Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3532

Appeal PA14-205

Ministry of Community Safety and Correctional Services

September 15, 2015

Summary: The appellant made an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Community Safety and Correctional Services (the ministry) for records, including progress reports, assessments and closing summaries related to probation orders and conditional sentences given to a named individual.

The ministry identified responsive records and issued a decision letter to the appellant, denying access to the records. The ministry claimed the application of a number of discretionary exemptions, as well as the mandatory exemption in section 21(1) (personal privacy), read in conjunction with the factor in section 21(2)(f) and the presumption in section 21(3)(b). During the mediation of the appeal, the appellant raised the possible application of the public interest override in section 23 of the *Act* to the records.

In this order, the adjudicator upholds the ministry's decision and finds that the records are exempt from disclosure, in their entirety, under section 21(1) of the *Act*. The adjudicator also finds that the public interest override in section 23 does not apply.

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), 21(3)(b), 21(2)(f) and 23.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of a decision of

the Ministry of Community Safety and Correctional Services (the ministry) in response to an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records, including progress reports, assessments and closing summaries connected to probation orders and conditional sentences given to a named individual.

[2] The ministry located responsive records and issued a decision letter to the appellant, denying access to the records, in their entirety. The ministry claimed the application of the discretionary exemptions in sections 14(1)(c), 14(1)(e), 14(1)(l), 14(2)(a), and 14(2)(d) (law enforcement); 15(b) (relations with other governments); and 19 (solicitor-client privilege). The ministry also claimed the application of the mandatory exemption in section 21(1) (personal privacy), read in conjunction with the factor in section 21(2)(f) and the presumption in section 21(3)(b).

[3] The requester (now the appellant) appealed the ministry's decision to this office. During the mediation of the appeal, the ministry indicated that it had claimed section 14(2)(a) of the *Act* in error and would not be relying on this exemption. The appellant also raised the possible application of the public interest override in section 23 of the *Act* to the records.

[4] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal sought and received representations from the ministry and the appellant, which were shared in accordance with this office's *Practice Direction 7*. In its representations, the ministry advised that it was no longer relying on the exemptions in sections 14(1)(c), 15(b) or 19. The appeal was then transferred to me for final disposition. I note that in her representations, the appellant advises that she is not seeking access to the names, addresses or telephone numbers of the victims, the CPIC access codes, or the names of confidential informants. Consequently, this information is no longer within the scope of the request and will not be disclosed to the appellant.

[5] For the reasons that follow, I uphold the ministry's decision. I find that the records are exempt from disclosure under section 21(1) of the *Act*. I also find that the public interest override in section 23 is not applicable in this instance.

RECORDS:

[6] There are 307 pages of records[1] consisting of:

- Correctional Services Division (CSD) records including offender incident reports, case notes and forms used for intake, assessment and evaluation purposes;
- Records provided by the Toronto Police Services to the CSD;

[1] I note that there is extensive duplication within the records.

- Records provided to the CSD by a community agency for assessment and treatment purposes;
- A pre-sentence report;
- CSD correspondence with third parties;
- A referral form used to refer the individual to community services;
- Canadian Police Information Centre (CPIC) and ICON database search results relating to the individual; and
- A probation order and a prohibition order.

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?

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

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

[7] The mandatory personal privacy exemption in section 21(1) only applies to "personal information." Consequently, it is necessary to determine whether the records contain "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,
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> > (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (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;

[8] 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]

[9] 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.[3]

[10] The ministry submits that the records[4] relate to the individual named in the request, who is an offender currently subject to a probation order and under the supervision of the ministry. The records, it states, contain the personal information of that individual, as well as other identified individuals, including victims of a crime.

[11] In particular, the ministry states that the personal information of the individual named in the request includes:

- physical identifiers;

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[2] Order 11.
[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] The ministry indicates that some of the records are duplicates.

- educational history;
- employment history;
- attendance at treatment and counselling programs;
- criminal history and interactions with law enforcement;
- family background;
- medical history; and
- personal views and opinions both by and about the individual.

[12] With respect to the other identifiable individuals referred to in the records, the ministry submits that they also contain their personal information, including their names, telephone numbers, personal views, and the nature of their relationship with the individual named in the request. In addition, the ministry advises that some of these individuals were the victims of crime, and that there is a considerable amount of personal information in the records relating to these crimes, including the impact they had on the victims.

[13] The appellant's representations do not address this issue.

[14] I find that the records contain the personal information of the individual identified in the request. I agree with the ministry that the records contain information about this individual's family background, medical history, personal views of and about the individual, physical identifiers, educational and employment history, attendance at treatment and counselling programs and criminal history and interactions with law enforcement. I also find that the records contain information about this individual's sex, age, national origin, family status, telephone number, home address, financial information, as well as the individual's name where it appears with other personal information about them. I find that this personal information falls within paragraphs (a), (b), (d), (e), (g) and (h) of the definition of personal information as set out in section 2(1) of the *Act*.

[15] I also find that the records contain the personal information of other identifiable individuals, namely family members and friends of the individual, as well as the victims of his/her crimes. This personal information includes their sex, family status, age, telephone numbers, addresses, personal views, education and employment history, as well as their names where they appear with other personal information about them. I find that this personal information also falls within paragraphs (a), (b), (d), (e) and (h) of the definition of personal information as set out in section 2(1) of the *Act*. As previously stated, the appellant is not seeking access to the names, addresses or telephone numbers of the victims and the names of confidential informants. However, I find that even with this information severed from the records, it would be possible to

identify these individuals from the additional personal information about them (and their relationship with the named individual) contained in the records.

[16] Lastly, I note that the records do not contain the personal information of the appellant.

Issue 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.

[18] In its representations, the ministry states that its position is that all of the records should be withheld because their disclosure would constitute an unjustified invasion of privacy under section 21(1)(f) of the *Act*. The ministry also argues that the presumption in section 21(3)(b) applies, as well as both a factor listed in section 21(2) and an unlisted factor.

[19] The factors and presumptions in sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[20] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome only if the "public interest override" at section 23 applies.[5] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.[6]

[21] Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2).[7] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[8] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and

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[5] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[6] Orders M-734, M-841, M-1086, PO-1819 and PO-2019.
[7] *John Doe v. Ontario (Information and Privacy Commissioner)*, cited above.
[8] Order P-239.

the mandatory section 21(1) exemption applies.[9]

[22] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[10] The ministry claims that the factor in section 21(2)(f) applies to the personal information in the records, and also claims a factor not listed in section 21(2).

[23] The ministry relies on the presumption in section 21(3)(b), which states that a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information ". . . was compiled and is identifiable as part of an investigation into a possible violation of law . . ." The ministry claims that the presumption in section 21(3)(b) applies to the records provided by the Toronto Police Service to it and that the other records were created directly or indirectly as a result of a law enforcement investigation.

[24] The ministry also claims that the factor in section 21(2)(f) applies to the records. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[11] This factor states that in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, the head of an institution shall consider if "the personal information is highly sensitive." The ministry states that the personal information of complainants, witnesses or suspects has been found by this office to be "highly sensitive" for the purpose of section 21(2)(f).[12] The ministry submits that the type of reasoning in Order P-1618 should be applied to the records at issue which relate to a repeat offender, his victims and other affected individuals, including his relatives.

[25] Lastly, the ministry submits that an unlisted factor applies in the circumstances of this appeal. It states that some are the individuals referred to in the records are victims of crime within the definition set out in the *Victims Bill of Rights, 1995* (*VBR*).[13] In particular, the ministry states:

> The Ministry submits that disclosure of personal information would arguably violate the [*VBR*]. The preamble to the *VBR* emphasizes the importance of not operating in a manner that increases the suffering of victims of crime:
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> > The people of Ontario believe that victims of crime, who have suffered harm and whose rights and security have been violated by crime, should be treated with compassion and fairness. The

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[9] Orders PO-2267 and PO-2733.
[10] Order P-99.
[11] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[12] See Order P-1618.
[13] S.O. 1995, c.6.

> people of Ontario further believe that the justice system should operate in a manner that does not increase the suffering of victims of crime . . . [underlining added].
>
> The *VBR* prescribes in paragraph 1 of section 2 the following principle: "Victims should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials." As "justice system officials", the CSD is bound by this provision. We submit that any consideration of section 21 of the FIPPA must consider disclosure being an unjustified invasion of personal privacy by virtue of the fact that it would contravene the *VBR*, and in particular the likelihood that it would increase the suffering of the victims . . .

[26] The appellant's representations do not address the applicability of this exemption.

[27] I find that all of the records at issue are exempt from disclosure under section 21(1) of the *Act* as their disclosure would constitute an unjustified invasion of the personal privacy of not only the individual named in the request, but of the other individuals referred to in the records as well. As previously stated, the records do not contain the personal information of the appellant. Where access to records is sought under the *Act* in these circumstances, the personal privacy exemption in section 21(1) is mandatory unless one of the exceptions listed in section 21(1) or 21(4)[14] applies. I find that, in this instance, none of these exceptions applies. In considering whether disclosure of personal information would constitute an unjustified invasion of privacy, the presumptions in section 21(3) and the factors in section 21(2) must be considered.

[28] I find that the presumptions in section 21(3)(a) (medical and psychological history and evaluation), (d) (employment and educational history), (f) (an individual's finances) and (h) (ethnic origin) applies to some of the personal information contained in the records, which means that disclosure of this information would constitute a presumed invasion of the personal privacy of the individuals to whom it relates. Therefore, I find that this personal information is exempt from disclosure under section 21(1).

[29] With respect to the remaining personal information at issue, I find that the factor in section 21(2)(f) (highly sensitive), which does not favour disclosure of personal information, applies. Given that the records contain extensive personal information about an individual who committed crimes for which convictions were obtained and also about the victims of these crimes, I find that the personal information at issue is highly sensitive. I also find that none of the factors favouring disclosure listed in section 21(2)(a) through (d) apply to this information, and the appellant has not provided

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[14] Section 21(4) sets out the circumstances which would not constitute an unjustified invasion of personal privacy.

arguments that any of these factors apply.

[30] Consequently, I find that the records are exempt from disclosure in their entirety under the mandatory personal privacy exemption in section 21(1) of the *Act*.

Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

[31] The appellant has raised the possible application of the public interest override in section 23 to the records at issue. 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]

[32] 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.

[33] 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.[15]

[34] 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.[16] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[17]

[35] A public interest does not exist where the interests being advanced are essentially private in nature.[18] Where a private interest in disclosure raises issues of

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[15] Order P-244.
[16] Orders P-984 and PO-2607.
[17] Orders P-984 and PO-2556.
[18] Orders P-12, P-347 and P-1439.

more general application, a public interest may be found to exist.[19] A public interest is not automatically established where the requester is a member of the media.[20]

[36] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[21]

[37] Any public interest in *non*-disclosure that may exist also must be considered.[22] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[23]

[38] A compelling public interest has been found to exist where, for example, the integrity of the criminal justice system has been called into question.[24] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations;[25]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[26]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[27]
- the records do not respond to the applicable public interest raised by appellant.[28]

[39] The appellant submits that the disclosure of these records is a matter of "great public interest" because the individual named in the request has recently been the subject of a police investigation into possible "criminality" in the office of a former Mayor. The appellant acknowledges that the records at issue relate to the individual's past convictions. The information in the records, the appellant argues, will help "illuminate" the history of this individual. The appellant goes on to state that this individual's character and criminal history have been the subject of numerous media stories and that a Court ruled in favour of a media request seeking access to several court exhibits that were part of a criminal trial in relation to the offence(s) that are the subject matter of the records at issue. The appellant advises that these exhibits

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[19] Order MO-1564.
[20] Orders M-773 and M-1074.
[21] Order P-984.
[22] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[23] Orders PO-2072-F, PO-2098-R and PO-3197.
[24] Order PO-1779.
[25] Orders P-123/124, P-391 and M-539.
[26] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[27] Order P-613.
[28] Orders MO-1994 and PO-2607.

included a statement by the individual that the former Mayor was a "close friend," and a letter of reference provided by the former Mayor. Accordingly, the appellant argues, the records could shed further light on this individual's influence with the former Mayor.

[40] The ministry submits that the public interest described by the appellant does not meet the threshold of a "compelling" public interest. In particular, the ministry argues that the appellant is seeking historic correctional records about a private citizen's personal past circumstances, which does not meet the threshold of section 23. Further, the ministry argues that while the individual named in the request has been the subject of numerous stories in the media, it does not change the fact that the individual continues to have privacy rights under the *Act* given that one of the purposes of the *Act* is to protect the privacy of individuals with respect to their personal information held by institutions. Lastly, the ministry submits that there is no compelling interest in the disclosure of correctional records, and none that would override protecting highly sensitive personal information, including personal information belonging to victims of crime.

[41] Based on the evidence provided by the parties and my review of the records, I find that there is not a sufficiently compelling public interest in the disclosure of the records as contemplated by section 23 of the *Act*. As noted earlier, the records for which section 21(1) was claimed consist not only of the personal information of the individual named in the request, but also that of other individuals, including victims of crime.

[42] Given the notoriety of the individual named in the request, I accept that there may be great interest by members of the public about the contents of the records, and their release would be newsworthy. However, such curiosity 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 of the records. That is the purpose of weighing a compelling public interest, where one is found to exist, against the purpose of applicable exemption(s). In this instance, I conclude that this interest does not clearly outweigh the purpose of the personal privacy exemption in section 21(1). I have found in my discussion of section 21(1) that the personal information in the records includes sensitive information about the individual in question and victims of crime and that disclosure of this information would constitute an unjustified invasion of their personal privacy under section 21(1). Privacy protection is one of the enumerated purposes set out in section 1(b) of the *Act*. I find that the appellant has not provided sufficient evidence that any public interest, compelling or otherwise, exists in the disclosure of this personal information that would sufficiently outweighs the privacy protection purpose extant in the section 21(1) exemption.

[43] Further, I note that a significant amount of information about this individual has already been widely covered by the media, including the relationship between this individual and the former Mayor and alleged criminal activity. Based on my review of the records, I find that their disclosure would not shed further light on the matters that

have been covered by the media because the records describe unrelated past conduct. I am not persuaded by the appellant's argument that because of the individual's relationship with the former Mayor, there is a compelling public interest in the disclosure of the details of this individual's past conduct. I accept the ministry's argument that simply because this individual has been in the media spotlight does not mean that there is a compelling public interest in historic correctional records about them; nor is the right to privacy under the *Act* lost. It also bears repeating that these records also contain detailed sensitive personal information about other individuals, and I find that there is no compelling public interest in the disclosure of this information.

[44] Lastly, the appellant's position appears to be that, because the Ontario Superior Court of Justice ordered the disclosure of portions of one of the records at issue[29] and other records to the media, this office should do the same. I remind the appellant that requests for access to records made under the *Act* are subject to the *Act*, including the possible application of the exemptions, such as the mandatory personal privacy exemption in section 21(1). The media requests that were the subject matter of the Court proceedings were not made under the *Act.* Therefore, the public interest considered by the Court was not subject to the application of the *Act* and its exemptions, which is an entirely different circumstance than that of a request made under the *Act*.

[45] Therefore, I find that the public interest override provision in section 23 has no application in the present appeal. I uphold the ministry's decision and dismiss the appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: September 15, 2015

Cathy Hamilton
Adjudicator

[29] A pre-sentence report prepared by a Probation and Parole Officer.