

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3232

Appeal PA12-121

Ministry of Community Safety and Correctional Services

July 15, 2013

Summary: The appellant made a request to the ministry for access to Ontario Provincial Police records compiled as part of an investigation into her daughter's death. The ministry granted access, in part, and denied access to other records, claiming the discretionary exemptions in sections 49(a), in conjunction with sections 14(1)(l) (facilitate commission of an unlawful act) and 14(2)(a) (law enforcement) and 49(b), in conjunction with section 21(1) (personal privacy). In this order, the adjudicator does not uphold the exemption in section 14(1)(l), but finds that disclosure of the records would result in an unjustified invasion of personal privacy under section 21(1). However, the adjudicator also finds that the compassionate grounds exception in section 21(4)(d) applies to some of the information. The ministry's decision is upheld, in part, and some information is ordered disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 49(a), 14(1)(l), 49(b), 21(1), 21(3)(b) and 21(4)(d).

Order Considered: MO-2237.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access decision made by the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) in response to a request for information relating to the investigation of the requester's daughter's death.

[2] In response to the request, the ministry located responsive records and issued a decision, granting access, in part. The ministry denied access to other records, claiming the application of the discretionary exemptions in section 49(a), in conjunction with section 14(1)(l) and 14(2)(a), and section 49(b), in conjunction with section 21(1). The ministry also advised the requester that portions of some records were non-responsive to the request.

[3] The requester (now the appellant) appealed the ministry's decision to this office.

[4] During the mediation of the appeal, the appellant confirmed she was interested in all the information relating to the investigation of her daughter's death, except the birth dates or contact information of individuals, or the names of funeral home drivers and ambulance attendants, which were not disclosed to her by the ministry.

[5] The appellant also advised that she was not interested in the police codes, or those parts of the records that were marked non-responsive to the request. As a result, several records were removed from the scope of appeal. Consequently, those portions of records remaining at issue that contain police codes or are non-responsive are no longer at issue and will not be disclosed to the appellant.

[6] With respect to other individuals (the affected parties) who may have an interest in the appeal, the mediator attempted to contact some of them, with respect to disclosure of their information, but did not obtain their consent.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought representations from the ministry, the appellant and nine affected parties. I received representations from the ministry and two affected parties, which were shared with the appellant in accordance with this office's *Practice Direction 7*. The appellant did not provide representations. In addition, during the inquiry, the ministry issued a supplementary decision letter, with further disclosure to the appellant of an ambulance call report.

[8] For the reasons that follow, I uphold the ministry's decision, in part, and order it to disclose records as set out in the order provisions.

RECORDS:

[9] The records remaining at issue consist of an occurrence report, supplementary reports, police officers' notes, interviews and statements, video interviews and two CD's of photographs.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 14 apply to the information at issue?
- C. Does the mandatory exemption at section 21(1) apply to the information at issue?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

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

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

confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[11] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(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.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[12] 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.¹

[13] 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.²

[14] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[15] The ministry states that the records at issue in this appeal were compiled by the Ontario Provincial Police (OPP) and document their investigation into the sudden death of the appellant's daughter, and that the investigating officers conducted interviews with witnesses and other individuals to determine the cause of death. The ministry

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

advises that the investigation determined that the cause of the appellant's daughter's death was suicide.

[16] The ministry submits that the records, or portions thereof, contain the personal information of 12 individuals who provided evidence to the investigating OPP officers. These individuals, the ministry states, were acting in a personal, rather than a professional, capacity. Further, the ministry submits that the personal information is "wide ranging" and consists of names, telephone numbers, addresses, as well as substantive and sensitive personal observations provided by individuals about themselves and about others in connection with the OPP investigation.

[17] The appellant did not provide representations, but advised the mediator during the mediation of the appeal that she was not interested in the dates of birth and contact information of individuals; nor was she interested in the names of ambulance attendants or funeral home drivers.

[18] I have reviewed the records and I find that the vast majority of them contain the personal information of several individuals, including the appellant's daughter, other family members, friends, and witnesses. In particular, the records relate to various investigating police officers' actions in contacting and interviewing individuals in the context of conducting an investigation. Most of these portions include statements made by these individuals, or other information recorded by the officers about these individuals, as well as the appellant's daughter, witnesses and other individuals. On my review of this withheld information, I find that the personal information includes the individuals' marital or family status [paragraph (a)], their criminal and/or medical histories [paragraph (b)], their address and telephone number [paragraph (d)], their personal opinions or views [paragraph (e)], the views or opinion of another individual about them [paragraph (g)] and their names, along with other personal information relating to them [paragraph (h)].

[19] The two affected parties who provided representations in this appeal are paramedics who attended the scene and subsequently provided statements to the OPP. I find that these statements contain the appellant's daughter's personal information and some of their own personal information, including their employment history [paragraph (b)]. As previously noted, during the mediation of the appeal the paramedics' names, badge numbers and contact information were removed from the scope of the request, and will, therefore not be disclosed to the appellant.

[20] I also note that the records that contain the appellant's personal information have already been disclosed to her.

[21] In sum, I find that the records remaining at issue only contain the personal information of a number of identifiable individuals, including the appellant's daughter.

B. Does the discretionary exemption at section 14(1)(l) exemption apply to the information at issue?

[22] In its representations, the ministry advises that it is no longer relying upon the exemption section 14(2)(a), but continues to rely on the exemption in section 14(1)(l), which states:

(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

[23] 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)

[24] The term "law enforcement" has been found to apply to a police investigation into a possible violation of the *Criminal Code*.⁴

[25] Except in the case of section 14(1)(e), 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.⁵

[26] The ministry is the only party who provided representations on this exemption. However, as previously noted, the appellant advised the mediator that she was not interested in pursuing access to police codes.

[27] The ministry submits that the disclosure of the records for which this exemption was claimed could have a harmful effect on law enforcement, which could, in turn,

⁴ Orders M-202, PO-2085.

⁵ 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.).

“hamper the control of crime.” In particular, the ministry argues that disclosure of sensitive personal information compiled during a law enforcement investigation without the consent of third parties could lead to one or more of the following outcomes:

- members of the public could cease to cooperate with police during an investigation, due to the possible disclosure of their personal information; or
- members of the public could cooperate with police, but censor or tailor their comments, based on the assumption that it is likely to be disclosed.

[28] The ministry states:

In the [m]inistry’s submission, both of the above scenarios are to be avoided as strenuously as possible. The police rely on the full and frank observations they typically receive from the public as part of their investigation. Without public support and cooperation, the ability of the police to investigate crimes is jeopardized.

[29] Past orders of this office have upheld this exemption where disclosure of a record could provide an individual with information that sheds light on the operations of the police. Examples of the type of information that has been found to be exempt under section 14(1)(l) are police codes, police cell phone numbers, patrol zones, and patrol car identification numbers. This type of information may hamper the control of crime, as it could possibly provide an individual with information which could be used to thwart the police’s law enforcement efforts.

[30] In this appeal, the type of information for which the ministry is claiming this exemption is not as described above, as it is personal information. I find that the ministry’s arguments respecting the application of section 14(1)(l) to this personal information amounts to no more than mere speculation. In particular, I find that I have not been provided with the requisite “detailed and convincing” evidence to establish that disclosing personal information could reasonably be expected to render the ministry’s law enforcement activities vulnerable to interference of the kind contemplated by the exemption in section 14(1)(l) of the *Act*. Therefore, I reject the ministry’s position that disclosure of this particular information could facilitate the commission of an unlawful act or hamper the control of crime. Accordingly, I find that section 14(1)(l) does not apply, and the withheld information is not exempt under that section.

[31] I will now consider whether the personal information relating to other individuals still at issue in this appeal qualifies for exemption under section 21(1).

C. Does the mandatory exemption at section 21(1) or the apply to the information at issue?

[32] Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an “unjustified invasion of personal privacy.”

[33] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. 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).

[34] 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 or section 49(b). Once a presumed unjustified invasion of personal privacy under section 21(3) is established for records which are claimed to be exempt under section 21(1), it can only be overcome if section 21(4) or the “public interest override” at section 23 applies.⁶

[35] 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.⁷

[36] The ministry submits that the affected parties have not provided their consent to disclose their personal information, and that section 21(3)(b) of the *Act* applies, creating a presumption that disclosure of others’ personal information would constitute an unjustified invasion of their privacy. The ministry states that the records contain personal information collected by OPP investigating officers for the purpose of ruling out any criminal wrongdoing, and that this personal information was both “compiled” and “identifiable” as part of the investigation, fitting squarely within the requirements of section 21(3)(b).

[37] The two affected parties who provided representations advise that they consent to the disclosure of the statements they gave to the OPP, with the exception of their own personal information.

[38] Based on my review of the personal information at issue, I find that it was compiled and is identifiable as part of the OPP’s investigation into a possible violation of law, namely the *Criminal Code of Canada*. Furthermore, I find that despite the fact that no charges were laid in this matter, the presumption in section 21(3)(b) still applies.⁸

⁶ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

⁷ Orders P-242 and MO-2235.

⁸ Order PO-1849

Therefore, I find that disclosure of the records would constitute an unjustified invasion of the personal privacy of a number of identifiable individuals, including the appellant's daughter. However, for the reasons that follow, I also conclude that section 21(4)(d) applies to some of the records at issue and, therefore, their disclosure would not constitute an "unjustified invasion of personal privacy." This information, which I refer to below, is therefore not exempt under section 21(1).

[39] Section 21(4)(d) of the *Act* 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, and 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.

[40] 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")

[41] The application of section 21(4)(d) requires a consideration of the following questions,⁹ 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?

⁹ Orders MO-2237 and MO-2245.

2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

[42] Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the "circumstances" to be considered would 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 21(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 21(4)(d).¹⁰

[43] After the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons."¹¹

[44] The ministry submits that it considered whether the compassionate disclosure provisions in section 21(4)(d) apply. The ministry agrees that parts one and two of the three-part test have been satisfied, as some of the records contain the personal information of the appellant's daughter,¹² and the requester is a "close relative" of the deceased.

[45] Turning to the third part of the test, the ministry states that it must be satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons. The ministry submits that it considered the following factors in determining that no further disclosure of records would be desirable for compassionate reasons:

- affected third parties have repeatedly not consented to the disclosure of their personal information by either specifically denying consent or not responding to notification by it and the IPC;
- if consent is to be meaningful, the ministry must act on whatever response it receives. It does not make sense to not obtain consent and then to go ahead and disclose personal information;

¹⁰ Order MO-2237.

¹¹ Order MO-2245.

¹² However, the ministry also notes that some of the records do not reference the deceased at all, and contain other individuals' personal information.

- the personal information is highly sensitive due to the circumstances under which it was collected (a police death investigation). Any disclosure of this sensitive information is essentially disclosure to the world;
- members of the public would be less forthright in cooperating with the police and assisting them with their investigations should they become aware that their personal information may be disclosed. This type of outcome should be "strongly avoided," in the interests of public safety and security;
- the appellant has already been provided with most of the responsive records, including medical information, photographs, personal information provided by the appellant and by individuals who provided their consent;
- through the severance of records, many of the details of the appellant's daughter's death have been disclosed, which should answer specific questions the appellant may have; and
- the privacy rights of the affected parties have been protected.

Analysis and Findings

Step 1 – Personal Information of the Deceased

[46] I have found above that the records contain the personal information of the appellant's deceased daughter and a number of affected parties. I note that some of the personal information of these affected parties is inextricably intertwined with that of the appellant's daughter. I also note that some of the records contain only the personal information of the affected parties, and not the deceased. I am therefore satisfied that the first requirement for the application of section 21(4)(d) is satisfied only with respect to the records that contain the appellant's deceased daughter's personal information.

Step 2 – Spouse or "Close Relative"

[47] I am satisfied that the appellant is the mother of the deceased individual whose personal information is contained in the records at issue and that the second requirement for the application of section 21(4)(d) is satisfied.

Step 3 – Desirable for Compassionate Reasons

[48] Because section 21(4)(d) can override the presumed unjustified invasion of privacy as set out in section 21(1), based on the presumption in section 21(3)(b), it raises an issue about the interpretation of the words "desirable for compassionate reasons."

[49] In Order MO-2237, Assistant Commissioner Brian 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.

[50] I agree with and adopt this approach for the purposes of this appeal.

[51] I have carefully considered all the circumstances surrounding this request and appeal, particularly the privacy interests of the other individuals whose personal information appears in the records. I am satisfied that disclosure to the appellant of some of the personal information in these records is "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, however because this information is subject to the exception to the exemption provided by section 21(4)(d), its disclosure would not result in an unjustified invasion of personal privacy and, consequently, it is not exempt under sections 21(1). Accordingly, I will order disclosure of some of the records to the appellant as they fall within the ambit of the exception in section 21(4)(d) of the *Act*.

[52] In particular, I find that the following portions of records would provide the appellant with further information about her daughter's death and qualify under the exception in section 21(4)(d):

- Occurrence summary – portions of pages 5, 6 and 7;
- Police Officers' notes – portions of pages 25, 26 and 85;

- Witness statements – portions of pages 122-125, 187-190 and 208-214; and
- The CD of photographs of the scene.

[53] Accordingly, as my findings above set out, I have found that some of the information in the records qualifies for the exception in section 21(4)(d) and thus disclosure of this information does not constitute an unjustified invasion of personal privacy under section 21(1).

[54] I have also upheld the ministry's decision to withhold the remaining personal information, as disclosure of this information would be an unjustified invasion of another individual's personal privacy.

ORDER:

1. I order the ministry to disclose the information in the records, as described in my finding above by **August 20, 2013** but not before **August 15, 2013**. To ensure clarity with respect to the information to be withheld, I have enclosed a copy of the records that are to be disclosed to the appellant highlighting in green the portions that are to be withheld.
2. I have not included a copy of the CD of the photographs of the scene. It is to be disclosed in full to the appellant.
3. I uphold the ministry's decision to withhold the remaining information.
4. 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 provision 1.

Original signed by: _____
Cathy Hamilton
Adjudicator

July 15, 2013 _____