

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3504

Appeals PA13-164 and PA13-255

Ministry of Community Safety and Correctional Services

June 30, 2015

Summary: This order addresses two appeals that resulted from a single access request. The appellant sought access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to all ministry records relating to his brother's death. The ministry granted partial access to the responsive records relying on the mandatory personal privacy exemption in section 21(1) (personal privacy) of the *Act* to withhold portions of the records. The requester appealed the ministry's decision to deny access and a third party appealed the ministry's decision to grant partial access. The application of section 21(4)(d) was raised in both appeals. The requester narrowed the scope of his appeal to include only the withheld personal information of his brother contained in the various police occurrence reports and police officers' handwritten notes at issue, and he relied on section 21(4)(d) to argue that he should be granted access to the withheld information for compassionate reasons. The affected party argued that none of the personal information of the deceased should be disclosed to the requester for compassionate reasons.

The ministry's decision to disclose parts of the records is not upheld as disclosure of the deceased's withheld personal information is found to constitute an unjustified invasion of personal privacy under section 21(1). Disclosure of the deceased's personal information is presumed to be an unjustified invasion of privacy under sections 21(3)(a) (medical history) and 21(3)(b) and is found not to be desirable on compassionate grounds under section 21(4)(d). The appellant's pecuniary, inheritance-related motives, his years long estrangement from his deceased brother, and the content of his submissions establish an absence of any compassionate reasons for disclosure.

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"), 21(1), 21(3)(a), 21(3)(b) and 21(4)(d).

Orders and Investigation Reports Considered: Orders P-242, MO-2235, MO-2237, MO-2245 and PO-2802-I.

Cases Considered: *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

OVERVIEW:

[1] The appellant¹ submitted a request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all available information relating to his brother's death.

[2] The ministry located a number of police records responsive to the request including an occurrence summary, occurrence and other reports, officers' handwritten notes and photographs. As required by section 28 of the *Act*, the ministry notified an individual whose interests could be affected by disclosure of the responsive records (the affected party). In response, the affected party objected to disclosure of the records and provided submissions to the ministry outlining the basis for its objections.

[3] The ministry then issued a decision granting the appellant partial access to the responsive records. The ministry relied on the discretionary exemptions in sections 14(1)(l) (facilitate commission of unlawful act) and 14(2)(a) (law enforcement) and the mandatory exemption in section 21(1) (invasion of privacy) with reference to the presumption in section 21(3)(b) (investigation into violation of law), to withhold portions of the records. The ministry also withheld portions of the records as non-responsive to the request.

[4] The affected party appealed the ministry's decision to this office, objecting to the ministry's decision to disclose portions of the records, and Appeal PA13-164 was opened. Subsequently, the appellant appealed the ministry's decision to withhold portions of the records to this office and Appeal PA13-255 was opened. Appeals PA13-164 and PA13-255 were processed concurrently.

[5] During the mediation stage of the appeals, the appellant agreed to be identified to the affected party as the deceased's brother. The appellant also confirmed that he is not pursuing access to information that was deemed non-responsive by the ministry, information withheld under the section 14(1)(l) exemption, and information relating to

¹ Although the affected party is the appellant in Appeal PA13-164 and the requester is the appellant in Appeal PA13-255, in this order, I will refer to the requester only as the appellant.

any individual other than his brother. He also confirmed that he is not pursuing access to various pictures that formed part of the responsive records. Accordingly, the photographs, personal information relating to other individuals, non-responsive information and information withheld under section 14(1)(l) in the records, are not at issue in this appeal.

[6] Throughout the mediation process, the affected party continued to object to the disclosure of any information to the appellant on the basis that it would be an unjustified invasion of the deceased's privacy under the mandatory exemption in section 21(1). The fact that the appellant had been provided with a copy of the coroner's report was also discussed during mediation, and it was noted that the coroner's report contained some information that was also found in the records at issue in the appeal. A mediated resolution of the appeals was not possible and they were moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[7] I conducted concurrent inquiries into the appeals and sought representations from the ministry, the affected party and the appellant. The affected party provided representations and asked that they not be shared with the appellant. The ministry also provided representations and asked that parts of them not be shared with the appellant. I determined that the affected party's representations satisfied the confidentiality criteria of this office as did the portions of the ministry's representations which the ministry asked me to keep confidential. In accordance with this office's *Code of Procedure* and *Practice Direction Number 7*, I shared only the non-confidential portions of the ministry's representations with the appellant. In its representations, the ministry withdrew its reliance on the discretionary exemption in section 14(2)(a). Accordingly, this exemption is no longer relevant to these appeals and I will not consider it further.

[8] In this order, I uphold the ministry's decision to withhold from the appellant the personal information of the deceased it identified as exempt under section 21(1) since disclosure of it is presumed to be an unjustified invasion of privacy under sections 21(3)(a) (medical history) and 21(3)(b) and is not desirable on compassionate grounds under section 21(4)(d). For the same reasons, I find that the personal information of the deceased which the ministry decided to disclose is exempt under section 21(1) and should be withheld.

RECORDS:

[9] The records at issue consist of:

- the personal information of the deceased contained in the police occurrence reports and summaries and handwritten police officers' notes which the ministry decided to disclose to the appellant (Appeal PA13-164).

- the personal information of the deceased contained in the handwritten police officers' notes, police occurrence reports and summaries, and an additional handwritten document which the ministry withheld under the mandatory personal privacy exemption in section 21(1) of the *Act* (Appeal PA13-255).

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 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] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.² Section 2(2) also relates to the definition of personal information and states:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

[12] To qualify as personal information, the information must be about an individual in a personal capacity and it must be reasonable to expect that the individual may be identified if the information is disclosed.³

[13] The ministry submits that the records contain extensive personal information about a number of individuals, including the deceased, witnesses, public officials and next of kin. It states that the personal information consists of addresses, telephone numbers and opinions or factual statements about the deceased that could identify the individuals who made them.

[14] The appellant states that he assumes that the personal information at issue only relates to his deceased brother since he has confirmed that he is not interested in pursuing any personal information belonging to unrelated witnesses or public officials contained in the records. He states that he is aware of additional documents, including a note left by his brother and a letter attached to his brother's will, and he specifically seeks access to these records. He also asks that any information in the records about

² Order 11.

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

him be disclosed since he believes this qualifies as his own personal information under the *Act*.

[15] I find that the records all contain information about the deceased and other identifiable individuals that qualifies as "personal information" under paragraphs (a), (b), (d), (e), (g) and (h) of the definition in section 2(1) of the *Act*. I note that under section 2(2) of the *Act*, the personal information of a deceased individual remains "personal information" for the purposes of the *Act* for thirty years after death. In accordance with section 2(2), I find that the deceased's personal information in the records attracts the privacy protection provided by the *Act* and the deceased's privacy interests are not diminished by virtue of his recent death. I also find that the records do not contain any personal information of the appellant.

[16] Since I have found that the records do not contain the appellant's personal information, and the appellant has narrowed the scope of his appeal to the personal information contained in the records that relates to his deceased brother, I will consider the appellant's right to access the information at issue under section 21(1) of the *Act*.

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

[17] 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(1). I find that the information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 21(1) and the only exception that could apply is paragraph (f), which states:

21. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

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

[18] Sections 21(2) and (3) help in determining whether disclosure would be an unjustified invasion of personal privacy under section 21(1)(f). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21.

[19] The appellant submits that paragraph 21(4)(d) applies to the withheld information at issue in Appeal PA13-255. The ministry submits that section 21(4)(d) does not apply to the withheld information at issue. The affected party submits that

section 21(4)(d) does not apply to any of the personal information of the deceased in the circumstances of these appeals.

[20] If any of paragraphs (a) to (h) of section 21(3) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1). 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.⁴ A presumed unjustified invasion of personal privacy under section 21(3) cannot be rebutted by one or more factors or circumstances under section 21(2).⁵ The ministry submits that the presumption at section 21(3)(b) applies. The representations before me also allude to the possible application of the section 21(3)(a) presumption. These presumptions 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[.]

[21] Section 21(4)(d) states:

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

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

Representations

[22] The ministry submits that almost all of the records fall squarely within the mandatory presumption in section 21(3)(b) because they were compiled by and are identifiable as part of a police investigation into a possible violation of law resulting from the death of the deceased. It explains that the deceased’s death was investigated by the police to rule out any third party involvement. The ministry argues that because

⁴ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁵ *Ibid.*

the records clearly relate to an investigation into a possible violation of law and the personal information of individuals other than the appellant is contained in them, the information at issue is protected from disclosure under section 21(3)(b).

[23] In respect of section 21(4)(d), the ministry states that while it believes that "greater knowledge of the circumstances of their loved one's death" is usually "compassionate" for surviving family members, the wording of section 21(4)(d) supports a more nuanced approach in its interpretation than has been adopted in previous orders of this office. The ministry submits that not all families are alike and there are situations where disclosure may not be compassionate. It maintains that this appeal is one such situation. The ministry argues that there are compassionate reasons for not disclosing the personal information at issue to the appellant despite the fact that he was entitled, as the brother of the deceased, to information about the deceased in accordance with section 18(4) of the *Coroners Act*.

[24] As noted above, the affected party submitted representations which are confidential in their entirety and I am not able to refer to them in this order.

[25] The appellant states that he is not aware of precisely what records are being withheld. He asks that I consider the possible application of the public interest override in section 23 of the *Act*. In respect of the ministry's claim that the presumption in section 21(3)(b) applies, he submits that the last part of the presumption which qualifies it and reads, "except to the extent that disclosure is necessary to prosecute the violation or continue the investigation", is relevant in this appeal. He states that he is suspicious about the circumstances surrounding his brother's death. He submits that there is evidence to suggest criminal activity and this warrants further investigation of his brother's death. He also describes alleged nefarious activities and implies that they are related to his brother's death. Along with his representations, the appellant provides a number of documents which he believes are relevant to support his position and allegations. He further submits that disclosure is not "an unjustified invasion of personal privacy" because section 21(4)(d) of the *Act* seems to apply. He states that the records contain the personal information of a deceased individual in accordance with the first part of the test, that he is a "close relative" in accordance with the second part of the test, and that disclosure to him is desirable for compassionate reasons in the circumstances. The appellant then concludes by stating the following:

I am willing if it would help resolve matters to the satisfaction of all affected parties to renounce any possible legal claim to the assets in [the deceased's] estate, subject to two conditions.

First, that the executor [named individual] and my sister [named individual] agree to renounce any possible legal claim to what used to be the remainder of my mother's estate.

Second, that [named individual] agree to turn over the role of executor for [the deceased's] estate matters to me.

Analysis and findings

[26] The personal information at issue is contained in a police occurrence summary, police occurrence and other reports, police officers' handwritten notes and another handwritten note all compiled during the Ontario Provincial Police's investigation of the deceased's death. I accept the ministry's submission that the purpose of the police investigation was to determine whether the deceased's death was caused by a criminal act. I therefore accept the ministry's submission that the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, namely, a possible offence under the *Criminal Code*. This office has consistently maintained that the section 21(3)(b) presumption only requires that there be an investigation into a possible violation of law to apply.⁶ I find that the police's investigation of a possible *Criminal Code* offence in relation to the deceased's death engages the presumption in section 21(3)(b) of the *Act*. Accordingly, I find that disclosure of the personal information at issue is presumed to constitute an unjustified invasion of the deceased's personal privacy under section 21(3)(b). I do not find the appellant's arguments about the need for additional investigation persuasive, and I reject his assertion that disclosure is necessary despite the application of the presumption in section 21(3)(b).

[27] I also note that a second presumption, the medical history presumption in section 21(3)(a) applies to some of the information at issue in this appeal. Some of the personal information relates to the deceased's medical history and condition and thus falls squarely within this second presumption. Accordingly, I also find that the presumption in section 21(3)(a) applies and disclosure of the personal information at issue is presumed to be an unjustified invasion of the deceased's personal privacy.

[28] The Divisional Court has confirmed that once a presumed unjustified invasion of personal privacy under section 21(3) has been established, it can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁷ The appellant claims that section 21(4)(d) applies. He also asks me to consider the possible application of section 23 of the *Act* to his appeal.

21(4)(d) – compassionate reasons

[29] In two seminal orders, MO-2237 and MO-2245, Commissioner Brian Beamish, who was the Assistant Commissioner at the time, articulated this office's approach to determining the application of section 21(4)(d) of the *Act*. The Commissioner established that the application of section 21(4)(d) requires a consideration of three questions, all of which must be answered affirmatively in order for the section to apply:

⁶ Orders P-242 and MO-2235.

⁷ *John Doe v. Ontario (Information and Privacy Commissioner)*, *supra* note 4.

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?⁸

[30] The term "close relative" is 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[.]

[31] I adopt the three-part test established by the Commissioner and apply it in the appeals before me. I agree with the appellant that the first two parts of the test are satisfied in these appeals. The records contain the personal information of a deceased individual in satisfaction of part 1 of the test. I also accept that the appellant, as the deceased's brother, qualifies as a "close relative" under the definition of that term in section 2(1) of the *Act*. However, I do not agree with the appellant that the answer to part 3 of the test is affirmative.

[32] In order to satisfy part 3 of the test, the circumstances of the request must establish that disclosure of the personal information of the deceased individual is desirable for compassionate reasons. In formulating part 3 of the test in Order MO-2237, Commissioner Beamish discussed the purpose of section 21(4)(d) and wrote:

... 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.

[33] Bearing in mind the reasons and findings in Orders MO-2237 and MO-2245 and comparing the circumstances present in those orders to the circumstances in the appeals before me, I find that the appeals before me are distinguishable. Unlike most

⁸ Orders MO-2237 and MO-2245.

appeals this office has decided regarding requests for personal information of a deceased individual by close relatives of the deceased, there simply are no compassionate reasons for disclosure here.

[34] I agree with the ministry's submission that not all families are alike and there are family circumstances in which disclosure is not desirable for compassionate reasons. The appellant's own representations lay out such circumstances and establish the absence of any compassionate reasons for disclosure. In his representations, the appellant confirms that he was estranged from his deceased brother for almost a decade and that the estrangement was intentional and acrimonious. He also explains that he suspected and accused his brother of a number of serious personal vengeances and potential criminal acts which he reported to the police. The appellant's submissions contain a large amount of very personal and sensitive information describing various family dynamics and circumstances, and significant tensions between different members of his family. I need not detail these incidents and allegations due to their personal nature and because it is not necessary for the purpose of articulating my reasons. It suffices for me to say that the appellant's representations confirm that there was no relationship whatsoever between him and the deceased for approximately a decade, and certainly not a relationship that can be considered "loving" or "familial" which is typically the case when applying section 21(4)(d) of the *Act*.

[35] In addition, there is no evidence before me that the appellant is mourning the loss of his brother. Rather, the evidence before me is that the appellant's main interest in accessing his deceased brother's personal information is pecuniary. The appellant himself confirms this in his representations when he sets out a number of conditions for the resolution of his appeal, all of which have to do with the deceased's estate and inheritance issues. The purpose of section 21(4)(d) of the *Act* is to provide personal information to close relatives of deceased individuals to assist them in their grieving process when compassionate reasons are evident from the circumstances of the request. Where the circumstances of a request comprise solely pecuniary and inheritance-related motives and exclude any indication of bereavement, section 21(4)(d) cannot apply. In Interim Order PO-2802-I, Adjudicator Steven Faughnan found that section 21(4)(d) did not apply where the appellant sought withheld information for estate accounting purposes. Adjudicator Faughnan wrote:

I have considered the issue and find that the reasons for requesting the withheld information do not qualify as compassionate reasons. This request is not motivated by a desire to resolve what the appellant's grandmother believes is a lack of clarity in the information she has received about her brother's death or to assist her in the grieving process, but is instead sought essentially for the purposes of an accounting. In my view, this is not the kind of reason that meets the threshold of compassionate. Accordingly, I find that, in the circumstances, disclosure of the withheld personal information of the deceased in the records is not

desirable for compassionate reasons. As a result, I find that the exception in section 21(4)(d) does not apply.

[36] I agree with Adjudicator Faughnan's reasoning and adopt it here. I find that the appellant's pecuniary, inheritance-related reasons for seeking access to his deceased brother's personal information do not qualify as compassionate reasons. I also find that the appellant's and the deceased's intentional decade-long estrangement and the absence of any indication that the appellant is grieving his brother's death, are circumstances that establish that disclosure is not desirable for compassionate reasons. Accordingly, I find that section 21(4)(d) does not apply in these appeals.

[37] As a result, I uphold the ministry's decision in Appeal PA13-255 to withhold portions of the records containing the deceased's personal information. I do not uphold the ministry's decision in Appeal PA13-164 to grant the appellant access to some of the deceased's personal information contained in the records. In coming to my conclusion that section 21(4)(d) does not apply, I have taken into consideration all of the representations before me, including the confidential representations provided by the ministry and the affected party. Although I am not able to discuss these confidential representations, I confirm that they support my conclusion that the circumstances establish that there are no compassionate reasons for disclosure, however, there are compassionate reasons for not disclosing the deceased's personal information.

[38] I turn now to the appellant's request that I consider the possible application of the public interest override in section 23 of the *Act* to this appeal. This office has established that in order to satisfy the requirements of section 23, there must be a compelling public interest in disclosure, and this compelling public interest must clearly outweigh the purpose of the exemption. The appellant provides no submissions at all on why he believes there is a compelling public interest in disclosure of his deceased brother's personal information that outweighs the personal privacy exemption that I have found applies to protect the information at issue. The appellant's appeal is strictly a personal matter that arises, as I have found above, from his financial interest in inheritance-related issues. In these circumstances, I find that there is no public interest whatsoever in disclosure of the deceased's personal information and section 23 does not apply.

[39] Finally, I note that the appellant has obtained a copy of the Coroner's Report of his brother's death. He did so, presumably, under section 18(4) of the *Coroners Act*, which requires that the coroner's findings be provided to the "spouse, parents, children, brother and sisters" of the deceased upon request. I find that the appellant's use of this provision of the *Coroners Act* and his possession of information relating to his brother's death under it, does not impact on my decision to deny the appellant access to his brother's personal information under section 21(4)(d) the *Act*. The *Coroners Act* and the *Act* address different issues and serve different purposes, and I find that there is no conflict between section 18(4) the *Coroners Act* and the privacy protection provisions I

considered under the *Act*. One of the two purposes of the *Act* is the protection of privacy with respect to personal information held by institutions and my decision is consistent with this purpose.

[40] As I have found that the presumptions in sections 21(3)(a) and (b) apply to the withheld information, and neither of sections 21(4)(d) or 23 applies, I find that all of the deceased's personal information in the records is exempt from disclosure under the mandatory personal privacy exemption in section 21(1) of the *Act*.

ORDER:

1. I uphold the ministry's decision in Appeal PA13-255 to withhold the deceased's personal information and dismiss this appeal.
2. I do not uphold the ministry's decision in Appeal PA13-164 to disclose some of the deceased's personal information.
3. I order the ministry **not to disclose** to the appellant any of the deceased's personal information contained in any of the records at issue in Appeal PA13-164.

Original signed by: _____
Stella Ball
Adjudicator

_____ June 30, 2015