



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2821**

## **Appeal PA08-135**

### **Ministry of the Attorney General**



Tribunal Services Department  
2 Bloor Street East  
Suite 1400  
Toronto, Ontario  
Canada M4W 1A8

Services de tribunal administratif  
2, rue Bloor Est  
Bureau 1400  
Toronto (Ontario)  
Canada M4W 1A8

Tel: 416-326-3333  
1-800-387-0073  
Fax/Téloc: 416-325-9188  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The Ministry of the Attorney General (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for a copy of all police and Special Investigations Unit (SIU) records pertaining to the death of the requester's son, who died in the course of a hostage taking incident. The requester advised the Ministry that she had been appointed as Liquidator of the deceased's Estate. The requester stated that a copy of the Declaration of Heirship and Designation of Liquidator had already been provided to the Ministry.

The Ministry issued a decision advising that partial access was granted to the records. The Ministry further advised that access was denied to the remaining portions of the records, which consisted of SIU Director's reports, correspondence, internal e-mails, police documents and investigator's notes, pursuant to the discretionary exemption in section 14(2)(a) (law enforcement) and the mandatory exemption in section 21(1) (personal privacy), with reliance on the presumption in section 21(3)(b) of the *Act*.

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

During mediation, the appellant clarified that she was pursuing access to the records containing the statements and interview notes of the woman held hostage and the hostage negotiator only, as they were the last persons to be in contact with her son. The appellant is not seeking access to any other withheld documents. The appellant states that this information is requested for compassionate reasons, as contemplated by section 21(4)(d) of the *Act*.

The appellant also confirmed during mediation that she is not seeking access to the name, address or telephone number of the hostage. In addition, the appellant advised that the records are not required for the administration of her son's estate, and that section 66(a) of the *Act* is not at issue in this appeal.

No further mediation was possible and the matter moved to adjudication in which an adjudicator conducts an inquiry under the *Act*. This office initially sought and received written representations from the Ministry and one of the affected parties, the Police hostage negotiator, who declined to submit representations. This office then sent the non-confidential portions of the Ministry's representations to the appellant and invited her to provide representations. The appellant also made submissions in response to the Notice of Inquiry. The appeal was subsequently assigned to me.

## **RECORDS:**

The records at issue consist of the withheld statements and interview notes of the woman held hostage and of the hostage negotiator, along with two audio-tapes of these interviews.

## **DISCUSSION:**

### **BACKGROUND**

The SIU is described on the Ministry's website, as follows:

The SIU is a civilian law enforcement agency, independent of the police, that investigates circumstances involving police and civilians which have resulted in serious injury, including sexual assault, or death. Part VII of the *Police Services Act* creates the SIU and defines its powers.

The SIU is independent of any police service. The Unit reports to the Attorney General, however the SIU's investigations and decisions are also independent of the government. The Director of the SIU is empowered under the *Police Services Act* with causing criminal charges to be laid against police officers where warranted on the basis of the evidence gathered during an investigation.

### **LAW ENFORCEMENT**

#### **General principles**

The Ministry has claimed the application of section 14(2)(a) to the records. This section states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
- (c) the conduct of proceedings referred to in clause (b)

The term “law enforcement” has been found to apply in the following circumstances:

- a municipality’s investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]
- a children’s aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act, 1997* [Order MO-1337-I]

The term “law enforcement” has been found *not* to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds *Commissioner* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner’s investigation under the *Coroner’s Act* [Order P-1117]
- a Fire Marshal’s investigation into the cause of a fire under the *Fire Protection and Prevention Act, 1997* [Order PO-1833]

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words “could reasonably be expected to”, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

### **Section 14(2)(a): law enforcement report**

The word “report” means “a formal statement or account of the results of the collation and consideration of information”. Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

In order for a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three-part test:

1. the record must be a report; and
2. the report must have been prepared in the course of law enforcement, inspections or investigations; and
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law. (Order 200 and Order P-324).

The Ministry submits that the records at issue in this appeal form part of the SIU investigative brief and are exempt from disclosure pursuant to section 14(2)(a) of the *Act*, as they satisfy all three parts of the test inherent in that section of the *Act*. The Ministry describes the records, as follows:

... The *investigative brief* is essentially a compilation of the information obtained during the course of the investigation of an incident that falls within the SIU's statutory jurisdiction and the steps taken in the discharge of that investigative jurisdiction. The information includes all documentary materials obtained by the SIU from third parties or generated by the SIU (including administrative and other internal forms used to track the progress of the investigation, and working notes/emails/memos of internal deliberations and advice relating to such things as investigation plans, legal advice, privacy considerations, investigative working theories and the Director's analysis of the criminal liability issues), as well as records in the form of audiotapes, videotapes and CDs.

The *investigative brief* in this matter, as in all incidents investigated by the SIU, was reviewed by the Director of the SIU with a view to determining whether there were reasonable grounds to believe that the subject officer had committed a criminal offence in connection with the death in question and, consequently, whether a criminal charge or charges should be laid. Based upon a review of the *investigative brief* and the information contained therein, the Director decided that criminal charges were not warranted in this case.

Although not specifically one of the records in issue in this appeal, it is important to note that the SIU Director's Report to the Attorney General of Ontario was, as in all cases, prepared on the basis of the *investigative brief* together with the SIU Director's analysis of that information and ultimate decision in respect of whether a criminal charge or charges should be laid.

**Part 1: The record must be a report**

The Ministry submits that the records that comprise the investigative brief constitute a "formal statement or account of the results of the collation and consideration of information," and are more than "mere observations or recordings of fact," as they form an integral part of the Director's Report, as described above. Consequently, the Ministry concludes that the information contained in the records constitutes a "report" for purposes of part one of the section 14(2)(a) test.

**Parts 2 and 3: The report must have been prepared in the course of law enforcement, inspections or investigation and the report must have been prepared by an agency which has the function of enforcing and regulating compliance with the law.**

The Ministry submits that:

Section 113 of the [*Police Services Act, PSA*] is the statutory scheme creating the SIU ... It charges the SIU with the investigation of " ... the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers" ... In the event of these occurrences, an independent investigation into the incident is conducted by SIU investigators with a view to determining whether any police officer may have committed a criminal offence in the circumstances. Once all reasonable steps have been taken to gather all of the relevant information surrounding the incident, the information obtained is compiled in final form into an *investigative brief*, which, in turn, is reviewed by the Director in determining whether there exists reasonable grounds to believe that a police officer has committed a criminal offence ... In the event that the Director finds that reasonable grounds exist, he or she causes an information to be laid against the officer or officers and refers the matter to the Crown Attorney for prosecution... Pursuant to ... the *PSA*, the results of the investigation are reported to the Attorney General in the form of the Director's Report to the Attorney General.

The Ministry submits that parts two and three of the test are met, as the SIU's enabling statutory regime, described above, and the creation of the *investigative brief* and the Director's Report establish that the records were created in the course of law enforcement investigations by an agency that has the function of enforcing and regulating compliance with the law.

The appellant did not make representations on this issue.

### **Analysis and Findings**

Previous decisions of this office have addressed the application of section 14(2)(a) to records compiled by the SIU in the course of an investigation undertaken pursuant to section 113 of the *PSA* (Orders P-1315, P-1418, PO-1819, PO-1959 and PO-2414). In Orders PO-1959 and PO-2414, it was found that the Director's Reports to the Attorney General, the cover letter to that document and other investigative documents that consist of "a formal statement of the results of the collation and consideration of information," qualify for exemption under section 14(2)(a).

In Order PO-1959, Adjudicator Sherry Liang considered the Ministry's position in that appeal that the entire SIU file should be considered to qualify as a "report" for the purposes of section 14(2)(a). The Ministry makes the same argument in this appeal. In addressing that issue, Adjudicator Liang wrote:

Essentially, the Ministry's submission is that all of the records must be considered together for the purposes of the application of section 14(2)(a). I am unable to accept this submission, and I find that section 14(2)(a) requires consideration of whether *each* record at issue falls within that exemption. The Ministry has enclosed copies of two prior orders of this office in support of its position. In Order P-1315, it appears that a group of records described as the SIU's final investigative report, and which included witness statements, expert reports, summaries of forensic testing and other evidence gathered in the course of the police investigation into an accident, was considered as one record and found as a whole to constitute a "report" for the purposes of section 14(2)(a). A similar approach was applied in Order P-1418. More recently, however, in PO-1819, section 14(2)(a) was applied to each record which formed part of the SIU investigation file.

On my reading of these orders, it is clear that even in P-1315, there were a large number of records in the SIU investigation file which were considered separately by the adjudicator for the purposes of section 14(2)(a). Some of these records, such as interview notes, a motor vehicle accident report and vehicle examination and damage report, are similar to those before me which the Ministry asserts form part of an overall SIU 'investigation brief'.

Order P-1418 is less easily reconciled with Order PO-1819, and with the approach I have taken in this order. I am satisfied that, if there is any inconsistency between the approaches in some of the orders in this area, the analysis in PO-1819 is more in keeping with the intent of this section of the *Act*. Although I find that Record 2 (the Report of the Director) meets the requirements of section 14(2)(a), it does not follow that all the material which may have been gathered together, placed before and considered by the Director before arriving at his conclusions is

also exempt, without further analysis. In this respect, I agree with the appellant that section 14(2)(a) does not provide a 'blanket exemption' covering all records which the Ministry views as constituting part of the SIU's 'investigative brief.'

In the case before me, the SIU investigation file consists of numerous different records from diverse sources. As the representations of the Ministry describe, they are essentially a compilation of information obtained during the course of the SIU's investigation and the steps taken by SIU staff in the discharge of that investigative jurisdiction, and include documentary materials obtained by the SIU or generated by the SIU. The Director's decision is based upon a review of all the records, but his analysis and decision is contained in Record 2 (the Director's Report) alone.

I accept, and it is not seriously disputed by the appellant, that Record 2 qualifies as a "report" for the purposes of section 14(2)(a), in that it consists of a formal statement of the results of the collation and consideration of information. I also find that Record 4, the cover letter to Record 2, qualifies for exemption, as the two records together can reasonably be viewed as forming the report to the Attorney General from the SIU Director.

...

I find that none of the remaining records at issue meet the definition of a "report". To elaborate further on some of these, Records 15, 19, 23 to 27 and 29 to 37 consist of either Sarnia Police Service incident reports, supplementary reports, or excerpts from police officers' notebooks. Generally, occurrence reports and similar records of other police agencies have been found not to meet the definition of "report" under the *Act*, in that they are more in the nature of recordings of fact than formal, evaluative accounts of investigations: see, for instance, Orders PO-1796, P-1618, M-1341, M-1141 and M-1120. In Order M-1109, Assistant Commissioner Tom Mitchinson made the following comments about police occurrence reports:

An occurrence report is a form document routinely completed by police officers as part of the criminal investigation process. This particular Occurrence Report consists primarily of descriptive information provided by the appellant to a police officer about the alleged assault, and does not constitute a "report".

On my review of the incident reports, supplementary reports and police officers' notes at issue in this appeal, I am satisfied that they also do not meet the definition of a "report" under the *Act*, in that they consist of observations and recordings of fact rather than formal, evaluative accounts. The content of these records is descriptive and not evaluative in nature.



I agree with Adjudicator Liang's reasoning and adopt it for the purposes of this appeal.

Applying the reasoning in Order PO-1959 to the records at issue in this appeal, which consist only of the audio tapes and related notes, I conclude that they do not qualify as "reports" within the meaning of section 14(2)(a), as they represent recordings of fact and observations, rather than formal, evaluative accounts of the information contained therein. Accordingly, I find that the records do not qualify for exemption under section 14(2)(a) of the *Act*.

## **PERSONAL INFORMATION**

### **General principles**

The Ministry states that the records at issue are exempt under section 21(1) of the *Act*, as they contain personal information about individuals other than the appellant that were obtained as part of an investigation into a possible violation of law. The Ministry asserts, therefore, that the disclosure of the records would constitute an unjustified invasion of privacy. In order to determine whether section 21(1) 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].

### **The meaning of “about” the individual**

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].

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].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term “personal information” by excluding an individual's name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”. Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

### **The meaning of “identifiable”**

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.)].

The Ministry submits that the records contain personal information within the definition at section 2(1) and that this personal information relates to individuals other than the appellant. Specifically, the Ministry submits that the personal information relates to the deceased, the

woman who was held hostage, the hostage negotiator, other civilian and police witnesses and an officer who was the subject of the SIU Director's Report. I note that the records relating to the subject police officer are not at issue in this appeal.

In particular, the Ministry states that the information qualifies as "personal information" for the purposes of the definition of that term in section 2(1) as it includes information relating to the age and sex of identifiable individuals (paragraph (a) of the definition), their medical and psychological histories (paragraph (b) of the definition), their addresses and telephone numbers (paragraph (d) of the definition), the personal opinions or views of individuals (paragraph (e) of the definition), the views or opinions of one individual about another (paragraph (g) of the definition) and the names of individuals together with other personal information about them (paragraph (h) of the definition).

With respect to past orders of this office, in which, in some circumstances, information associated with a person in his or her professional, official or business capacity was not considered to be "about the individual" within the meaning of definition of personal information in section 2(1), the Ministry submits that the information in the records is not associated with individuals in their "professional or official government capacity."

In support of their position, the Ministry relies on Reconsideration Order R-980015, in which I stated:

In order for an organization, public or private, to give voice to its views on a subject of interest to it, individuals must be given responsibility for speaking on its behalf. I find that the views which these individuals express take place in the context of their employment responsibilities and are not, accordingly, their personal opinions within the definition of personal information contained in section 2(1)(e) of the *Act*. Nor is the information "about" the individual, for the reasons described above. In my view, the individuals expressing the position of an organization, in the context of a public or private organization, act simply as a conduit between the intended recipient of the communication and the organization which they represent. The voice is that of the organization, expressed through its spokesperson, rather than that of the individual delivering the message.

Applying my reasoning, the Ministry submits that the records consist of information provided by witnesses during the course of a law enforcement investigation into a police-related incident, and that the information is inherently of a personal and sensitive nature.

The Ministry states:

For example, the hostage negotiator was not giving voice to her organization when her information was provided to the SIU. Rather, she was expressing her personal recollections, views and opinions with respect to the incident in question. In the language of the passage cited above, this information does not represent the

views or opinions of an organization, be it public or private. It is not associated with the witnesses in their employment or professional capacity. Rather, this information is more appropriately characterized as being associated with individuals in their personal capacity.

The appellant did not make representations on this issue.

### **Analysis and Findings**

As set out earlier, all of the records at issue were compiled and formed part of the SIU investigation of the police's interactions with the appellant's deceased son. I find that all of the records contain information about the appellant's son that meets the definition of "personal information" in paragraphs (a) (age and sex), (c) (telephone number), (g) (the views of other individuals about the appellant's son) and (h) (the appellant's son's name along with other personal information relating to him).

In addition, the records contain the personal information the woman who was held hostage and of other identifiable individuals who were involved with the events surrounding the appellant's son's death. This information qualifies as the personal information of these individuals because it includes information about their age (paragraph (a)), their addresses and telephone numbers (paragraph (c)) or their names along with other personal information about them (paragraph (h)).

The Ministry submits that some records also contain the personal information of the police officer who was the subject of the SIU investigation. I have carefully examined the written material identified as the responsive records and have carefully listened to both of the audiotapes which comprise the records at issue. While a number of police officers, including the officer acting as a hostage negotiator, and the SIU investigators are identified by name, nowhere in these records is there any indication that one or more police officers were the subject to the SIU's investigation. Accordingly, I do not agree that the records contain the personal information of any of the police officers identified in the records. In my view, the activities of the officers whose names appear in the records, including the officer acting as a hostage negotiator, indicate that they were acting strictly in their professional, as opposed to their personal, capacities. In addition, I find that there was nothing inherently personal about the officers included in the records which would take the information from the professional to the personal sphere.

Therefore, upon a careful review of the records at issue, I find that the notes and the audio tapes contain only the "personal information" of the appellant's son, the former girlfriend and other civilians who are identified in the records, as that term is defined in section 2(1) of the *Act*. The information relating to police officers that are included in the records does not constitute their "personal information" for the purposes of the definition in section 2(1).

## **INVASION OF PRIVACY**

### **General principles**

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception is more complex, and requires a consideration of additional parts of section 21.

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21.

### **Section 21(1) – personal privacy**

Where a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. In my view, only the exception in section 21(1)(f) has any possible application in the circumstances of this appeal. Section 21(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

### **Section 21(3) – presumed invasion of privacy**

The Ministry submits that because the records at issue were compiled as part of the SIU investigation into a possible violation of law, in this case the *Criminal Code*, they are subject to the presumption against disclosure in 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.

### **Section 21(4)(d) – compassionate reasons**

The appellant, on the other hand, argues that the exception in section 21(4)(d) applies. This section permits the disclosure of personal information about a deceased individual to the spouse or close relative of the individual where it is desirable for compassionate reasons. Section 21(4)(d) states:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

The terms “close relative” and “spouse” are defined in section 2(1) of the *Act* as follows:

“close relative” means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; (“proche parent”); and

“spouse” means,

- (a) a spouse as defined in section of the *Family Law Act*, or
- (b) either of two persons who live together in a conjugal relationship outside marriage. (“conjoint”)

### **Analysis and Findings**

As previously indicated, section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. 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).

The Ministry also made representations that section 21(3)(b) applies to the personal information contained in the records and states that the:

... SIU is a law enforcement agency which conducts criminal investigations surrounding the circumstances of incidents which fall within its jurisdiction 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.

I accept the Ministry's representations that the personal information contained in the records was collected as part of an investigation into a possible violation of law and agree that the presumption in section 21(3)(b) applies, subject to the discussion of section 21(4)(d) below.

A presumed unjustified invasion of privacy can 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 16 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]. Put slightly differently, section 21(4) creates an exception to the exemption in section 21(1).

The principal issue in this appeal is whether section 21(4)(d) permits the further disclosure of the appellant's son's personal information (which may be co-mingled with the information of other individuals) in the remaining records at issue, namely, the audiotapes of interviews by the SIU investigators with the woman held hostage and the police officer who served as the hostage negotiator, along with certain notes taken at that time. Based on the wording of this provision, a finding that the exception in 21(4)(d) applies to some or all of this personal information means that disclosure of that information would *not* be an unjustified invasion of personal privacy.

The Ministry submits that section 21(4)(d) does not apply because the disclosure of the appellant's son's information would constitute an unjustified invasion of other individuals' privacy, as the personal information of all of these individuals is so comingled and interwoven that severance is not reasonably feasible.

The appellant submits that she is seeking closure regarding the death of her son and is looking to obtain access to information relating to the conversations that occurred during the final hours of her son's life. She submits that she is not seeking this information for any other purpose.

#### **Scope of section 21(4)(d)**

I have found that parts of the records consist of the personal information of the appellant's son, along with that of other identifiable individuals, and that the audio tapes also contain these individuals' voices and mannerisms. I agree with the Ministry that this information is inextricably intertwined in a way that cannot be resolved by severing. As a result, these records raise one of the more difficult aspects of applying section 21(4)(d): the question of how to treat information that is clearly the personal information of the deceased individual, but, at the same time, is also the personal information of another individual or individuals. Assistant Commissioner Brian Beamish has analyzed this issue in previous orders, involving records subject to the *Municipal Freedom of Information and Protection of Privacy Act* [Orders MO-2237, MO-2270, MO-2290, MO-2292, MO-2306, MO-2387].

In Order MO-2237, Assistant Commissioner Beamish analysed section 14(4)(c) of *MFIPPA*, which is the equivalent of section 21(4)(d) of the *Act*, and stated:

The first question to address here is whether the reference to “personal information about a deceased individual” can include information that also qualifies as that of another individual. In my view, this question should be answered in the affirmative. The circumstances of an individual’s death, particularly one that is followed by a police investigation, are likely to involve discussions with other individuals that will entail, to a greater or lesser extent, the collection and recording of those individuals’ personal information. In my view, an interpretation of this section that excludes any information of a deceased individual on the basis that it also qualifies as the personal information of another individual would be inconsistent with the definition of “personal information”, set out above, since the information would clearly qualify as recorded information “about” the deceased individual. It would also frustrate the obvious legislative intent behind section 14(4)(c), of assisting relatives in coming to terms with the death of a loved one.

...

Accordingly, in my view, it is consistent with both the definition of “personal information” in section 2(1) and the legislative purpose behind this section to interpret “personal information about a deceased individual” as including not only personal information solely relating to the deceased, but also information that qualifies as the personal information of not only the deceased, but another individual or individuals as well.

The conclusion that personal information about a deceased individual can include information about other individuals, raises the further question of how the information of those other individuals should be assessed in deciding what to disclose under section 14(4)(c). In my view, assistance is provided in that regard by the legislative text, which permits disclosure that is “in the circumstances, desirable for compassionate reasons.”

Where this is the case, the “circumstances” to be considered would, in my view, include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 14(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 14(4)(c).

As well, the fact that the protection of personal privacy is one of the *Act*’s purposes, articulated in section 1(b), must be considered in assessing whether to disclose information that, in addition to being personal information of the



deceased, also qualifies as the personal information of another individual or individuals.

In my view, the approach taken by Assistant Commissioner Beamish in Order MO-2237 is equally applicable in the case before me, and I will adopt it for purposes of this appeal.

### **Applying section 21(4)(d)**

In Order MO-2237, Assistant Commissioner Beamish articulated a three part test, which must be considered in order for the section to apply, as follows:

In my opinion, the application of section 14(4)(c) [the Municipal equivalent of section 21(4)(d)] requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or “close relative” of the deceased individual?
3. Is disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

I adopt the three-part test for purposes of this appeal.

#### *Step 1 - Personal Information of the Deceased*

I have found, above, that the records contain the personal information of the appellant’s son and other identifiable individuals, and as noted above, this personal information is inextricably intertwined with that of the appellant’s son. Accordingly, severing this information to avoid disclosure of other individuals’ personal information is not practicable. I find that the first requirement for the application of section 21(4)(d) is satisfied.

#### *Step 2 - Spouse or “Close Relative”*

“Close relative” is defined in section 2(1) of the *Act*:

“close relative” means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption;

I am satisfied that the appellant is the parent of the deceased individual whose personal information is contained in the records at issue, and therefore she is a “close relative”. I find that the requirement for the application of section 21(4)(d) is satisfied.

*Step 3 - Desirable for Compassionate Reasons*

With respect to the application of section 21(4)(d) of the *Act*, the Ministry states:

Section 21(4)(d) of the *Act* does not apply to override the presumed unjustified invasion of personal privacy because the records contain the personal information of individuals other than the deceased. To reiterate, these individuals include [the woman held hostage], the hostage negotiator, the subject officer and other police and civilian witnesses. Section 21(4)(d) only permits the disclosure of personal information about a deceased individual to the spouse or close relative of the individual where it is desirable for compassionate reasons. The appellant does not stand in a family relationship with any of the individuals set out above.

The Ministry acknowledges that one or more of the records in question may also contain the personal information of the deceased. However, the Ministry submits that this information is so amalgamated and interwoven with the personal information of individuals other than the deceased that severance is not reasonably feasible. In order to avoid disclosing information which is properly exempted from disclosure, any such attempt at severance in these circumstances would result in the disclosure of information that is substantially unintelligible and, therefore, meaningless.

The Ministry further submits that there are strong policy reasons for protection the personal information contained in the records. The Ministry states:

It is necessary that an investigative law enforcement agency be able to protect personal information compiled as a component of an investigation into potentially criminal conduct. Central in any such investigation is the willingness of witnesses to come forward and provide information that they might 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 frequently of a sensitive nature whose provision is often only forthcoming where confidentiality can be assured. The concern for confidentiality is shared between police officers and civilians ... it is necessary 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. With respect to civilian witnesses, it has been the experience of the SIU that there are many occasions when they will only provide the SIU with information if they believe that all communications will be kept in confidence. Many express fear of possible police reprisal, whereas others are worried what they say may at some point be used against them in a legal proceeding.

...

It is also the case that records provided to the SIU by the police service, for use in the SIU's investigation, are provided in the expectation that they will be used exclusively for purposes of the SIU's investigation.

For confidentiality reasons, I cannot disclose the representations of the Ministry with regard to the disclosure of the personal information of the woman held hostage. However, I can summarize that the Ministry submits that the personal information relating to her is of an extremely sensitive nature.

As previously indicated, the appellant submits that she wishes to have closure with respect to her son's death and, accordingly, is seeking information regarding the final hours of his life. In particular the appellant states:

Again, I am only seeking closure regarding the death of my son and am requesting that I be sent the transcripts of the conversations that occurred during the final hours of my son [named individual's] life.

Because section 21(4)(d) can override the presumed unjustified invasion of privacy as set out in section 21(3)(b), it raises an issue about the interpretation of the words "desirable for compassionate reasons".

In Order MO-2237, Assistant Commissioner Beamish considered the definition of the word "compassionate" and the intent of the Legislature as follows:

The *Concise Oxford Dictionary, Eighth Edition*, defines "compassionate" as follows: "adj. sympathetic, pitying." Compassion is defined in the *Concise Oxford Dictionary, Eighth Edition*, as follows: "n. pity inclining one to help or be merciful."

I accept these definitions as evidence of the plain and ordinary meaning of the word "compassionate" and adopt it for the purposes of this appeal.

As discussed above, I have concluded that by using the words "in the circumstances" the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons." In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. It is recognition that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.

I adopt this approach for the purposes of this appeal.

As previously noted, the records consist of audio recordings taken by the SIU investigators during interviews with the woman held hostage and the hostage negotiator in the course of their investigation into role played by the local police service, if any, the death of the appellant's son, as well as notes taken as a result of these interviews.

I found above that the personal information in the records qualifies as the personal information of the appellant's son, the woman held hostage, and other civilian witnesses, which is closely intertwined. Accordingly, any order that I make requiring the disclosure of the son's personal information will result in the disclosure of the personal information of the other individuals. In this situation, all of the relevant circumstances that must be considered include the nature of the request, the privacy interests of the appellant's deceased son and especially those of the woman who was held as a hostage, and the other civilian witnesses. The circumstances surrounding the events that gave rise to the appellant's son's death were particularly horrific. Because of the nature of this information, I am unable to refer to it in any greater detail.

With respect to the records arising from the SIU's interview with the woman who was held hostage, I give considerable weight to the fact that the personal information relating to her that is contained in those records is of an extremely sensitive and personal nature. On balance, and given the nature of the personal information at issue, I find that her privacy interests far outweigh the appellant's need for this information in order for her to have some degree of closure.

Therefore, I find that in the particular circumstances of this appeal, disclosure of the audio tape and notes relating to the SIU's interview with the woman who was held hostage would not be "desirable for compassionate reasons." Consequently, I uphold the Ministry's decision that disclosure of these records would be an unjustified invasion of her privacy, pursuant to section 21(3)(b). Therefore, the mandatory exemption at section 21(1) applies to these records and they are not to be disclosed.

Turning to the records created as a result of the interview with the police officer who acted as the hostage negotiator in the course of this incident, I have carefully considered all the circumstances surrounding this request and appeal, particularly the privacy interests of the woman who was held hostage and the other civilian witnesses. I find that disclosure to the appellant of the personal information in a portion of these records is "in the circumstances, desirable for compassionate reasons." I have concluded that in the circumstances of this case, the other individuals' privacy interests must yield to the compassionate reasons for disclosure, only with respect to those portions of the negotiator's audiotape interview which describe in narrative form the circumstances surrounding the hostage-taking event itself, as well as the accompanying notes. As a result, I conclude that only the narrative portion of the audiotape and the accompanying notes contain information whose disclosure to the appellant is desirable for compassionate reasons under section 21(4)(d). Accordingly, I will order disclosure of this portion of the audiotape and the corresponding portion of the notes, as it falls within the ambit of the exception in section 21(4)(d) of the *Act*. Because this information is subject to the exception,

its disclosure would not result in an unjustified invasion of personal privacy and it is not exempt under section 21(1).

Conversely, the second portion of the tape, which I will describe as the “question and answer” portion of the tape relates to police procedures, rather than the circumstances surrounding the death of the appellant’s son. Accordingly, I find that it is subject to the presumption in section 21(3)(b) and is, therefore, exempt from disclosure under section 21(1).

In conclusion, I find that section 21(4)(d) applies to some of the personal information at issue in the audio tape of the interview and the accompanying notes of the SIU interview with the hostage negotiator. As a result, I find that the disclosure of this information does not constitute an unjustified invasion of privacy. Accordingly, the exemption in section 21(1) does not apply to this information and I will order that it be disclosed.

**ORDER:**

1. I uphold the Ministry’s decision with respect to the audio tape of the SIU interview with the woman who was held hostage and the notes that are related to her interview with the SIU investigators. I also uphold the Ministry’s decision not to disclose the “question and answer” portion of the audiotape and this part of the accompanying notes from the interview with the hostage negotiator.
2. I order the Ministry to disclose the narrative portion of the audio tape of the interview with the hostage negotiator and the notes relating to the narrative portion of the interview to the appellant by **October 15, 2009**, but not before **October 8, 2009**.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to order provisions 2 and 3.

Original Signed By: \_\_\_\_\_  
Donald Hale  
Adjudicator

September 3 , 2009 \_\_\_\_\_