

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3273

Appeal PA12-303

Ministry of Community Safety and Correctional Services

November 4, 2013

**Summary:** The requester submitted an access request to the ministry for records related to the motor vehicle accident in which his son died. The ministry identified over 100 pages of responsive records and granted partial access, but withheld information under section 14(2)(a) (law enforcement report) and section 21(1) (unjustified invasion of personal privacy). The requester appealed the decision to this office. On appeal, the adjudicator upholds the ministry's claim of the law enforcement exemption, in part, but orders additional disclosure of information, based on the application of the compassionate grounds exception to section 21(1) found in section 21(4)(d) of the *Act*.

**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"), 14(2)(a), 21(2)(f), 21(3)(a), 21(3)(b), 21(3)(d), 21(4)(d).

**Orders and Investigation Reports Considered:** Orders PO-1819, PO-1959, PO-2254, PO-2524, MO-2237 and MO-2245.

### OVERVIEW:

[1] This order addresses the issues raised by the response of the Ministry of Community Safety and Correctional Services (the ministry) to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about the motor vehicle accident that claimed the life of the requester's

son. The request specifically listed the accident report, the statements of witnesses or any person involved, police notes, and correspondence.

[2] The ministry granted partial access to the records identified as responsive to the request, but withheld some portions under the law enforcement and personal privacy exemptions in sections 14 and 21(1), respectively. The ministry also indicated that some information had been severed from the records because it was considered to be not responsive to the request. The ministry stated that in making the decision on access, the "compassionate grounds" provision in section 21(4)(d) of the *Act* had been considered.<sup>1</sup>

[3] The requester did not agree with the ministry's access decision and appealed it to this office. During the mediation stage of the appeal, the appellant told the mediator that he also wanted a copy of the accident reconstruction report, which is known as the Technical Traffic Collision Investigation (TTCI) Report. The ministry conducted a further search for this record and issued a supplementary decision, granting partial access to it. In the decision, the ministry relied on the same exemptions identified in the original decision, but added section 15(b) (publicly available) as an additional basis for denying access. The appellant advised the mediator that he did not seek access to the withheld portions of the occurrence summaries and reports or officers' notes (pages 1 to 43), but wanted the appeal to proceed to adjudication to determine the issues related to all other information severed from the records.

[4] The appeal was transferred to the adjudication stage, where an adjudicator conducts an inquiry. I started my inquiry by sending a Notice of Inquiry outlining the issues to the ministry initially, seeking representations. The ministry requested a brief extension to the due date to consider the possibility of revising its access decision. The ministry subsequently issued a revised decision and disclosed additional information.<sup>2</sup> As the additional disclosures did not fully satisfy the appellant, the ministry was asked to respond to the issues outlined in the Notice of Inquiry, and did so. Next, I sent a copy of the representations I had received from the ministry to the appellant, inviting him to also address the issues in this appeal. The appellant did not submit written representations, but spoke with staff from this office and explained his position on access to the records.

[5] In this order, I partly uphold the ministry's revised access decision, but order additional information to be disclosed to the appellant, pursuant to section 21(4)(d) of the *Act*.

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<sup>1</sup> Section 21(4)(d) of the *Act* deals with disclosure of the personal information of deceased individuals to a spouse or close relative where it is "desirable for compassionate reasons," and even if the exemption in section 21(1) applies. This appeal does not raise the application of section 66(a) of the *Act*, which provides for the exercise of the rights of a deceased person by the individual's personal representative if the exercise of the right relates to the administration of the individual's estate.

<sup>2</sup> This third decision letter contains no reference to section 15(b).

## **RECORDS:**

[6] There are approximately 50 pages of the TTCI Report, which have been withheld in part, or in their entirety, remaining at issue in this appeal.

## **ISSUES:**

- A. Did the ministry properly sever and withhold non-responsive information?
- B. Does the record contain "personal information" as defined in section 2(1)?
- C. Does section 14(2)(a) apply to the Technical Traffic Collision Investigation Report?
- D. Would disclosure result in an unjustified invasion of personal privacy under section 21(1)?
- E. Did the ministry properly exercise its discretion under section 14(2)(a)?

## **DISCUSSION:**

### **A. Did the ministry properly sever and withhold non-responsive information?**

[7] The ministry's initial access decision referred to the severance of information on pages 45 to 58 and 90 to 105 as "non-responsive." The appellant disputes the withholding of information for this reason.

[8] The ministry clarified in its representations that some of the information had been labeled as non-responsive erroneously, but that this incorrectly severed information had been disclosed in its supplementary revised decision. With respect to the information severed as non-responsive from pages 90 to 105, the ministry explains that this information consists of:

... administrative date stamps, which relate to the printing of the reports, and therefore would change each time the record is printed. Therefore, these "administrative date stamps" are not part of the record.

In previous decisions, the IPC has accepted that "administrative information relating to the printing of the reports" is not responsive to the request.

[9] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. For example, section 24(1)(a) requires a person seeking access to a record to make a request in writing to the institution that the person believes has custody or control of the record, and to provide sufficient detail to enable an experienced employee of the institution to identify the records that are responsive to the request.

[10] To be considered responsive to the request, the records (or information) must “reasonably relate” to the request.<sup>3</sup> The ministry correctly notes that past orders of this office have upheld the severance of “administrative information,” such as strings of computer code, or printing date stamps, that appear in records as non-responsive because the information does not reasonably relate to the real subject matter of the appellant’s interest.<sup>4</sup> In Order PO-2254, Senior Adjudicator Sherry Liang found that “administrative information relating to the printing” of the requested records was non-responsive to the appellant’s request:

The information in these portions of the record reflect when the record was printed and by whom, and was created after the appellant’s request. I am satisfied that this information is not covered by the scope of the appellant’s request, and I uphold the Ministry’s decision to withhold this information.<sup>5</sup>

[11] The same holds true in this appeal. All other information on pages 90 to 105 was disclosed to the appellant, and I am satisfied that the one-line date stamp severed by the ministry from the bottom of each of those pages is, in fact, not responsive to the appellant’s request. Therefore, I find that the information has been properly withheld by the ministry as non-responsive.

**B. Does the record contain “personal information” as defined in section 2(1)?**

[12] The ministry relies on the discretionary exemptions in section 49(a) in conjunction with section 14(2)(a), and section 49(b) in conjunction with section 21, to support the denial of access to information.

[13] Before I determine which sections of the *Act* may apply, I must first decide whether the records contain “personal information” and, if so, to whom it relates. The personal privacy exemption in section 21 or 49(b) can only apply to records that contain “personal information” as that term is defined in section 2(1) of the *Act*.

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<sup>3</sup> Orders P-880 and PO-2661.

<sup>4</sup> For example, Orders MO-2877-I and PO-3228.

<sup>5</sup> See also Order MO-2958.

[14] "Personal information" means recorded information about an identifiable individual, including the types listed in paragraphs (a) to (h) of the definition. The list of examples of personal information in the definition is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) of section 2(1) may still qualify as personal information.<sup>6</sup> To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>7</sup> 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.<sup>8</sup>

### ***Representations***

[15] The ministry submits that the records contain the personal information of two witnesses, including their names, ages, dates of birth, telephone numbers, addresses, and "observations by or about them." The ministry argues that these individuals would be identified if this information is disclosed and notes that the information requested also includes information about "a vehicle including license plate information." Finally, the ministry submits that "the records contain personal information of an officer," but there is no elaboration on this statement.

### ***Analysis and findings***

[16] Based on my review of the records remaining at issue, I find that they do not contain the personal information of the appellant. However, I find that the records remaining at issue contain the appellant's son's personal information, including his medical information, the opinions or views of the witnesses as they relate to him, and his name along with information relating to the circumstances of the accident, thereby falling within the ambit of paragraphs (b), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[17] I note that some of the withheld information in the report is not "about" an identifiable individual, but rather is information about the other vehicle involved in the accident, although mixed with personal information about the other driver. Specifically, I find that the records contain the personal information of the other driver and another identifiable individual, the second witness, according to the definition in section 2(1) of the *Act*. The information of these witnesses includes their names, addresses, phone numbers, ages, birth dates, medical history, identifying numbers, views or opinions and names together with other information of a personal nature, for the purpose of paragraphs (a), (b), (c), (d), (e) and (h) of the definition. In some instances, this

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<sup>6</sup> Order 11.

<sup>7</sup> Order PO-1880, upheld in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>8</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

personal information of the witnesses is intertwined in the records with the personal information of the appellant's son.

[18] Finally, the records also contain the personal information of the two police officers who investigated the collision. Specifically, I find that there is information about these individuals, such as their names, addresses, education and employment history, that fits within paragraphs (a), (b), (c), (d) and (h) of the definition in section 2(1). Where this personal information is found in Appendix E of the records, the officers' curriculum vitae, no personal information of the deceased is contained in those records.

[19] As the records do not contain the appellant's personal information, the relevant personal privacy exemption is section 21(1), not section 49(b). Section 49(a) also does not apply for the same reason. I will therefore begin my review of the exemptions by looking at whether section 14(2)(a) applies to the undisclosed information.

**C. Does section 14(2)(a) apply to the withheld portions of the Technical Traffic Collision Investigation Report?**

[20] The ministry relies on section 14(2)(a) to deny access to pages 50, 51, 83 to 86, 108 to 128, in their entirety, and portions of pages 46, 47, 55 to 57, 60, 62, 67, and 88 of the TTCI Report.

[21] Section 14(2)(a) 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.

[22] 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.<sup>9</sup>

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<sup>9</sup> Orders 200 and P-324.

[23] The word "report" is not defined in the *Act*. However, previous orders of this office have established that for the purpose of section 14(2)(a), the word "report" means "a formal statement or account of the results of the collation and consideration of information." The title of a document is not determinative of whether it is a report, although it may be relevant to the issue.<sup>10</sup>

[24] Section 14(2)(a) exempts "a report prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with a law," rather than simply exempting a "law enforcement report." This wording is not seen elsewhere in the *Act* and supports a strict reading of the exemption.<sup>11</sup>

### ***Representations***

[25] According to the ministry, the Technical Traffic Collision Investigation Report is:

A report that has been prepared as a way of consolidating or considering the evidence that has been collected by the OPP, during the course of its investigation into the fatal motor vehicle collision.

[26] The ministry submits that it has claimed this exemption "for the records which comprise the Technical Traffic Collision Investigation Report," noting that all of the records are law enforcement records because they were created "for an ongoing law enforcement investigation" into the collision. The ministry adds that the investigation of motor vehicle collisions may result in either *Criminal Code* or *Highway Traffic Act* charges. The ministry takes the position that the TTCI Report is a "formal statement [or] account of the results of the collated reports and data."

### ***Analysis and findings***

[27] In this appeal, I am satisfied that the TTCI Report was prepared as a result of an investigation into a fatal motor vehicle collision by the OPP, an agency which has the function of enforcing and regulating compliance with a law. However, my determination respecting the application of section 14(2)(a) in this appeal turns on the interpretation of the word "report" in the exemption.

[28] Past orders have reviewed the approach to determining whether records qualify as a "report." As stated above, the title of the record is not determinative of the issue. In addition, the orders affirm that an overly broad interpretation of the word "report" could create an absurdity. In particular, if "report" were interpreted to mean "a statement made by a person" or "something that gives information," essentially all

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<sup>10</sup> Order MO-1337-I.

<sup>11</sup> Order PO-2751.

information prepared by a law enforcement agency would be exempt, rendering the exemptions in sections 14(1) and 14(2)(b) to (d) superfluous or redundant.<sup>12</sup>

[29] Regarding the ministry's claim that the records comprising the TTCI report qualify as a "report," I found it helpful to look at past decisions that address the application of section 14(2)(a) to records compiled by the Special Investigations Unit (SIU) in the course of conducting an investigation under section 113 of the *Police Services Act*.<sup>13</sup> Many of these appeals feature records similar to the ones at issue here, such as officer's notes, investigator's notes, witness interviews or statements, and other documents that together represent the sum of a particular investigation. In Order PO-1959, for example, the ministry claimed, relying on Orders P-1315 and P-1418, that the entire SIU file should be construed to constitute a "report" for the purpose of section 14(2)(a). Adjudicator Sherry Liang rejected this argument, preferring instead the record-by-record approach to the review of the exemption claim followed in Order PO-1819. Most of the records remaining at issue were found to contain only factual information compiled in the course of the SIU investigation, not formal statements or accounts of the *results of the collation and consideration of information*. Ultimately, Adjudicator Liang found that only the SIU Director's Report, the cover letter to that document and other investigative documents comprised "a formal statement of the results of the collation and consideration of information" for the purposes of the exemption under section 14(2)(a). With respect to the Director's Report, Adjudicator Liang stated:

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."

[30] Similarly, in Order PO-2524, Adjudicator Steven Faughnan addressed the same argument advanced by the ministry in relation to the entire contents of an SIU investigative file, and affirmed that the records at issue in such appeals must be looked at individually to determine whether they qualified for exemption under section 14(2)(a) or other provisions of the *Act*. In my view, a TTCI Report is analogous to an SIU report. For this reason, I agree with the reasoning outlined in the orders discussed above, and I adopt it in this appeal.

[31] Based on my review of the portions of the records comprising the TTCI Report that remain at issue, I find that most of the information does not reflect a formal

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<sup>12</sup> Orders MO-1238 and PO-2957.

<sup>13</sup> See, for example, Orders PO-1959, PO-2414, PO-2524 and PO-2854.



statement or account of the result of the investigating officer's "collation and consideration of information" for the purpose of section 14(2)(a) of the *Act*. Specifically, I find that the following individual records from the TTCI Report, that have been withheld in their entirety, do not reflect the consideration or collation of information gathered in the course of investigating this collision: Involved Vehicles (pages 50-51); Vehicle Examinations, Appendix B (pages 83-86); Witness Statements, Appendix D (pages 108 to 111); and Curriculum Vitae(s), Appendix E (pages 113 to 128).

[32] Further, I find that the following other records, from which only brief portions have been withheld, do not qualify as a "report" for the purpose of section 14(2)(a): Summary of Involvement (page 46); Incident Synopsis (page 47); Field Notes and Scene Sketch, Appendix A (pages 60, 62, 67); and Scale Diagram and Measurement Records, Appendix C (page 88).

[33] The content of each of these individual records is most relevant to the determination. In this context, I note that these parts of the TTCI Report contain information such as vehicle photos, vehicle sketches, officer's notes, witness statements and resumes. I conclude that the information is simply factual in nature. Accordingly, I find that none of these individual documents qualifies as a "report" within the meaning of section 14(2)(a) because their content does not represent a "formal statement or account of the results of the collation and consideration of information." Having reached this conclusion, I find that section 14(2)(a) does not apply to the records, with one exception, discussed below.

[34] I have reached a different conclusion regarding the portion of the TTCI Report identified as the Investigative Summary, from which only portions of three pages (55-57) have been withheld. As a whole, this record represents the investigating officer's summary of his conclusions and findings about the motor vehicle collision. I am satisfied that the Investigative Summary represents the officer's account of the results of his collation and consideration of the information about the accident, based on the investigation conducted. Accordingly, I find that the discretionary exemption in section 14(2)(a) of the *Act* applies to the record, subject to my review of the ministry's exercise of discretion in choosing to withhold it.

**D. Would disclosure result in an unjustified invasion of personal privacy under section 21(1)?**

[35] With reference to the revised access decision, the ministry relies on the factor favouring privacy protection in section 21(2)(f) and the presumptions in sections

21(3)(a), 21(3)(b) and 21(3)(d) in support of its position that disclosure of this information would constitute an unjustified invasion of personal privacy.<sup>14</sup>

[36] 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. The exceptions in sections 21(1)(a) to (e) are relatively straightforward. The exception in section 21(1)(f) (where “disclosure does not constitute an unjustified invasion of personal privacy”), is more complex and requires a consideration of additional parts of section 21.

[37] Sections 21(2) to (4) provide guidance in determining if disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. 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. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Finally, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

[38] If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2), as well as other considerations that are relevant in the circumstances of the case. 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).

[39] A presumption can, however, 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 23 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.<sup>15</sup>

### ***Section 21(1)(a) - Consent***

[40] The possible application of the exception in section 21(1)(a) has been raised in this appeal. The Notice of Inquiry sent to the ministry provided an outline of section 21(1)(a) noting that for the exception to apply, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request.<sup>16</sup> I pointed out to the ministry that it had received written consent from the driver of the other vehicle involved in the collision for disclosure of that individual’s

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<sup>14</sup> Sections 21(2)(f) and 21(3)(d) to pages 112 to 128, in their entirety, and parts of page 46; sections 21(2)(f), 21(3)(a) and 21(3)(b) to pages 50, 51, 108 to 111, in their entirety, and parts of pages 47 and 60; and sections 21(2)(f) and 21(3)(b) to pages 83 to 86, in their entirety, and parts of pages 62, 67, and 88.

<sup>15</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

<sup>16</sup> Order PO-1723.

cellular telephone number, but not the witness statement. When the Notice of Inquiry was issued, the ministry had not disclosed that information, even though it had that individual's consent.

[41] In response to my question about the effect of the consent, the ministry stated that the other driver had "indicated that the appellant could contact them via their cell phone," but also "clearly indicated that they did not want the report shared for 'personal reasons'." The ministry submits that:

The offer of the third party to provide a cell phone number does not equate to a waiver of the third parties (sic) request to not have their personal information as contained in the records shared with the appellant, and that they have not provided express or implied consent to share their personal information beyond their limited explicit consent to only provide their cell phone information.

[42] The ministry's other representations address provisions contained in Part III of the *Act* that deal with an institution's use and disclosure obligations.

#### *Analysis and findings*

[43] Section 21(1)(a) provides that:

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

upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

[44] In this appeal, this office received a consent form from the driver of the other vehicle. This consent, as noted by the ministry, is limited to providing a cell phone number to the appellant. The cell phone number is recorded on the consent form. However, I have reviewed the records that were identified by the ministry as responsive to the appellant's request, and I note that the particular cell number provided to the ministry on the affected party's consent form does not appear in any of the withheld portions of the records before me in this appeal. In the circumstances, therefore, since the written consent does not relate to undisclosed information in a record to which the appellant is "entitled to have access," I find that section 21(1)(a) does not apply.

#### ***Section 21(3) presumptions***

[45] The ministry relies on the presumptions against disclosure in paragraphs (a), (b) and (d) of section 21(3). These provisions state:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(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.

[46] The ministry's representations do not address the presumption in section 21(3)(a), which has been claimed to deny access to personal information on pages 50, 51, 108 to 111, in their entirety, and parts of pages 47 and 60. Nevertheless, the records speak for themselves, and based on my review, I find that there is personal information relating to the medical condition of another identifiable individual on pages 47, 50, 60 and 110, as well as medical information about the appellant's son on pages 110 and 111, that fits within section 21(3)(a) of the *Act*.

[47] The ministry submits that section 21(3)(b) applies because the records contain personal information collected by OPP officers who were investigating to determine the cause of a motor vehicle fatality, and for the purpose of ruling out any criminal wrongdoing that might warrant charges under the *Criminal Code* or citing an offence under the *Highway Traffic Act*. The information was, therefore, compiled and is identifiable as part of an investigation into a possible violation of law. The ministry's claim of section 21(3)(b) applies to pages 50, 51, 83 to 86, 108 to 111, in their entirety, and parts of pages 47, 55 to 57, 60, 62, 67 and 88.

[48] With respect to the presumption in section 21(3)(b), I accept the ministry's submission that the personal information at issue in these records was compiled by the OPP as part of its investigation of the fatal motor vehicle accident to determine if an offence under the *Highway Traffic Act* or *Criminal Code of Canada* had been committed. Even though no criminal proceedings were commenced, section 21(3)(b) may still apply since the presumption only requires that there be an investigation into a possible violation of law.<sup>17</sup> I find, therefore, that section 21(3)(b) applies to this information and that it is exempt under section 21(1) as its disclosure is presumed to result in an unjustified invasion of another individual's personal privacy.

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<sup>17</sup> Orders P-242 and MO-2235.

[49] The ministry submits that section 21(3)(d) applies to the personal information of an officer “that could reveal employment and educational history, years of service, as well as information such as professional qualifications.” The ministry’s claim of section 21(3)(d) relates to pages 112 to 128 (Appendix E), in their entirety, and parts of page 46. I have reviewed the information to which the ministry’s section 21(3)(d) claim applies in this appeal, I find that the officers’ education and employment information, including the number of years they have been with the OPP, constitutes the educational and employment history of the individuals to whom this information relates. Previous orders issued by this office have found that information contained in resumes falls within the scope of section 21(3)(d).<sup>18</sup> I agree. Therefore, I find that disclosure of this personal information would constitute a presumed unjustified invasion of privacy under section 21(3)(d) of the *Act*, and that it is exempt under section 21(1).

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

[50] As stated previously, notwithstanding a finding that sections 21(3)(a), (b) and (d) apply to various withheld portions of the records, any of these presumptions 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 23 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.<sup>19</sup> In this appeal, the public interest override in section 23 has not been raised and, in my view, it does not apply.

[51] However, of relevance to this appeal is the exception to the section 21(1) exemption found in section 21(4)(d), which 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.

[52] As established by Assistant Commissioner Brian Beamish in Orders MO-2237 and MO-2245, the application of section 21(4)(d)<sup>20</sup> requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

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<sup>18</sup> Orders M-7, M-1084, MO-1257 and PO-2756.

<sup>19</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

<sup>20</sup> In those orders, Assistant Commissioner Beamish reviewed section 14(4)(c) of *MFIPPA*, which is the municipal equivalent of section 21(4)(d) in *FIPPA*.

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 the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

[53] 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).<sup>21</sup>

[54] 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."<sup>22</sup>

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

[55] I concluded above that the personal information of the deceased individual appears in many of the records. Specifically, his personal information is contained in the following portions of the TTCI report: Summary of Involvement, Incident Synopsis, Involved Vehicles, Field Notes & Scene Sketch, Vehicle Examinations, Scale Diagram and Measurement Record, and Witness Statements. With respect to these segments of the TTCI Report, I find that the first requirement for the application of section 21(4)(d) is met.

[56] However, there is no personal information about the deceased individual in Appendix E of the TTCI Report, which consists of the résumés of the investigating officers. As these records do not contain the appellant's son's personal information, I find that this first requirement is not met in relation to these particular records and that they are exempt, pursuant to section 21(1), as the disclosure is presumed to be an unjustified invasion of personal privacy under section 21(3)(d) of the *Act*.

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<sup>21</sup> Order MO-2237.

<sup>22</sup> Order MO-2245.

*Step 2 – Spouse or "Close Relative"*

[57] "Close relative" is defined in section 2(1) of the *Act* as "a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption." In this appeal, the appellant fits within the definition of "close relative" because he is the father of the deceased individual whose personal information is contained in the records. Therefore, given that the appellant is a "close relative," I find that this requirement for the application of section 21(4)(d) is satisfied.

*Step 3– Desirable for Compassionate Reasons*

[58] The ministry submits that it considered the following factors in determining the amount of disclosure that would be desirable for compassionate reasons:

- The third party individuals have either specifically denied consent or they have not responded to our notification request to them asking if they would provide consent.
- The personal information in question is highly sensitive, due to the circumstances in which it was collected (a fatal motor vehicle collision investigation). The third party individuals are private citizens who provided highly personal accounts of what happened to the investigating officers, which the police relied on to complete their investigation. The ministry is particularly concerned that the disclosure of records under FIPPA, including sensitive records such as these, comes without any subsequent controls or restrictions, meaning that any disclosure under FIPPA is in effect potentially a disclosure to the world.
- The ministry is concerned that if members of the public knew that the personal information they provided to the police was going to be disclosed under the FIPPA process, even when they did not agree to it, it is foreseeable that potential witnesses would be less forthright in cooperating with the police, and in assisting the police with their investigations. The ministry submits that this type of outcome is one that should be avoided, in the interests of public safety and security.
- The ministry notes that the appellant has already been provided with the majority of the responsive records, which should answer specific questions they may have consistent with the purpose for which section 21(4)(d) of the FIPPA was enacted. The ministry has disclosed the records or the parts of the records that provide the appellant with detailed factual information of the circumstances of the deceased's death. The ministry maintains that through the severance of records, most of the details of the death of the deceased individual that are in the possession of the

ministry have been disclosed, while the privacy rights of third party individuals have been protected.

[59] With reference to the first bullet point, above, the other driver indicated on his consent form that although he was willing to share his cell number, he did not want the ministry to “send the report” to the appellant “for personal reasons.” The ministry’s representations on section 21(4)(d) conclude with the following submission:

The appellant has the opportunity to obtain greater knowledge of the circumstances in a manner that respects the privacy wishes of at least one of the affected parties [witnesses], and that access to the records in question are not the only means of obtaining that knowledge.

[60] The ministry’s submission respecting the factor in section 21(2)(f) essentially restates the position that because one of the witnesses specifically declined to consent, disclosure of this individual’s personal information would result in significant personal distress, especially in the context the personal information was collected – a tragic motor vehicle accident involving a fatality.

[61] As indicated previously, the appellant did not submit written representations in this appeal. However, in a telephone conversation with a staff member from this office, he stated that he believes that the records contain information that will enable him to better understand what happened to his son. He also indicated that he has spoken with the witnesses and since they have suggested certain things about the state of the road where the accident took place, he would like to see the records in their entirety to decide for himself. In my view, this comment implicitly raises the application of section 21(4)(d), disclosure on compassionate grounds.

### *Analysis and findings*

[62] Under section 50(1) of the *Act*, the Commissioner is empowered to review “any decision of the head” on appeal. This power of review includes a decision made under section 21(4)(d), which depends on the head being “satisfied that, in the circumstances, the disclosure is desirable for compassionate purposes.” If the Commissioner disagrees with the head’s assessment under this section, the Commissioner may make a different determination.

[63] A finding that the exception in section 21(4)(d) applies to some or all of the personal information means that disclosure of that information would not be an unjustified invasion of personal privacy. In other words, where this provision applies, the information is not exempt under section 21(1).<sup>23</sup>

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<sup>23</sup> See Orders MO-2237, MO-2245 and MO-2292.



[64] As outlined above, Orders MO-2237 and MO-2245 established the guiding principles for reviewing and applying the compassionate grounds exception to the personal privacy exemption. In Order MO-2237, Assistant Commissioner Beamish made the following comments about the purpose of the exception:

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.<sup>24</sup>

[65] In Order MO-2245, the Assistant Commissioner added that:

Losing a loved one is a sad and difficult process. Section [21(4)(d)] of the *Act* was designed to **allow families to have the records they feel they require** in order to grieve in the way they choose [emphasis added].

[66] In Order MO-2237, Assistant Commissioner Beamish provided the following guidance for how the exception should be applied to 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:

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 or coroner's 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) [the municipal equivalent of section 21(4)(d)], of assisting relatives in coming to terms with the death of a loved one.

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<sup>24</sup> Page 19 of Order MO-2237.

[67] In the circumstances of this appeal, and with regard for the principles outlined in Orders MO-2237 and MO-2245, I will be ordering the disclosure of additional information to the appellant based on the application of the exception to the section 21(1) mandatory personal privacy exemption provided for by section 21(4)(d) of the *Act*.

[68] I will begin by addressing the ministry's submission that the access decision made in response to this request has provided the appellant with "most of the details of the death of the deceased individual ..., while the privacy rights of third party individuals have been protected." In putting forth this argument, the ministry relies on the fact that one of the witnesses did not consent to the disclosure of his statement, while the other witness did not respond to the ministry's notification efforts. Implicit in the ministry's argument is that disclosure of the withheld information would not assist the appellant and other family members in better understanding the death of their son.

[69] Based on my review of the records, I agree that the ministry has provided a great deal of information about the accident that took the life of the appellant's son. Large portions of the TTCI report were disclosed in the ministry's initial and revised access decisions. I have considered the position taken by the driver of the other vehicle that he does not wish to have his witness statement disclosed. Finally, I have also considered the appellant's stated reasons for seeking access to the records. Having done so, I conclude that the ministry's reasons for not providing greater disclosure in this case reflect its own views, rather than the appellant's, about what information may assist the appellant and his family in grieving the loss of their son in the way they choose. In my view, this is not the correct approach to take in assessing what disclosures are compassionate in the circumstances. Assistant Commissioner Beamish had the following to say in Order MO-2245 about an institution imposing its own views on disclosure:

The task of the institution, and this office on appeal, is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons." This does not place the institution "*in loco parentis*" in the manner suggested by the Police when the disclosure is to adult relatives. Again, on the question of what is "compassionate", I accept the evidence and representations of the appellant.

[70] In further support of its position that disclosure of the records, particularly the witness statements, would constitute an unjustified invasion of personal privacy, the ministry refers to the high degree of sensitivity of the personal information, due to the fact that it was collected following a "fatal motor vehicle collision." According to the ministry, the disclosure of these "highly personal accounts of what happened ... without any subsequent controls or restrictions," is effectively "a disclosure to the world." This same argument has been addressed in previous orders. While the sensitivity of the context has been recognized, the institution's concerns about "disclosure to the world"

have been largely rejected in the analysis of the application of section 21(4)(d). In Order MO-2245, for example, Assistant Commissioner Beamish stated:

The Police have taken the position that disclosure under the *Act* is the equivalent to disclosure to the world and, as a result, they still have an obligation of protecting information deemed sensitive. With respect, this position misses the point of section 14(4)(c). With the enactment of this section, the Legislature has recognized a special group of requesters, namely the spouses and close relative of deceased individuals. Institutions have been directed to very specific criteria when considering disclosure to this group as compared to "disclosure to the world." In this case, the Police have not recognized the clear intent of the Legislature.

[71] Therefore, in assessing the relevant circumstances in this appeal, including the appellant's stated need to receive additional information to gain a better understanding of the circumstances of his son's death, I give significant weight to the fact that much of the appellant's son's personal information in the witness statements includes the witnesses' observations about what happened to the deceased during and after the collision. This is the appellant's son's sensitive personal information. In circumstances where grieving relatives seek access to information about the circumstances of the death, I attribute significant weight to the need for access to this information as part of the grieving process.

[72] I will also address that aspect of the ministry's representations that appears to introduce the notion of potential harm to "public safety and security" resulting from disclosure of the witness statements. The ministry submits that "it is foreseeable that potential witnesses would be less forthright in cooperating with the police, and in assisting the police with their investigations" if they knew that the personal information they provided in such a context could be disclosed under the *Act* without their consent. Notably, however, that the ministry's access decisions did not include a claim that any of the "harms-based" law enforcement exemptions in section 14(1) applied to this information. Therefore, while I am prepared to accept that the provision of personal information in a law enforcement investigation context may warrant consideration of the confidentiality expectation of the individuals providing the information, I reject the ministry's position on possible harm to "public safety and security" in this appeal. Here, the driver of the other involved vehicle *did* consent to disclosure of a telephone number to permit the appellant to contact him. The appellant also claims to have spoken with witnesses. Furthermore, had there been evidence warranting the laying of charges under either the *Criminal Code* or the *Highway Traffic Act*, any expectation of confidentiality would have to be revised as necessary for the resulting proceedings. In the circumstances of this appeal, therefore, I conclude that low weight ought to be accorded to the factor related to witness expectations of confidentiality as a basis for determining disclosure on compassionate grounds.

[73] In the circumstances of this appeal, and weighing the interests at stake with respect to the personal information of the deceased in the records, I find that the privacy interests of the other involved individuals must yield to the compassionate reasons for disclosure of additional information to the appellant, with a few exceptions. Specifically, I find that section 21(4)(d) applies to some of the personal information at issue in the following sections of the TTCI Report: "Involved Vehicles," "Vehicle Examinations – Appendix B," and "Witness Statements - Appendix D." In particular, I find that section 21(4)(d) applies to the deceased's actions and medical information about him. Given the application of the compassionate grounds exception in section 21(4)(d) to this information, I find that disclosure of the personal information would not constitute an unjustified invasion of privacy and that section 21(1) does not apply.

[74] Accordingly, I will order that these additional parts of the TTCI Report be disclosed to the appellant, subject to upholding certain severances to the records by the ministry for brief snippets of the personal information of the two witnesses and one police officer. For clarity, I have identified the severances of exempt information on the copies of the records provided to the ministry with this order.

**E. Did the ministry properly exercise its discretion under section 14(2)(a)?**

[75] As I have upheld the ministry's decision to deny access, in part, under section 14(2)(a), I will now consider the ministry's exercise of discretion in doing so. Since section 14(2)(a) is discretionary, the ministry had the discretion to disclose the withheld portions of the records, even if they qualified for exemption. This is the essence of a discretionary exemption.

[76] On appeal, an adjudicator may review the institution's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so. In doing so in this appeal, I may find that the ministry erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, takes into account irrelevant considerations, or fails to take into account relevant considerations. In such a case, I may send the matter back to the ministry for an exercise of discretion based on proper considerations. However, I may not substitute my own discretion for that of the ministry.<sup>25</sup>

[77] The ministry takes the position that it exercised its discretion under section 14 appropriately and with regard to relevant factors. The ministry submits that in denying access under section 14(2)(a), it considered: the position of the other individuals whose personal information appeared in the records; the appellant's right of access to the information, generally, to assist him in dealing with the tragic death of his son; the law enforcement purpose and context of the collection; and the fact that "police

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<sup>25</sup> See section 54(2) of the *Act* and Order MO-1573.

investigations into the conduct of citizens are confidential and privileged to the investigative body in order to maintain fairness and a presumption of innocence.”

[78] In the circumstances, I conclude that the factors cited by the ministry respecting its exercise of discretion are relevant considerations, with the exception of the last one. In my view, the notion that the results of an investigation are “confidential and privileged to the investigative body in order to maintain fairness and a presumption of innocence” is not a relevant consideration in the context of this appeal. As I pointed out previously, the ministry did not claim the law enforcement exemptions to which such considerations might properly apply, such as section 14(1)(f).<sup>26</sup>

[79] More generally, however, and aside from this last factor, I am satisfied that in denying access to the brief portions of the Investigative Summary section of the TTCI report that it did, the ministry exercised its discretion to deny access in a proper manner, taking into account relevant considerations. Accordingly, I uphold the ministry’s exercise of discretion, and I find that the withheld portions of pages 55 to 57 of the Investigative Summary record are exempt under section 14(2)(a) of the *Act*.

#### **Addendum – Occurrence summaries, reports and police officers’ notes**

[80] As identified in the introduction to this order, the appellant decided during mediation that he would not pursue access to the withheld portions of the occurrence summaries and reports or officers’ notes. These records were numbered pages 1 to 43 by the ministry.

[81] During the adjudication of this appeal, however, I reviewed those records, including the withheld portions. I remarked on the duplication of some of the records. For example, pages 84 to 86 of Appendix B and pages 109 to 111 of Appendix D to the TTCI Report find their duplicates in pages 21 to 23 and 41 to 43, respectively, of the records the appellant had removed from the scope of the appeal. Notably, portions of these records will be disclosed in this order on compassionate grounds, pursuant to section 21(4)(d).

[82] In my view, however, the occurrence summaries, reports and officers’ notes may also contain the very type of information that would assist a grieving family member in understanding the circumstances of the death of their loved one and help bring closure to the death. In this order, I rejected the ministry’s position on withholding similar information in the TTCI Report. If I were to let the possibility that additional personal information on pages 1 to 43 could be disclosed on compassionate grounds pass without commenting, I would be allowing the ministry to disregard section 21(4)(d) and take a course of action that frustrates the intent of the Legislature in enacting the provision.

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<sup>26</sup> Section 14(1)(f) of the *Act* provides that: A head may refuse to disclose a record where the disclosure could reasonably be expected to ... deprive a person of the right to a fair trial or impartial adjudication.

[83] In the circumstances, therefore, I would urge the ministry to consider re-exercising its discretion to release additional portions of the occurrence summaries, reports and police officers' notes to the appellant, in accordance with the guidance provided by my reasons respecting section 21(4)(d), above. I find support for this approach in the decision of Assistant Commissioner Beamish in Order MO-2245, where he made a similar recommendation to a police service in comparable circumstances.

**ORDER:**

1. I uphold the ministry's decision regarding information severed as non-responsive.
2. I uphold the ministry's section 14(2)(a) exemption claim, only with respect to the withheld portions of pages 55 to 57.
3. I uphold the ministry's section 21(1) exemption claim, only in relation to small portions of the other witnesses' personal information contained throughout the records and in relation to the withheld personal information of the investigating officers on page 46 and in Appendix E. For the sake of clarity, I have highlighted the portions of the records that ought not to be disclosed on the copies provided to the ministry with this order.
4. I order the ministry to disclose to the appellant the non-exempt portions of the "Involved Vehicles" (pages 50 and 51), "Vehicle Examinations – Appendix B" (pages 83 to 86) and "Witness Statements – Appendix D" (pages 109 to 111) to which section 21(4)(d) applies by **December 10, 2013** but not before **December 5, 2013**. I also order the ministry to disclose other information in these same portions that is related to the involved vehicles and does not qualify as "personal information."

The copies of pages 109 to 111 originally provided by the ministry contain severances, even though the pages were withheld in their entirety. I have used the clean duplicated copies of the records (pages 41 to 43) to highlight exempt information on the pages sent to the ministry with this order.

5. 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 disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

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November 4, 2013