish to pursue access to any toxicology reports that relate to additional construction workers who may have been present at the time of the accident, the appellant must submit another request under the *Act*.

PERSONAL INFORMATION

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 where 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.)].

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], but 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].

Representations

The Ministry submits that the toxicology reports contain the types of personal information listed in paragraphs (a), (b), (c), and (h) of the definition listed in section 2(1) of the *Act*. The Ministry also submits that given that the four individuals to whom the information relates have been deceased for less than thirty years, the information contained in the records continues to qualify as their personal information.

In her representations, the appellant makes no specific submissions on whether the information contained in the toxicology reports qualifies as personal information but she does state that the personal identities of the individuals to whom the information relates "are not secretive." She states that "all of this information has been previously published in newspaper articles and still appears in articles on the internet." In support of her position she enclosed a number of newspaper and internet articles with her representations. The appellant also advises that she does not seek access to individuals' names and personal information and this information can be severed from the records.

Analysis and finding

Having reviewed the records at issue, I find that they contain the personal information of the four individuals who died in the construction accident identified in the request. In particular, I find that the records include information relating to the medical history of these individuals (paragraph (b)) as well as their names, together with other personal information (paragraph (h)).

I understand that the appellant is content to have any personal information severed from the records. However, since information has been published about the individuals to whom the information relates, in my view, the disclosure of any of the information contained in the records amounts to disclosure of personal information about the four deceased individuals. Therefore, I find that all of the information in the records at issue qualifies as personal information within the meaning of the definition in section 2(1) of the *Act*.

I also find that none of the records contain the personal information of the appellant.

PERSONAL PRIVACY

Under section 21(1), where a record contains the personal information 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 section 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* of if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the records 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.

The Ministry relies on the presumed unjustified invasion of personal privacy in section 21(3)(a) of the *Act* 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;

Representations

The Ministry submits:

> [T]he requested toxicology reports in the entirety contain medical information relating to the four deceased individuals. The Ministry submits that a number of earlier IPC orders have concluded that records regarding the post-mortem forensic tests of a deceased individual's blood and urine relate to the medical condition of the deceased person at the time of his or her death (P-362, P-412 , P-482, P-945. P-1121, MO-1918, MO-1722, MO-1789). The Ministry submits that the conclusions reached in these earlier orders are applicable in the circumstances of the appellant's access request and the disclosure of the requested toxicology reports would constitute an unjustified invasion of the personal privacy of the deceased individuals.

The appellant does not make any specific representations on whether the disclosure of the information contained in the toxicology reports would amount to a presumed unjustified invasion of personal privacy. However, she does submit that the results of the toxicology reports are not secretive and that they have been presented and discussed at a Coroner's Inquest.

Analysis and finding

Having reviewed the record, I find that the personal information at issue in the toxicology reports consists of medical information belonging to the deceased which falls within the presumption at section 21(3)(a) of the *Act*. This is in keeping with the findings of a number of prior orders of this office which have found that disclosure of toxicology results is a presumed unjustified invasion of personal privacy under section 21(3)(a) [see, for example, Orders M-818, MO-1722, P-1121, MO-1918].

As I have found that section 21(3)(a) applies and, as noted above, it cannot be rebutted by factors in section 21(2), it is not necessary for me to determine whether any of the factors in section 21(2) apply. Additionally, in the circumstances of this appeal, I find that none of the limitations in section 21(4) apply. As the appellant has raised the possible application of the public interest override at section 23 of the Act, I will go on to determine whether or not that section applies to rebut the presumption at section 21(3)(a) and override the application of the exemption at section 21(1). First, however, I will determine whether the absurd result principle applies in the circumstances of this appeal.

ABSURD RESULT

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 21(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Order M-444, MO-1323}.

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];

- the requester was present when the information was provided to the institution [Orders M-444, P-1414];

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

As noted above, the appellant submits that the information that is contained in the records is public knowledge because it appears in newspaper articles that can still be accessed on the internet.

I have reviewed the newspaper and internet articles provided by the appellant to support her position and while they do discuss the accident and name the four individual who died, none of the articles reveal the specific information that appears in the toxicology reports. Given these circumstances, I find that the absurd result principle does not apply to the personal information in these records.

PUBLIC INTEREST OVERRIDE

As noted above, the appellant submits that the public interest override provision in section 23 applies in the circumstances of this appeal.

Section 23 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 *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act* are to be "read in" as exemptions that may be overridden by section 23 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

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 [Order P-1396, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.)].

In considering whether there is a "public interest" in the 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, P-1439]. 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].

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, P-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].

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balancing exercise is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398].

Representations

The appellant submits that there is a compelling public interest in disclosing the toxicology reports. She submits that she is requesting copies of the toxicology reports to pass on to her lawyer for further action.

The appellant also submits that the results in the reports have been presented and discussed in a Coroner's Inquest which she states was "hosted before the cause of the accident was determined by expert structural engineers." She submits:

> Because then [named coroner] rushed into an Inquest without waiting to know the cause of the accident, she was unable to bring about important safety measure for alcohol and substances abuse prevention in the construction workplace. Had she waited until all engineering litigation was complete, she would have learned "worker error" caused the accident, and not the engineering scaffolding design, which was used for the first time in Ontario. She would have learned the findings in the toxicology reports are what caused "worker error" in this tragic accident of June 8, 1993.

The appellant further submits:

> Not only do workers using alcohol and drugs put themselves at risk, they also put all members on their team at risk, as happened on June 8, 1993. They also put members of the public on the ground below the bridge at risk. Their judgment up high on engineered scaffolding platforms needs to be focused. Would one drive a car under the influence of alcohol and/or drugs? Would one move a complex engineered scaffolding platform to a new location, with fellow team members on it? Would one remember to apply emergency brakes or follow documented equipment procedures when operating in such a state?
>
> Zero tolerance for alcohol and substance abuse must not only be accepted, but it must also be mandated and monitored on all Ontario construction sties by Ministry of Labour and WSIB [Workplace Safety and Insurance Board].
>
> When there is a construction accident or "near miss", all construction workers and workers on the teams must immediately submit to mandatory blood and urine testing of alcohol and substance abuse…The province of British Columbia has led the way with Construction Worker Safety legislation that must be replicated not only in Ontario, but in all Canadian provinces.
>
> These were the lessons learned and lost by Ontario in the June 8, 1993 Garden City Skyway scaffolding collapse accident. These are the recommendations that should have been achieved by this mandatory construction Coroner's Inquest. These are the changes required to save lives that may also have prevented the Nov. 2000 Ambassador bridge accident, and the Nov. 2007 Amberley bridge accident.
>
> In summary, I feel the above information is substantive enough to release the toxicology reports as requested, with names blacked out. In these times we live in today, we must make every effort possible to protect the well being of all those involved in jobs that are considered dangerous. We must act proactively and put into law mandatory alcohol and drug testing for all construction workers involved in an accident or "near miss" situation, for the safety of all, including the public.

The Ministry submits that there is no compelling public interest in the disclosure of any of the information contained in the records and, therefore, that section 23 has no application in the circumstances of this appeal. Specifically, it submits:

> The Ministry acknowledges that there is a general public interest in regards to public safety matters arising in the circumstances of construction accidents. However, the Ministry does not believe that release of the requested toxicology reports will have significant implications for the broader public safety.

> The *Coroners Act* recognizes the balance that exists between the need to protect personal privacy, and the need that society has to know why someone died. As examples of the need for openness and transparency, coroner's inquests are almost always open to the public except in unusual circumstances such as where national security is threatened.
>
> The Ministry submits that the public interest in relation to the construction accident on June 8, 1993, that resulted in the death of the four individuals was addressed through the mandatory coroner's inquest that was held between October 2, 1995, and November 6, 1995, pursuant to section 10(5) of the *Coroners Act*.

The Ministry also cites Order P-1121 in support of its position that section 23 does not apply. In Order P-1121, former Assistant Commissioner Tom Mitchinson found that the appellant failed to establish a compelling public interest in the disclosure of post-mortem forensic test results which would clearly outweigh the purpose of the mandatory personal information exemption at section 21(1).

Analysis and findings

In Order MO-1722 Adjudicator Donald Hale found that there did not exist a compelling public interest in the disclosure of records including information detailing the results of a deceased individual's toxicology tests and his blood alcohol reading. In that order, referring to section 16, the municipal equivalent of section 23 of the provincial *Act*, Adjudicator Hale stated:

> The circumstances surrounding the accident to which the records at issue are related are very compelling and were of great interest not only in the community where it occurred but also throughout Ontario. However, I am of the view that the disclosure of the information contained in the records would not serve the purpose of informing the public about the activities of the Police or the government. The public interest in this case revolves around the need to know more about the tragic circumstances which led to the accident and the loss of four young lives. In my view, there is no public interest, compelling or otherwise, in disclosure that would serve the purposes envisioned by section16. As a result, I find that section has no application to the records under consideration.

More recently, in Order MO-1918, Assistant Commissioner Brian Beamish applied Adjudicator Hale's reasoning and also found that there was no compelling public interest in releasing toxicology results of the victim of a fatal motor vehicle accident.

In my view, the reasoning applied by Adjudicator Hale in Order MO-1722 and subsequently followed by Assistant Commissioner Beamish in Order MO-1918, is equally applicable in the circumstances of the current appeal. I accept the appellant's position that alcohol and substance abuse must be monitored on construction sites because not doing so puts construction workers and the general public at risk. However, I find that disclosure of the specific information in the

records at issue in this appeal would not advance the public good of reducing substance abuse on construction sites, or serve the purpose of informing the public of the activities of government. Additionally, in my view, the submissions provided by the appellant speak to a private as opposed to a public interest. In particular, in her submissions she acknowledges that she seeks access to the information to pass on to her lawyer for a related civil action. As a result, I am unable to conclude that there is a public interest, compelling or otherwise, in the disclosure of the specific information at issue.

Moreover, even if a compelling public interest in the disclosure of the information were to exist, for the section 23 override provision to apply, that compelling public interest must be shown to clearly outweigh the purpose of the exemption claim. In this case, the purpose of the exemption at section 21(1) is the protection of the privacy of individuals. This reflects one of the two key purposes of the *Act*: to protect the privacy of individuals with respect to personal information about themselves held by institutions. In my opinion, the personal interests of the appellant in this case do not outweigh the privacy interests of the deceased individuals whose personal information is contained in the records.

Accordingly, I am not satisfied that there exists a compelling public interest in the disclosure of the personal information in the records that would outweigh the purpose of section 21(1) of the *Act*. Therefore, I find that the "public interest override" at section 23 does not apply in these circumstances and the mandatory exemption at section 21(1) of the *Act* applies to exempt the information at issue from disclosure.

ORDER:

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

Original Signed by: July 14, 2009
Catherine Corban
Adjudicator