Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3544

Appeal PA13-446

Ministry of Community Safety and Correctional Services

October 28, 2015

**Summary:** The appellant requested police records about the Ontario Provincial Police investigations of the murder of two individuals and the death of a third individual. The Ministry of Community Safety and Correctional Services denied access under sections 14(1)(a), 14(1)(c), 14(1)(d) and 14(1)(l) (law enforcement); section 19 (solicitor-client privilege); and section 21(1) (personal privacy) of the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator finds that the records consist of personal information and are exempt under section 21(1). The appellant also claimed that the public interest override in section 23 applies, in part on the basis that no charges were laid after the investigations. He also submitted that the right of freedom of expression, protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*, supports his view that there is a compelling public interest in disclosure. The adjudicator does not accept the appellant's argument under section 2(b) of the *Charter*, and finds that section 23 does not apply. The ministry's decision to deny access to the records is upheld.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of "personal information"), 21(1)(f), 21(3)(b), 21(4)(d) and 23; *Canadian Charter of Rights and Freedoms*, section 2(b).

**Orders and Investigation Reports Considered:** Orders M-50, PO-3023 and PO-3164.

**Cases Considered:** *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; and *R. v. Mentuck*, 2001 SCC 76.

## OVERVIEW:

[1] The appellant, a journalist, 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*). The request was for general occurrence reports and supplementary occurrence reports relating to Ontario Provincial Police (OPP) investigations into the deaths of three named individuals. Two of the individuals had been found murdered in their home. The third died in a motor vehicle accident.

[2] The OPP issued a press release with respect to the murder investigation, which stated, in part:

> Police have concluded that the suspect believed to be responsible for this incident was known to the victims and is now deceased. The investigation has identified that there are no other known suspects.
>
> Although specific details pertaining to this incident cannot be released, police can confirm that no criminal charges will be laid.

[3] In its access decision in response to the appellant's request, the ministry denied access to all responsive records pursuant to the following sections of the *Act*: 14(1)(a), 14(1)(c), 14(1)(d), 14(1)(h), 14(1)(l), 14(2)(a) (law enforcement); 19 (solicitor-client privilege); and 21(1) (personal privacy).

[4] The appellant filed an appeal of this decision. The appeal was then assigned to a mediator under section 51 of the *Act*. During mediation, the appellant raised the issue of the public interest in disclosure of the records at issue, and as a result, the public interest override found in section 23 of the *Act* is at issue in this appeal. Also during mediation, the ministry noted that in addition to the exemptions claimed, report printing information was not responsive to the request. The mediator relayed this information to the appellant, who confirmed that he does not seek access to this non-responsive information. The report printing information is therefore no longer at issue.

[5] The appeal then moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[6] The adjudicator initially assigned to this appeal invited representations from the ministry and the appellant, which were exchanged in accordance with section 7 of the *Code of Procedure* issued by this office, and *Practice Direction 7*.

[7] In its initial representations, the ministry stated that it no longer relies on sections 14(1)(h) and 14(2)(a) of the *Act*, and as a result, those sections are no longer at issue.

[8] Following the receipt of representations, this appeal was transferred to me to complete the inquiry. The ministry did not forward the records at issue to this office,

and I have therefore attended at the ministry's offices to conduct a detailed review of them.

## RECORDS:

[9] The records at issue consist of 21 pages of general occurrence reports, supplementary occurrence reports and homicide/sudden death reports.

## ISSUES:

[10] The issues remaining to be resolved in this appeal are as follows.

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) of the *Act* apply?

C. Does the public interest override at section 23 of the *Act* apply?

D. Does the discretionary exemption at section 19 of the *Act* apply?

E. Do the discretionary exemptions at sections 14(1)(a), 14(1)(c), 14(1)(d) and 14(1)(l) apply?

F. Did the ministry properly exercise its discretion to rely on sections 14(1)(a), 14(1)(c), 14(1)(d) and 14(1)(l) and 19?

## DISCUSSION:

### PERSONAL INFORMATION

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

[11] 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), in part, 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,
>
> . . .
>
> (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;

[12] 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.[1]

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

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

[14] 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.[2]

[15] The ministry's representations state:

> The Ministry has withheld the records because they contain personal information belonging to three deceased individuals, a witness, and a participant in one of the law enforcement investigations.

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621 and PO-2225.

> This personal information includes their names, in some cases their addresses, as well as information that links them to two OPP law enforcement investigations. This information would identify them if it were disclosed. Section 2(2) of [the *Act*] expands the scope of personal information to include that belonging to individuals who have been deceased for less than 30 years.

[16] The appellant's representations state:

> There is no basis for withholding the records because they contain the names of the three deceased individuals, a witness, and a participant in the investigation. The names of the deceased are already well-known to the public through media reports (and the police). With respect to the names of the other individuals, there is no suggestion by the Ministry that those names appear with other personal information or that disclosure would reveal other personal information about them. Names on their own do not constitute personal information. Therefore, they should not be withheld pursuant to section 21(1).
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> Furthermore, one of the witnesses to the motor vehicle collision that killed [named individual], a nurse who arrived on the scene within minutes of the collision, willingly spoke to a reporter for [a named media outlet] about her involvement and what she witnessed. . . .
>
> In the alternative, if such names (or addresses) do constitute personal information, any such personal information can be redacted and severed from the records.

[17] Having reviewed the records in detail, I find that, in their entirety, they consist of personal information. With one exception, the records are clearly identified as relating to the OPP investigation into the murders of two individuals. The exception is a record that is clearly identified as relating to the OPP investigation of the motor vehicle collision in which the third individual was killed. Therefore the records, in their entirety, constitute recorded information about the three deceased individuals. As well, as the ministry notes, the records also contain recorded information about two other identifiable individuals.

[18] The appellant's submission that "there is no suggestion by the Ministry that those names appear with other personal information or that disclosure would reveal other personal information about them," is without merit. As the ministry notes, the records contain information that links them to two OPP investigations. The records document police investigations into the deaths of three individuals. As I have just stated, this is recorded information about identifiable individuals.

[19] The appellant's arguments that the information should not be withheld because

"names of the deceased are already well-known to the public through media reports," and that a witness spoke to the media, has no impact on the issue of whether the records contain personal information, as distinct from the question of whether it is exempt from disclosure under section 21(1). Personal information remains personal information even if it is known to the public.

[20] In addition, I find that severing personal identifiers, as suggested by the appellant, would not render the information non-identifiable.

[21] The exceptions to the definition of personal information in sections 2(2) and 2(3) do not apply, as the individuals have not been dead for thirty years, and the investigations do not relate to them in a business, professional or official capacity.

[22] Accordingly, I find that the records, in their entirety, consist of personal information.

## PERSONAL PRIVACY

### B. Does the mandatory exemption at section 21(1) of the *Act* apply?

[23] 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. Section 21(1) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (b) in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;
>
> (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
>
> (d) under an Act of Ontario or Canada that expressly authorizes the disclosure;
>
> (e) for a research purpose if,
>
> > (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,

> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[24] I have reviewed section 21(1) and conclude that the only exception that could apply is section 21(1)(f), which allows disclosure if it would not be an unjustified invasion of personal privacy.

[25] Section 21(3) lists circumstances in which disclosure is presumed to be an unjustified invasion of personal privacy. 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.[3]

[26] The ministry submits that the presumed unjustified invasion of privacy at section 21(3)(b) applies.

### *21(3)(b): investigation into violation of law*

[27] Section 21(3)(b) states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

[28] 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.[4]

[29] The ministry submits:

> These records were created pursuant to a law enforcement investigation into the murders of two individuals and the motor vehicle collision that

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[3] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[4] Orders P-242 and MO-2235.

> claimed the life of another individual. If the evidence gathered during the investigations had pointed in a different direction, charges could have been laid by the investigating members of the OPP, most likely pursuant to the *Criminal Code*. As a result, the ministry submits that the records fall squarely within the presumption in section 21(3)(b).

[30] The appellant argues that section 21(3)(b) cannot apply because the records do not contain personal information, and refers to its arguments to that effect which I have reproduced, and dismissed, above. I have found that the records, in their entirety, consist of personal information, and this argument therefore cannot succeed.

[31] The appellant also submits that because three of the individuals identified in the records are deceased, their right to privacy is diminished. This argument refers to a factor that has been identified as a "relevant circumstance" under section 21(2),[5] but it does not affect the application of the presumed unjustified invasion of privacy under section 21(3)(b).

[32] I find that the records, in their entirety, were "compiled and [are] identifiable as part of an investigation into a possible violation of law," and the presumed unjustified invasion of personal privacy in section 21(3)(b) applies.

[33] As noted above, 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.[6] I will therefore consider whether either of these provisions applies.

### *Section 21(4)*

[34] If any of the paragraphs in section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21(1).

[35] Section 21(4)(a) relates to information about officers and employees of institutions. Section 21(4)(b) relates to contracts for personal services between an individual and an institution. Section 21(4)(c) relates to licences, permits and discretionary benefits conferred on individuals. None of these sections applies.

[36] Section 21(4)(d) pertains to information about deceased individuals. It states:

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

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[5] See Order M-50.
[6] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

> (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. [Emphasis added.]

[37] The appellant is not a spouse or close relative of any of the deceased individuals. I find that section 21(4)(d) does not apply.

### *Conclusions under section 21(1)*

[38] Subject to the consideration of the public interest override below, I find that the records, in their entirety, are exempt under section 21(1). The exception to the exemption at section 21(1)(f), which applies "if the disclosure does not constitute an unjustified invasion of personal privacy," is not made out in this case because the presumed unjustified invasion of personal privacy in section 21(3)(b) applies.

## PUBLIC INTEREST OVERRIDE

### C. Does the public interest override at section 23 of the *Act* apply?

[39] Section 23 states:

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

[40] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[41] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[7]

[42] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[8]

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[7] Order P-244.
[8] Orders P-984 and PO-2607.

[43] A public interest is not automatically established where the requester is a member of the media.[9]

[44] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[10]

[45] Any public interest in *non*-disclosure that may exist also must be considered.[11] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[12]

[46] A compelling public interest has been found to exist where, for example:

- the integrity of the criminal justice system has been called into question;[13]
- public safety issues relating to the operation of nuclear facilities have been raised;[14] or
- disclosure would shed light on the safe operation of petrochemical facilities[15] or the province's ability to prepare for a nuclear emergency.[16]

[47] A compelling public interest has been found *not* to exist where, for example:

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[17] or
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter.[18]

[48] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[49] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the

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[9] Orders M-773 and M-1074.
[10] Order P-984.
[11] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[12] Orders PO-2072-F, PO-2098-R and PO-3197.
[13] Order PO-1779.
[14] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.
[15] Order P-1175.
[16] Order P-901.
[17] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[18] Order P-613.

information is consistent with the purpose of the exemption.[19]

***Representations***

[50] The appellant submits that there is a compelling public interest in disclosure that outweighs the purpose of the section 21(1) exemption.

[51] The appellant states:

> In light of the fact that no criminal charges have been laid and no charges are forthcoming, it is critical for the community affected by the murders of [named individuals] to know whether the police have properly investigated their deaths and reached appropriate conclusions. Disclosure of the records will help ensure that can occur. It is important for the public to know whether the OPP's decision to conclude its investigation and not lay charges is well-founded and reasonable in the circumstances.
>
> There has also been much speculation by the public and media about a possible link between the murders of [named individuals] and the death of [named individual]. Therefore, it is in the public interest to release the records because they will shed light on the circumstances and investigation of these deaths[.]
>
> In the present case the public interests supporting disclosure outweigh the privacy interests at stake. The records requested are being sought potentially to assist in finding answers about the murders of [named individuals] since the OPP has concluded its investigation without laying any charges. It is rare and unusual situation when no charges are laid as a result of two murders, and the public is entitled to know the specific reasons and circumstances leading to the decision to not lay charges. Therefore, the public interest in this matter is highly compelling.
>
> Although there has been significant media and public interest in the murders, the OPP has released little information about the motive, the circumstances of the murders, who is responsible, and how the investigation of [named individual]'s death may be related. This lack of transparency and minimal information breeds a lack of public confidence in the investigation. It also breeds speculation, gossip, and rumours in the community. As one of the . . . family members told the [appellant], "We desperately want to know what happened and why, no matter how difficult it may be to hear. So far, we have no answers. There has been a proliferation of rumours, speculation and innuendo, but few hard facts and

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[19] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

little certainty." When facts and information about a criminal case are missing, gossip and innuendo fill the void.

The Supreme Court of Canada has stated that, "there is a prima facie case that s. 2(b) (of the *Charter*[20]) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded." [*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, at para. 37.] The appropriateness and effectiveness of police investigations is clearly a compelling matter. As Justice Iacobucci explained on behalf of the Supreme Court in *R. v. Mentuck* [2001 SCC 76 at para. 51]:

> As this Court recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLil 87 (SCC), [1989] 1 S.C.R. 927, at p. 976, "participation in social and political decision-making is to be fostered and encouraged," a principle fundamental to a free and democratic society. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy.

. . .

The Ministry has not provided any evidence that anyone will suffer harm should the records be disclosed. The public's confidence in the police is so pressing a concern that even if there were harm, the public interest would outweigh the privacy interests at stake.

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[20] The appellant is clearly referring to the *Canadian Charter of Rights and Freedoms*.

> Furthermore, since the names of the murder victims . . . and [an individual who attended the scene of the motor vehicle collision] have been published widely, to continue to suppress this information cannot be justified on privacy grounds.
>
> With respect to the second part of the test under section 23, the public interest in disclosure outweighs the purpose of the stated exemptions. The public's right to be informed must supersede the right to privacy in this case, in light of the public and family's demand for information, and the fact that police have stated they believe they know who was responsible for the murders, but are not laying charges because the person responsible is deceased. Since there will not be any charges or public trial, this appeal is the only opportunity for the public to be properly informed about the OPP's findings and conclusions regarding the murders. This is consistent with one of the key purposes of [the *Act*], which is to keep the public informed.
>
> In a previous case, the requesting party asked for the dates that DNA samples were taken from victims and/or identified addresses as part of an investigation relating to a criminal case that has received significant public attention. The IPC found there was a compelling public interest in disclosure and made the following comments:
>
> > "The public has an interest in knowing whether or not the law enforcement agencies involved conducted their investigation into the crimes committed by the affected party in a timely and effective manner, especially in light of the disturbing nature of these crimes. I find that due to the nature of these crimes, the need for transparency in relation to the investigation outweighs the privacy interests of the affected party, the two identified individuals and one unidentified individual." [Order PO-3164].

[52] The ministry submits that section 23 does not apply because:

- the appellant's status as a member of the media does not in itself, represent a public interest in disclosure [Order M-773], and the likelihood of publication foreseeably augments the intrusiveness of any infringement of personal privacy;
- one of the news stories submitted by the appellant with his representations states that the family of the deceased, "still grieving, is vigilant about privacy," and this should cause significant concern about disclosing personal information belonging to the deceased; and
- family members of the deceased being quoted in news reports as wanting to know more about the police investigation into the murders, as mentioned by the

> appellant, does not mean that family members want personal information disclosed to the media.

***Analysis***

[53] The appellant relies on Order PO-3164 in support of its position that there is a public interest in disclosure of information about this murder investigation. However, the circumstances of the two cases are quite different. In Order PO-3164, Commissioner Brain Beamish stated:

> I agree with the submission made by the appellant that the manner in which the investigation was conducted and particularly, whether DNA evidence was collected and entered into the NDDB [National DNA Data Band] in a timely manner is a matter of strong public interest.
>
> I have reviewed Justice Campbell's report on the Bernardo investigation, in which he found that Paul Bernardo's DNA sample was submitted in December 1990, but was lost at the CFS [Centre for Forensic Science]. The result of this error was a delay of over two years before Bernardo's arrest and conviction. In his final report, Justice Campbell states: "If the five suspect samples including Bernardo's had been given the highest priority on December 13, 1990, the DNA match to Bernardo could have been found in early January 1991." This issue of timely cataloguing of DNA evidence is clearly the focus of the appellant's request.
>
> The disclosure of the information contained in the record at issue will inform the citizens of Ontario when crucial and time sensitive evidence was collected and catalogued by law enforcement. It will shed light on whether the investigation suffered delays similar to those in the Bernardo investigation or if the police collected and inputted evidence in a timely manner. . . .

[54] While the appellant has provided ample evidence to demonstrate that the murders of the two deceased individuals have been the subject of significant media discussion, the factors enumerated in this extract from Order PO-3164 are not present here. There are no allegations that the investigation suffered delays or failed to protect public safety.

[55] The appellant's submissions, quoted above, suggest that in any case where charges are not laid in the wake of a murder, the community is entitled to review the police files and determine whether appropriate steps were taken. I do not agree. Police work, by its very nature, attracts considerable public interest, but that does not mean that all police files should be public. The particular circumstances of each case must be reviewed in order to determine whether the public interest in disclosure rises to the level of a "compelling" public interest, and if so, whether that interest outweighs the

purpose of the exemption(s).

[56] As Commissioner Beamish stated in Order PO-3025, in declining to apply the public interest override to interview and interrogation records about an individual who was convicted of serious crimes:

> . . . although there may be widespread curiosity about the contents of the records, and their release would be newsworthy, that does not automatically lead to the application of the public interest override, which must assess whether the broader public interest would actually be served by disclosure. That is the purpose of weighing a compelling public interest, where one is found to exist, against the purpose of applicable exemptions.

[57] The appellant also refers to the Supreme Court of Canada's decision in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,[21] and its reference to situations where, ". . . without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded." In this case, however, the appellant's submissions and attached news stories clearly demonstrate that the circumstances surrounding the murders have been the subject of significant public discussion. As I have already noted, there is no suggestion that the investigation suffered delays or failed to protect public safety, and there is no evidence to suggest that denial of access to the records has impeded meaningful public discussion or criticism.

[58] The appellant's quote from *Criminal Lawyers' Association* is part of the Supreme Court of Canada's consideration of whether the freedom-of-expression guarantee found in section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) includes a constitutionally mandated right of access to records held by governments. Although the appellant does not frame his submission this way, he is in effect arguing that it would be unconstitutional to uphold the exemption claims in this case because of section 2(b) of the *Charter*. Whether this is framed as an argument that exemptions claimed by the ministry are constitutionally inapplicable or, alternatively, that "charter values" mandate an application of the public interest override in this case[22], I have concluded that it cannot succeed.

[59] The facts and outcome in the *Criminal Lawyers' Association* case support this conclusion. *Criminal Lawyers' Association* concerned a murder investigation and trial that resulted in judicial criticism of the behaviour of both the police and the Crown, involving failures to disclose relevant information to the defence. The OPP subsequently

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[21] 2010 SCC 23

[22] See *Nova Scotia (Worker's Compensation Board) v. Martin*, 2003 SCC 54 at para. 48; *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 24; *R. V. Clarke*, 2014 SCC 28 at para. 16 and *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495 at paras. 53-58.

investigated the behaviour of two police forces and the Crown Attorney. Following the investigation, the OPP issued what the Supreme Court described as a "terse press release" stating that there was "no evidence that the officers attempted to obstruct justice by destroying or withholding a vital piece of evidence" and "no evidence that information withheld from the defence was done deliberately and with the intent to obstruct justice." As the Court also observed, "the OPP offered no explanation for its conclusions."

[60] In finding that the denial of access to the records at issue in *Criminal Lawyers' Association* did not infringe rights under section 2(b) of the *Charter*, the Court stated:

> In our view, the CLA has not demonstrated that meaningful public discussion of the handling of the investigation into the murder of Domenic Racco, and the prosecution of those suspected of that murder, cannot take place under the current legislative scheme. Much is known about those events.

[61] In this case, similar to the situation in *Criminal Lawyers' Association*, the outcome of the OPP investigation was reported in a brief press release, and there has been considerable public discussion of the murders and the investigation that followed. The press release includes an explanation as to why charges have not been laid.

[62] I find, therefore, that the right to freedom of expression has not been violated, and for that reason, section 2(b) of the *Charter* does not apply in this case to support either the constitutional inapplicability of claimed exemptions, or an approach to section 23 that would require its application based on charter values.

[63] The appellant goes on to refer to *R. v. Mentuck*.[23] That case was decided under the open court principle and relates to whether or not a publication ban should be imposed in a criminal proceeding. While there is some connection with the issues in the present case, a publication ban is quite different than a statutory exemption claim in a request under the *Act*. The open court principle is not at issue in this case, and there has been no suggestion of police wrongdoing here. Accordingly, I do not find this argument persuasive.

[64] The appellant also argues that there is no evidence of harm to anyone in the event that the information is disclosed. This does not assist the appellant in demonstrating that there is a compelling public interest in the disclosure of the records.

[65] In addition, the appellant refers to statements that family have made to the media about wanting more information about the circumstances of the deaths. However, the requester in this case is a member of the media, not a family member. The *Act* expressly recognizes the interests of spouses and close relatives in section

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[23] 2001 SCC 76

21(4)(d), which provides an exception to the section 21(1) exemption where ". . . the disclosure is desirable for compassionate reasons." The interest of a family member in obtaining additional information is not a basis for overriding the section 21(1) exemption in order to make disclosure to a media outlet. Moreover, as the ministry notes, one of the media articles referred to by the appellant states that the family of the deceased, "still grieving, is vigilant about privacy."

[66] Given the significant public discussion that has already taken place, and the information that has already been disclosed by the OPP, and in the absence of any suggestion that the OPP did not conduct its investigations in a timely and effective manner, I find that a compelling public interest in disclosure has not been established, and section 23 therefore does not apply.

[67] Under the circumstances, it is not necessary for me to consider whether a compelling public interest outweighs the purpose of the section 21(1) exemption. It is also not necessary for me to consider issues D, E or F.

## ORDER:

I uphold the ministry's decision.

Original Signed by: October 28, 2015
John Higgins
Adjudicator