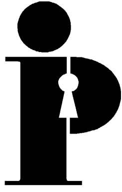

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2961

Appeal PA10-90

Archives of Ontario

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NATURE OF THE APPEAL:

The Archives of Ontario (the Archives) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information pertaining to an investigation undertaken by the Ontario Provincial Police (the OPP) into the operations of the Windsor Police Service in 1950. The requester sought access to specific documents, described as follows:

1. Papers of Premier [named individual], Correspondence of the provincial Secretary, [at a specified file location]; and

2. Papers of Attorney General [named individual], [at a second location]

The requester subsequently advised the Archives that he was also seeking access to the following items:

1. [certain specific] correspondence of the attorney-general; Windsor Administration of Justice; and

2. Cabinet briefs (Executive Council) in reference to the administration of justice in Windsor

The Archives advised that it would add item #1 of the second request to the original request and referred the requester to Reference Services for obtaining access to certain Cabinet records responsive to item #2, as these records do not need to be processed through the Information and Privacy Unit. The Archives granted partial access to the responsive records. Portions of the records were denied pursuant to the discretionary law enforcement exemption in section 14 and the mandatory personal privacy exemption in section 21(1) of the *Act*. A fee of $77.50 was assessed for processing the request.

The requester, now the appellant, appealed the Archives' decision to deny access to the records.

During mediation, the Archives sent the appellant a copy of an Index of Records containing a list of the records, including a description of them and the exemptions relied upon. The Archives reviewed the records at issue for a second time and issued a revised decision in which it decided to disclose some additional information, including all of Records 25 and 26 which had been previously withheld. In the decision, the Archives continued to rely upon sections 14 and 21 of the *Act* to withhold other records, in whole or in part.

The appellant subsequently advised the mediator that he did not seek access to the withheld portions of the records contained within record group B253911, but continued his appeal with respect to the withheld information contained in the rest of the records. Accordingly, the withheld information in record group B253911 is no longer at issue in this appeal.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. I sought and received the representations of the Archives initially, as it bears the onus of proof in establishing the application of the exemptions claimed for the records. In its

representations, a severed version of which was provided to the appellant, the Archives decided to disclose additional information contained in Records 21-23, 33-35 and 36-38 to the appellant. It also clarified that it was relying on the application of the discretionary exemption in section 14(1)(d) to Records 21-23, 28-32, 33-35 and 36-38. Portions of the Archives' representations were not shared with the appellant because they contained information that would otherwise be exempt from disclosure under the *Act*. The appellant also provided me with representations, which were then shared with Archives, who made additional submissions by way of reply.

RECORDS:

The following records remain at issue in this appeal as referred to in the Index of Records prepared by the Archives:

- parts of Records 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21-23, 24, 33-35, 36-38, 39-40; and

- all of Records 27, 28-32, 41-42 and 43.

DISCUSSION:

PERSONAL INFORMATION

The records that are the subject of this request are now over 60 years old. In the Notice of Inquiry provided to both parties, I identified the primary issue to be determined in this appeal in the following way and requested their representations as follows:

> Based on my preliminary review of the records, it appears that they contain "personal information" as that term as defined in section 2(1) of the *Act* and that the personal information does not relate to the appellant.
>
> **The main issue to be determined in this appeal is whether the records contain "personal information" and if so, whether it relates to an identifiable individual who has been dead for more than 30 years, in accordance with the exception to the definition contained in section 2(2) of the *Act*.**
>
> **To assist the parties in making their submissions on this issue, I refer them to the following cases in which this office has addressed similar records of a similar vintage and made certain determinations about how to establish whether an individual has been dead for more than 30 years when it is not clear from the records or from some other source.**
>
> **Please refer to the following IPC decisions on this issue:**
>
> - **Orders PO-1886, PO-2198, PO-2876, PO-2877 and MO-2467.**
>
> [my emphasis]

The term “personal information” is defined in section 2(1) of the *Act* as:

> “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;

Sections 2(2) and (3) also relate to the definition of “personal information” and provide exceptions to the general definition of that term, as follows:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

Undisclosed portions of Records 1 to 20

The documents that comprise Records 1 to 20 consist of letters or telegrams written by individuals to the Premier and Attorney General of Ontario, as well as the replies to that correspondence. The majority of these records were disclosed to the appellant, with the exception of the individuals' names and addresses. I find that this correspondence does not fall within the ambit of paragraph (f) of the definition of "personal information" referred to in section 2(1) and reproduced above. As the vast majority of these letters and telegrams, as well as the responses, have been disclosed to the appellant, I conclude that the Archives took the view that they did not qualify as correspondence that was "implicitly or explicitly of a private or confidential nature," as required under that part of the definition.

However, I agree with the position taken by Archives that the names and addresses of the senders that appear in the correspondence qualifies as the personal information of these individuals within the meaning of paragraph (d) of the definition described above. In addition, I find that the individuals' names, taken with the fact that they have written letters or sent telegrams to the Premier or Attorney General, qualifies as their personal information as contemplated by paragraph (h) of the definition in section 2(1). Having made these findings with respect to Records 1 to 20, I must now determine whether any of the exceptions contained in sections 2(2) or (3) apply to the personal information in the records.

The correspondence in Records 1 to 20 dates from 1950. It can be assumed, judging from the contents of the letters and telegrams, that the individuals who wrote them were adults, at least 18 years of age and born in at least 1932. If they are alive today, they would be at least 79 years of age. Thirty years ago, they would have been at least 49 years old. I find that it is more likely than not that an individual who was 18 years of age in 1950 would still be alive in 1980, or 30 years ago.

However, I acknowledge that it is likely that most of these individuals would have been more than 18 years old in 1950 and died before 1980. Accordingly, these individuals would have been dead for more than 30 years in 2011. Owing to the lack of evidence tendered to assist in making this determination, I am unable to find that this is the case. The appellant has provided me with evidence indicating that one of the individuals whose correspondence might be found in this batch of records died in 1990, or 21 years ago. Because the appellant has not seen the records, he is of course unable to provide me with accurate information as to the dates of death of the individuals whose personal information is included therein. The Archives has not been helpful in producing information about these individuals' dates of death. Accordingly, I am unable to determine accurately whether any of the personal information in Records 1 to 20 pertains to an individual who has conclusively been dead for more than 30 years. I am, therefore, unable to apply the exception in section 2(2) to the undisclosed personal information in Records 1 to 20.

In addition, based on the context in which the correspondence was prepared and the addresses that appear on them, I find that this personal information does not relate to these individuals in a business, professional or official capacity, as contemplated by section 2(3). As a result, I conclude that this exception also has no application to the personal information in Records 1 to 20.

Undisclosed portion of Record 24

The only information not disclosed in Record 24 is the name of a "newspaperman" employed by a newspaper in Detroit, Michigan. In my view, this individual's name cannot be characterized as his "personal information" for the purposes of the definition of that term in section 2(1). This individual's name appears only in his business or professional capacity. There is nothing contained in Record 24 which relates to this individual in his personal capacity, nor does the information reveal something of a personal nature about him [Orders P-1409, R-980015, PO-2225 and MO-2344]. Only personal information qualifies for exemption under section 21(1). As no other discretionary exemptions have been claimed for Record 24 and no mandatory exemptions apply, I will order the Archives to disclose these portions of Record 24 to the appellant.

Record 27

Record 27 is a letter dated September 12, 1950 from a member of the Windsor Police Commission (the member) and addressed to the Attorney General of Ontario. Based on my review of the contents of the letter I find that it contains information that qualifies as the member's personal information under paragraph (f) of the definition of that term in section 2(1). In addition, I find that Record 27 also contains the views and opinions of its author, as contemplated by paragraph (e) of the definition in section 2(1).

Undisclosed portions of Records 21-23, 33-35 and 36-38

Records 21-23, 33-35 and 36-38 are memoranda prepared by an inspector with the Ontario Provincial Police (the OPP) addressed to the Chief Inspector of the OPP and dated May 23, May 27 and June 12, 1950, respectively. Portions of each of these records have been disclosed to the appellant.

The undisclosed portions of Records 22 and 23 consist of a recitation by the inspector of several unsuccessful attempts to elicit information pertaining to the subject of his inquiries from an identified individual who was unable to provide it, owing to his excessive alcohol consumption. I find that this excerpt from the report dated May 23, 1950 contains the personal information of the erstwhile informant and members of his family. As Records 22 and 23 include references to the individual's state of intoxication and the marital status of his relatives, I find that it qualifies as the personal information of these identifiable individuals within the meaning of paragraphs (a) and (b) of the definition of that term in section 2(1).

Record 33 describes in detail a further meeting which took place involving the inspector and a woman who was incarcerated in the Essex County Gaol pending trial on criminal charges. The report, dated May 27, 1950, includes information that pertains to the circumstances surrounding the laying of these charges and the involvement of other identified individuals in these activities. I find that the top two-thirds of paragraph 2 of Record 33 contains the personal information of several identifiable individuals as it describes these individuals by name and their involvement in certain crimes.

However, I find that the remainder of the undisclosed portions of Record 33-35 relates only to the individuals who are identified in their professional, rather than their personal capacities. The inspector describes meeting with representatives of the Detroit Police and the local detachment of the Royal Canadian Mounted Police, as well as a local magistrate. I find that the information cannot be said to relate to these individuals in anything other than their professional capacities and that there is no personal element present which would move it into the personal realm. Again, as only personal information can qualify for exemption under section 21(1), I find that the bottom third of paragraph 2 of Record 33 and all of the undisclosed information in Records 34 and 35 is not exempt under the personal privacy exemption in section 21(1).

Record 36-38 is the last of the three reports filed by the OPP Inspector, on June 12, 1950. Again, Record 36 describes meetings held by the inspector with a member of the Windsor Police and with Detroit newspaper reporter. It also contains a reference to the fact that a magistrate also provided information to the inspector, though it does not state what that information is. I find that Record 36 does not contain personal information as it pertains to the named individuals only in their professional, rather than their personal, capacities.

The information contained in Records 37 and 38, however, includes comments provided to the OPP inspector which are of a critical nature about two identifiable individuals who are public officials and another who had been tried and convicted of specific criminal activity. In my view, this represents the personal information of these individuals under paragraph (g) of the definition of that term in section 2(1). The information in Record 37 is not attributed to any one individual, while the opinions expressed in Record 38 were provided by an individual in his professional, rather than his personal, capacity. As a result, these records do not contain the personal information of the individuals who supplied their views and opinions to the OPP inspector who actually prepared the report. I have provided a highlighted copy of Records 37 and 38 indicating those portions which contain the personal information of two identifiable public officials and a convicted person. I will determine below whether this personal information is properly exempt under section 21(1).

Record 28-32

Record 28-32 is comprised of a five-page letter dated October 27, 1950 prepared for the Attorney General of Ontario by a county court judge who had been appointed chairman of the Windsor Police Commission following the submission of the OPP inspector's reports earlier that year which are referred to above. In this letter, the judge relates his personal views and opinions about a number of issues surrounding policing in Windsor and the fitness of certain public officials for their positions. In my view, Record 28-32 contains the personal information of the judge who wrote it as it includes his views and opinions, as described in paragraph (e) of the definition of that term in section 2(1).

In addition, I find that this record includes the personal information of several identifiable public officials, representing the judge's views and opinions of these individuals and their effectiveness at their jobs. This falls within the ambit of paragraph (g) of the personal information definition in section 2(1).

Record 39-40

This two-page letter dated March 17, 1950 was sent by a private citizen to the Premier of Ontario. The letter contains a detailed expression of the writer's own views and opinions about the policing situation in Windsor, as well his views and opinions about two magistrates. As was the case in my findings respecting Record 28-32, I find that this information represents the personal information of the writer of the letter and the magistrates who are referred to therein, as contemplated by paragraphs (e) and (g) of the definition in section 2(1). The appellant has provided me with evidence, which is not disputed by the Archives, that one of the magistrates identified in the letter has been dead since 1959. Because that individual has now been dead for over 30 years, any information about him cannot be characterized as his "personal information", because of the operation of section 2(2) of the *Act*. I have no information about the date of death of the author of the letter or other magistrate identified in Record 39-40. As a result, I must treat the information pertaining to them as their personal information.

Record 41-42

Record 41-42 is a two-page letter sent to the mayor of Windsor dated October 30, 1950 by the mayor of another Ontario municipality in which the second mayor provides a recommendation for an individual to serve as the new chief of police in Windsor. I find that the record contains the personal information of the second mayor and the individual he is recommending to fill the vacant Windsor police chief position. In particular, the record contains a quite detailed explanation of the candidate's employment history (paragraph (b)), as well as the second mayor's views and opinions about this individual (paragraph (g)) and the second mayor's own views and opinions (paragraph (e)).

Record 43

Record 43 is a one-page memorandum dated November 1, 1950 addressed to the Attorney General of Ontario from an official with what was then described as the Department of the Attorney General. The memorandum describes the monetary pay-out made to an identified public official when he left his position in Windsor earlier that year. I find that the record contains only the personal information of the public official, specifically information relating to employment history and financial transactions in which the individual had been involved (paragraph (b)), as well as the individual's name, appearing with other personal information relating to him (paragraph (h)).

In summary, I have found above that the undisclosed portions of Record 24, the bottom third of paragraph 2 of Records 33 and all of the undisclosed information in Records 34, 35 and 36 do not contain information that qualifies as "personal information" for the purposes of the definition of that term in section 2(1). These records and parts of records cannot, therefore, qualify for exemption under section 21(1) as only information that qualifies as "personal information" can be exempt under that section. As no other exemptions have been claimed for it and no mandatory exemptions apply, I will order that this information be disclosed to the appellant.

PERSONAL 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. In the circumstances, it appears that the only exception that could apply is paragraph (f).

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 personal privacy under section 21(1)(f). If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.)]. Based on my view of the undisclosed personal information in the records, I conclude that the exceptions in section 21(4) have no application in this appeal. The appellant has raised the possible application of section 23 to the records and I will address that issue below.

Application of the presumptions in section 21(3) to the records

In the circumstances, it appears that the presumptions at paragraph (b), (d), (f) and (g) could apply to the personal information contained in the records. These sections state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness; and
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations;

Section 21(3)(b)

Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Orders P-242 and MO-2235]. The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn [Orders MO-2213, PO-1849 and PO-2608].

The presumption can apply to a variety of investigations, including those relating to by-law enforcement [Order MO-2147] and violations of the Ontario Human Rights Code [Orders PO-2201, PO-2419, PO-2480, PO-2572 and PO-2638].

Section 21(3)(d)

Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption [Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344].

Information contained in resumes [Orders M-7, M-319 and M-1084] and work histories [Orders M-1084 and MO-1257] falls within the scope of section 21(3)(d). A person's name and professional title, without more, does not constitute "employment history" [Order P-216].

Section 21(3)(f)

Lump sum payments that are separate from an individual's salary have consistently been found not to fall within section 21(3)(f) [Orders M-173, MO-1184, MO-1469, MO-2174 and MO-2318]. Contributions to a pension plan have been found to fall within section 21(3)(f) [Orders M-173, P-1348 and PO-2050].

Section 21(3)(g)

The terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards [Orders PO-1756 and PO-2176].

The thrust of section 21(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual [Order P-171].

Findings with respect to the application of the presumptions in section 21(3)

The undisclosed portions of Records 1-20 and 39-40 do not fall within the scope of the presumption in section 21(3)(b) as they were not compiled, nor are they identifiable, as part of a

law enforcement investigation. Rather, these letters were unsolicited complaints from private citizens in Windsor requesting the government of the day to take action against what the authors felt to be corrupt or improper practices in the administration of justice in that community. Further, I find that, with two exceptions, none of the other presumptions against disclosure in section 21(3) apply to this information. The address of the individual who wrote the telegram in Record 7, the letter that comprises Record 12, as well as the return address indicated in the response from the Ministry in Record 13, includes a reference to the writer's religious denomination. I find that this reference falls within the ambit of the presumption in section 21(3)(h), which states that a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if it indicates an individual's religious associations.

Record 27 is a letter dated September 12, 1950 submitted to the Attorney General of Ontario by a local county court judge in which the writer expresses his personal views on a particular subject. I find that Record 27 was not compiled and did not form part of an investigation into a possible violation of law, as is required by section 21(3)(b).

However, I find that the personal information contained in the reports prepared by the OPP inspector that comprise Records 21-23, 33-35 and 36-38 fall within the ambit of the presumption in section 21(3)(b), as they were compiled as part of a law enforcement investigation into possible wrongdoing in the administration of justice in Windsor at that time. Similarly, the personal information contained in Records 28-32 was also compiled and formed part of the on-going investigation into allegations of misfeasance against the Windsor Police and other justice officials. As a result, I find that the undisclosed personal information contained in Record 28-32 also falls within the presumption in section 21(3)(b).

Records 41-42 and 43 were not compiled and are not identifiable as part of an investigation into a violation of law and do not, accordingly, fall within the ambit of the section 21(3)(b) presumption. I find, however, that Record 41-42 represents a personal recommendation, as well as a character reference, for an identifiable individual and falls, therefore, within the scope of the presumption in section 21(3)(g). Record 43 contains personal information relating to an individual that describes his employment history (section 21(3)(d)) and his finances, income and financial activities, thereby qualifying under the presumption in section 21(3)(f).

As a result, I conclude that the disclosure of the personal information contained in Records 7, 12, 13, 21-23, 28-32, 33-35, 36-38, 41-42 and 43 is presumed to constitute an unjustified invasion of the personal privacy of the individuals identified therein. The application of the presumptions under section 21(3) is not extinguished by the passage of time or the completion of the law enforcement investigation or proceeding referred to in the records. Accordingly, subject to my discussion of section 23 below, I find that the personal information contained in these records is exempt under the mandatory exemption in section 21(1). I have provided the Archives with a highlighted copy of Records 22, 23, 33, 37 and 38 indicating those portions of the records that are exempt from disclosure under section 21(1) and are **not** to be disclosed.

Application of the factors in section 21(2) to Records 1-6, 8-11, 14-20, 27 and 39-40

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

The Archives claim that the considerations favouring privacy protection in sections 21(2)(f) and (i) apply to the personal information contained in Records 1-6, 8-11, 14-20, 27 and 39-40. These provisions state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (f) the personal information is highly sensitive;
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

The undisclosed portions of Records 1-6, 8-11 and 14-20 consist of the personal identifiers of the authors of these letters and telegrams, including their names and addresses. Record 27 contains the personal views and opinions of a local county court judge. In addition, Record 39-40 contains the author's views and opinions about several public officials, as well as his views generally of the law enforcement situation in Windsor in 1950. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

I cannot agree with the position taken by the Archives that disclosure of the personal information referred to above would ". . . cause significant personal distress to the individuals concerned because these complaints were submitted in confidence." I find that the position taken by the Archives is untenable. In my view, it is unreasonable to assume that the disclosure of the name and address of an individual who called for action to be taken to address a civic matter some 61 years ago could reasonably be expected to cause that individual, assuming he or she is still alive at all, significant personal distress. Accordingly, I find that section 21(2)(f) has no application to the undisclosed information contained in Records 1-6, 8-11 and 14-20.

Further, I note that portions of the personal information contained in Records 27 and 39-40 is now 61 years old and relates to individuals who were at the time serving as either a county court judge or as a police magistrate, respectively. As noted above, the appellant provided evidence indicating that one of the two magistrates referred to in Records 39-40 died in 1959. Any

information pertaining to him would no longer qualify as his personal information, owing to the operation of section 2(2) as he has been dead for more than 30 years.

I cannot agree with the position taken by the Archives with respect to the application of the consideration in section 21(2)(f) to the personal information in Records 27 and 39-40. I find that the disclosure of the views and opinions of the county court judge or the opinions of an individual private citizen about these public officials could not reasonably be expected to result in significant personal distress to either the county court judge, the second magistrate or to the author of the letters which comprise Records 27 and 39-40, owing to the passage of time. In addition, an examination of the content of Records 39-40 reveals that it reflects only the point of view of the individual who wrote it. In the case of Record 27, the point of view expressed is of a general, non-specific nature and would not, even at the time, have been seen as controversial or sensitive in nature.

In my view, the consideration in section 21(2)(f) has no application whatsoever to any of the personal information contained in Records 1-6, 8-11, 14-20, 27 and 39-40.

Similarly, I find that the disclosure of the undisclosed personal information contained in Records 1-6, 8-11, 14-20 and 27, even at the time they were originally created, could have unfairly damaged the reputation of any of the individuals referred to therein. With respect to Record 39-40, which represents the opinion of just one member of the public about issues around the administration of justice in Windsor in 1950, any such harm can hardly be said to be "unfair" some 61 years later. With the passage of so many years and the fading of memories about this entire episode, any possible harm to an individual's reputation is even further diminished as the individuals involved and their role in these events fade into history. In my view, the consideration listed in section 21(2)(i) has no application to the personal information contained in Records 1-6, 8-11, 14-20, 27 and 39-40.

The appellant relies on an unlisted consideration favouring the disclosure of the personal information found in Records 1-6, 8-11, 14-20, 27 and 39-40. The appellant argues that the factor described in previous orders as a diminished privacy interest in the personal information about a deceased person, particularly an individual who has been dead for many years, clearly applies to the personal information in these records.

The appellant has provided me with the dates of death of several individuals who played a prominent role in the events that are described in the records. The appellant submits, and the Archives does not dispute, that the man who was the Chief of the Windsor Police at the time of the creation of the records died in 1957. He also indicates that the man who served as Mayor of Windsor in 1950 died in 1981, while another prominent individual who was identified with the issues under consideration in the records died in 1990. Finally, the appellant submits that one of the magistrates who is likely identified by name in the records died in 1959. He also notes that many private citizens in that community were not reticent about speaking out publicly on the perceived shortcomings of the administration of justice in Windsor and were reported in the media taking public positions on these issues.

I concur with the appellant's position that the privacy interests of those individuals who are now deceased, but have not been deceased for 30 years, and whose personal information is contained in the records are significantly diminished, in accordance with this unlisted factor. Applying this consideration to the personal information in Records 1-6, 8-11, 14-20, 27 and 39-40, I find that it is a relevant factor when balancing the appellant's right of access against the privacy interests of only the individual whose personal information is contained in Records 1 and 2, as this individual died in 1990. With the evidence available to me, however, I am unable to determine with any precision which, if any, of the other individuals whose personal information is contained in Record 3-6, 8-11, 14-20, 27 and 39-40 are now deceased or whether they have been deceased for more than 30 years. As a result, I am unable to apply the unlisted diminished privacy interest after death consideration under section 21(2) to the personal information contained in these records.

I have concluded that no factors, listed or otherwise, favour either the disclosure or the non-disclosure of the personal information in Records 3-6, 8-11, 14-20, 27 and 39-40. As a result, I find that the mandatory personal privacy exemption in section 21(1) operates to exempt this personal information from disclosure. I have also concluded that the only relevant consideration under section 21(2) present with respect to the personal information in Records 1 and 2 favours disclosure. Accordingly, on balance, I find that the disclosure of the personal information in Records 1 and 2 would not result in an unjustified invasion of personal privacy under section 21(1). As a result, I find that these Records 1 and 2 are not exempt under section 21(1) and ought to be disclosed to the appellant.

Because I have found that the undisclosed portions of Records 3-6, 8-11, 14-20, 21-23, 27, 28-32, 33-35, 36-38 and 39-40 are exempt under section 21(1), it is not necessary for me to also consider whether they qualify for exemption under section 14(1)(d).

PUBLIC INTEREST IN DISCLOSURE

I have found above that the disclosure of the personal information in Records 7, 12, 13, 21-23, 28-32, 33-35, 36-38, 41-42 and 43 is presumed to constitute an unjustified invasion of personal privacy under section 21(1) owing to the operation of the presumption in section 21(3)(b). In addition, as a result of the application of the mandatory exemption in section 21(1), the undisclosed portions of Records 3-6, 8-11, 14-20, 21-23, 27, 28-32, 33-35, 36-38 and 39-40 are also exempt from disclosure. The appellant argues that there exists a public interest in the disclosure of all of the records responsive to his request as contemplated by section 23, which reads:

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

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.

The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

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 [Orders P-984, PO-2607]. 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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and 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 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. 484 (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 and 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, PO-2626, PO-2472 and PO-2614].

- 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 records do not respond to the applicable public interest raised by appellant [Orders MO-1994 and PO-2607].

Analysis and findings

The appellant argues that there is a public interest in disclosure of the withheld information, and submits that:

> The position taken by the Archives will effectively make it difficult if not impossible to conduct legitimate historical research into events that occurred in 20th Century Ontario. This would seem to be contrary to the mandate of the Archives. As an institution which receives substantial public funding it should have as part of its mandate to make its collections readily available for historical inspection and review. Unfortunately, it has taken the position that it will make it as difficult as possible to review materials and it will use every opportunity to try and halt historical research even into events that occurred at least two generations in the past.
>
> By establishing the '100 year rule' the Archives has taken it upon themselves to act in a manner beyond any privacy laws that set up a system that discourages if not completely frustrates legitimate enquiry into Ontario's past.
>
> It is assumed that this is exactly the kind of situation the FIPPA Act [is] designed to address. The conduct of the Archives in withholding materials should not be accepted, and it is respectfully submitted that they should be directed to provide the Applicant with the materials requested.

The Archives respond by pointing out that while it has a mandate of making records accessible, it is still subject to the privacy protection provisions in *FIPPA* which require that information subject to a mandatory exemption, like the personal information contained in the records at issue

in this appeal, be withheld. In addition, the Archives submit that, contrary to the position taken by the appellant, he:

> . . . has been given full disclosure to the majority of the documents requested. The current file that is under appeal contained 144 pages and of this amount, the Archives disclosed 104 pages in full, making severances to 31 pages (22 pages of these severances consist of only severing a name/address of an individual) and only 9 pages have been withheld in full.

In response to the position taken by the appellant, it must be noted that the privacy protection provisions in the *Act* were enacted by the Legislature for a reason, recognizing an individual's right to privacy with respect to their personal information for 30 years after death. These privacy provisions apply to the Archives and its holdings, as they do to every provincial institution under the *Act*.

I recognize the difficulty the appellant has encountered in obtaining access to all of the information he is seeking about these events which took place over 60 years ago. As a result of this order, however, the appellant will receive more of the information contained in the records, with the exception of the personal information that is subject to the section 21(1) exemption.

Accordingly, I find that there does not exist a compelling public interest in the disclosure of the personal information in Records 3-20, 21-23, 27, 28-32, 33-35, 36-38, 39-40, 41-42 and 43 which is sufficient to override the operation of the privacy protection provisions in section 21(1), despite the passage of time.

ORDER:

1. I uphold the Archives decision to deny access to Records 3-20, 21-23, 27, 28-32, 33-35, 36-38, 39-40, 41-42 and 43, in whole or in part. With this order, I have provided the Archives with a highlighted copy of Records 22, 23, 33, 37 and 38 indicating those portions of the records that are exempt from disclosure under section 21(1) and are **not** to be disclosed.

2. I order the Archives to disclose to the appellant all of Records 1, 2 and 24, as well as those portions of Records 22, 23, 33, 37 and 38 which are not highlighted on the copy provided to the Archives with this order, by providing him with a copy no later than **May 13, 2011** but not before **May 9, 2011**.

3. In order to verify compliance with this order, I reserve the right to require the Archives to provide me with a copy of the records that are disclosed to the appellant.

Original Signed by: April 6, 2011
Donald Hale
Adjudicator