

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3863

Appeal PA16-336

Ministry of Community Safety and Correctional Services

June 29, 2018

Summary: The appellants filed a request with the ministry for records relating to a specified incident resulting in the death of the brother of one of the appellants in 1970. The ministry granted partial access to the responsive records, citing the mandatory personal privacy exemption at section 21(1) with reference to section 21(2)(f) to withhold the remainder. In this order, the adjudicator upholds the ministry's decision with regard to any and all identifying personal information of affected parties; however, he orders the ministry to disclose the remaining information relating to the deceased.

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"), 2(2) (deceased for more than 30 years), 21(1), 21(4)(d).

Orders and Investigation Reports Considered: Order PO-3321.

BACKGROUND:

[1] The appellants made the following request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the Act):

All records relating to the coroner's investigation in 1970 concerning one of the appellant's deceased brother, including the complete and full report and all witness testimonies.

[2] The ministry granted partial access to the responsive records. The ministry relied on the mandatory personal privacy exemption in section 21(1) with reference to the factor in section 21(2)(f) of the *Act* (highly sensitive) to deny access to the remaining part of the responsive records.

[3] The appellants appealed the ministry's decision.

[4] At mediation, the ministry acknowledged that it had granted the appellants partial access to the responsive records based on the compassionate grounds provision under the *Act*, section 21(4)(d).

[5] The appellants asked the mediator to notify affected parties and seek consent for the ministry to disclose their personal information contained in the records at issue. The mediator was able to notify two affected parties, one of whom provided consent. Upon receipt of written consent from the affected party, the ministry issued a supplemental decision releasing the relevant portions of the record to the appellants.

[6] As mediation did not resolve the entire dispute, the appeal was transferred to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*. Representations were sought from the parties including the one affected party who was contacted during mediation and did not provide consent, along with three other affected parties located during the adjudication stage. Two affected parties could not be located. Representations were received from the ministry, the appellants and one affected party. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[7] In this order, I uphold the ministry's decision to withhold the identifying personal information of the affected parties who did not consent to the disclosure of their personal information. I order the ministry to disclose the remaining information including all of the information relating to the deceased.

RECORDS:

[8] The records at issue are 22 pages of records from the Office of the Chief Coroner relating to the death in 1970 of a brother of one of the appellants, including a synopsis of the incident, a synopsis of the witness statements, the actual witness statements, correspondence and OPP reports.

ISSUES:

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

[9] 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,

(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,

(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;

[10] 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

[11] 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.

¹ Order 11.

(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.

[12] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.²

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

Representations

[14] In its representations, the ministry claims that the information remaining at issue in the records is the personal information of affected parties including their names, relationship to the deceased and their observations of their own actions and those of others before, during and immediately after the death of the deceased.

[15] The ministry submits that one of the individuals in the records was a park supervisor. Although, for compassionate reasons the ministry released this supervisor's witness statement, including a synopsis of his statement, it withheld the supervisor's name and the name of one affected party contained within the statement. The park supervisor's name was also severed from the OPP reports. The ministry submits that section 2(3) should not apply to the park supervisor's name as he was acting in a personal capacity at the time of the incident. The ministry submits that the park supervisor was not a first responder, and, therefore, clearly was not acting in the course of his regular duties when the incident occurred.

[16] The appellants did not make representations on personal information. They indicate that their request for information is based on section 21(4)(d) (compassionate reasons) of the *Act*. After the death of an individual, it is that person's spouse or close relatives who are best able to act in their “best interests” with regard to whether or not particular kinds of personal information would assist them in the grieving process. I discuss this under Issue B below.

Analysis

[17] As a preliminary matter, I find that information about the deceased no longer qualifies as personal information, under section 2(2) of the *Act*, which states:

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

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

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

[18] There are no exceptions to section 2(2) and, as noted by Adjudicator Daphne Loukidelis in Order PO-3321, this section represents a clear indication by the Legislature that the privacy protections afforded under the *Act* will not continue indefinitely.

[19] As more than 30 years have passed since the death of this individual, I find that any information relating to him is no longer considered personal information and cannot, therefore, be exempt under section 21(1). Accordingly, where information about this individual appears in the records, including within the various witness statements, I will order it disclosed to the appellants.

[20] Based on my review of the records remaining at issue, I find that they contain the information of five affected parties that fits within the definition of "personal information" in section 2(1) of the *Act*. I find that the withheld information at issue is the personal information of affected parties and includes names, addresses, ages, family status, their personal opinions or views about the day and the actual specified event.

[21] The ministry submits that due to the subject matter of the records, severing the affected parties' identifying information such as names would largely not serve to remove personal information from the records. However, from my review of the records and the other representations before me, I find that much of the witness statements of the affected parties contain information that if disclosed would not reasonably be expected to identify them to the appellants. On the other hand, information relating to the affected parties such as names, gender, dates of birth, address and other information that could reasonably be expected to identify them is the personal information of the affected parties. Access to this personal information will be discussed below. The remainder of the information, however, is not the personal information of the affected parties because it would not be reasonable to expect that they would be identified if that information was disclosed and, as no other exemption has been claimed for this information, it will be ordered disclosed to the appellants.

[22] In addition, previous IPC orders have found that 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.⁴ On page 45 of the records, the ministry has withheld a letter written by the staff superintendent and addressed to a law firm. The name, position and contact information of the staff superintendent is not personal information under section 2(3) of the *Act* and I will order this information disclosed to the appellants. The letter also lists the lay witnesses to the

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

incident which includes the personal information of five affected parties including their names, some contact information along with a brief description of their involvement at the time of the incident. Access to this personal information will be discussed under section 21(1) below. This letter also notes and briefly describes the incident and includes information about the deceased individual. As noted, information about the deceased is no longer considered his personal information under section 2(2) of the *Act* and this information will be ordered to be disclosed to the appellants.

[23] I also do not accept the ministry's position that the name of the park supervisor, who was called to the scene of the incident, is his personal information. The ministry asserts that because he was not a first responder and was not acting within the course of his duties when he became involved in the incident, his information is personal and not professional. As mentioned, the ministry released the park supervisor's statement and withheld only his name and the name of one affected party contained within the statement. I note, from the released statement, that the park supervisor stated that he was performing his regular duties at the park when he was approached about the possible drowning. He then ran down to the water and proceeded to apply artificial resuscitation. I find that the park supervisor was acting in the course of his duties when he responded to the possible drowning incident and therefore the remaining information, specifically his name, is not considered personal information pursuant to section 2(3) of the *Act* and because his involvement in the incident does not reveal anything of a personal nature about him. Accordingly, I will order this information disclosed.

[24] In conclusion, I find that information in the records that is about the deceased individual is no longer considered the deceased's personal information and I will order it disclosed. Also, I find that information in the records that does not identify the affected parties is not considered personal information and I will order this disclosed to the appellants.

[25] I will now consider the application of section 21(1) to the personal information of the affected parties including any of their personal information that is mixed with the information of the deceased.

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

[26] Since I found that the records contain the personal information of several affected parties, I must consider whether section 21(1) applies to this information. 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.

[27] The section 21(1)(a) to (e) exceptions are relatively straightforward. In this

appeal, the ministry submits that none of the exceptions in sections 21(1)(a) to (e) are applicable. Of the three affected parties who were contacted in adjudication, two did not reply and the other, who provided representations, did not consent to the release of any of their personal information. Accordingly, section 21(1)(a) does not apply in the circumstances. Also, the appellants do not argue, and I find that none of the other exceptions in section 21(1)(a) to (e) apply in the circumstances.

[28] The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21. Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, the information is not exempt from disclosure. Sections 21(2) and (3) provide guidance in determining whether disclosure would or would not be an unjustified invasion of privacy.

[29] The ministry has not referred to any of the presumptions in section 21(3) as applying in this appeal.

[30] 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.⁵ 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 the mandatory section 21(1) exemption applies.⁶

[31] Section 21(4) creates exceptions to the exemption in section 21(1) and if any of these exceptions apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21.

[32] The appellants are claiming that section 21(4)(d) (compassionate grounds) applies in this instance. Section 21(4)(d) permits an institution to disclose personal information about a deceased individual to a spouse or close relative of the deceased individual, if the institution disclosing the information is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[33] Section 21(4)(d) states, in part:

... a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses **the personal information about a deceased individual** to the spouse or a close relative of the deceased

⁵ Order P-239.

⁶ Orders PO-2267 and PO-2733.

individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons. [emphasis added]

[34] As noted above, the information about the deceased is not his personal information. This raises a question about whether section 21(4)(d) could apply here.

[35] Even if the section 21(4)(d) exception could apply to the remaining information at issue (i.e. the affected parties' personal information), I do not find that it applies here. As a result of this order, the appellants will receive much of the information in the records except the information that identifies affected parties which is their personal information. I am not satisfied from the information before me that releasing this personal information is desirable for compassionate reasons in the circumstances. I have insufficient evidence before me to conclude that the disclosure of this information would assist in the grieving process or resolve a lack of clarity about the deceased's death, which are considerations under section 21(4)(d).⁷ In all the circumstances, including the fact that the personal information of the affected parties is highly sensitive (see below), I find that the disclosure of this personal information is not desirable for compassionate reasons. Therefore, I find that section 21(4)(d) does not apply to the information identifying the affected parties in the circumstances.

Representations

[36] The ministry submits that if it disclosed the withheld portions of the records, it would constitute an unjustified invasion of the privacy of affected persons, none of whom have consented to the disclosure of their personal information and most of whom were unable to be notified that their personal information is subject to disclosure.

[37] The ministry claims section 21(2)(f) (highly sensitive) as a factor supporting non-disclosure of the affected parties' personal information in the records.

[38] The ministry's position is that disclosure of personal information belonging to affected persons could be expected to cause significant distress, particularly for those affected parties who received no notification that their personal information is subject to disclosure.

[39] The ministry also submits that disclosure of this personal information could reasonably be expected to cause significant distress because the records date back to 1970, and the affected parties would not expect that their personal information would be subject to disclosure after all this time. It states that there are no legal proceedings or media reporting which would tip off the affected parties to the fact that this personal information is being disclosed. The ministry submits that unexpected disclosure of this type could be expected to cause significant distress.

⁷ As examples see Orders MO-2237, PO-2802-I and PO-3504.

[40] Further, the ministry submits that during mediation, one affected party was successfully contacted yet declined to consent to the disclosure of their personal information. The ministry suggests that it would be reasonable for this affected party to expect that their wishes would be respected, and that their personal information would not be disclosed. The ministry submits that not respecting an affected person's wishes could be expected to cause significant distress.

[41] The affected party whom the ministry is referencing in the paragraph above was also given notice of this appeal in adjudication and was offered an opportunity to provide consent or to provide representations on this issues. The affected party did not respond.

[42] Another affected party, who did provide representations, indicated a concern if their personal information is released. This affected party provides evidence to support their position that disclosure of any personal information that identifies them would cause significant distress. This affected party fully supports releasing the record to the extent that it may help bring the family closure. However, the affected party objects to the disclosure of any personal information as defined in section 2(1), specifically referring to identifying information such as name, address, age, gender, telephone number, or any names of parents or siblings, as well as any other identifying personal information.

[43] The appellants provided representations in this appeal. The appellants state that they fail to see how the contents of witness statements that were freely given to assist in the investigation of a tragic death, and that were then subject to scrutiny by the press and public in an "open" Coroner's inquest, could be construed, forty-seven years later, as sensitive personal information belonging to affected parties. The appellants question the ministry's claim that if the identity of affected parties is disclosed, it could reasonably be expected to cause them a significant level of distress. The appellants submit that this statement cannot be backed up by fact and is nothing but conjecture. They also submit that this position is contrary to the stated principles and purpose of the *Act*.

[44] The appellants assert that the ministry's position is a blanket statement that cannot be substantiated, and if adopted as an exemption for rights of access, would make a mockery of the principles of openness espoused in the *Act's* preamble.

[45] The appellants also submit that in their part of rural Ontario, respect for government and its institutions is as low as they have ever seen it. They refer to anger and mistrust based on personal experiences that their family, friends and neighbours have had with various government bureaucracies. The appellants state that they find it inconceivable that the ministry that relies almost solely on public cooperation and goodwill to keep Ontario safe would now object to the release of information that was freely given in the same spirit forty-seven years ago.

Analysis and finding

[46] As stated, I will order that information contained in the records relating solely to the deceased be disclosed. I have also found that the affected parties' statements, with their identifying information removed, is not personal information and I will order that they be disclosed. I will now discuss the remaining portions of the records that contain a mix of the personal information of the affected parties with information relating to the deceased, as well as portions that only contain the personal information of an affected party.

[47] 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 The factors listed at paragraphs 21(2)(a) through (d), if present, generally weigh in favour of disclosure, while the factors listed at paragraphs 21(2)(e) through (i), if present, generally weigh in favour of non-disclosure. The information at issue is identifying information of the affected parties.

[48] 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).⁹

[49] I will begin by discussing whether there are any factors weighing in favour of non-disclosure. The ministry referred to section 21(2)(f) (highly sensitive) as a factor in favour of non-disclosure.

Section 21(2) factor weighing in favour of non-disclosure

Section 21(2)(f) highly sensitive:

[50] In its representations, the ministry suggests that the factor weighing against disclosure at section 21(2)(f) is relevant in the circumstances of this appeal. This section reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

the personal information is highly sensitive;

[51] To be considered "highly sensitive" as contemplated by the factor weighing against disclosure at section 21(2)(f), there must be a reasonable expectation of

⁸ Order P-239.

⁹ Order P-99.

significant personal distress if the information is disclosed.¹⁰

[52] Based on the representations received, I accept one affected party's explanation that disclosure of information that identifies them would cause a significant level of distress.

[53] I agree with the ministry's position that disclosure of the personal information belonging to affected parties that may identify them could be expected to cause significant distress. This is especially so in the absence of consent, the fact that the content of the records relates to a tragic incident, and that dissemination of the records is not subject to any controls or restrictions.

[54] I accept that the personal information in the records that identifies affected parties, including name, address, age, gender, telephone number, or any names of parents or siblings, as well as any other identifying personal information, can be considered to be "highly sensitive" within the meaning of section 21(2)(f).

[55] Having consideration for the representations of the ministry and the affected party, I accept that it is reasonable to conclude that disclosure of the personal information of the individuals other than the information relating to the deceased (including affected parties who did not provide representations), could reasonably be expected to result in their significant personal distress. Accordingly, I find that the factor at section 21(2)(f) weighing against disclosure is relevant to my determination of whether disclosure of the affected parties' information would be an unjustified invasion of personal privacy.

[56] However, as noted under Issue A, the information in the affected parties' statements that would not reasonably be expected to identify them is not their personal information and I will order that it be disclosed.

Section 21(2) factors weighing in favour of disclosure

[57] The appellants did not specifically refer to any section 21(2) factors, but it appears from their representations that they are implicitly raising the factor in section 21(2)(a) (public scrutiny).

Section 21(2)(a) public scrutiny

[58] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(a) requires that the ministry consider whether releasing the personal information is desirable for the purpose of subjecting the activities of the institution to public scrutiny.

¹⁰ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[59] In their representations, the appellants refer to issues with respect for government and its institutions in their part of rural Ontario. They take issue with the ministry's objection to release information that was freely given to the police in the spirit of public cooperation and goodwill forty-seven years ago.

[60] The objective of section 21(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the appellant's representations along with the withheld portion of the record, I conclude that disclosing the withheld personal information contained in the witness statements would not result in greater scrutiny of the ministry. Additionally, I find that the subject matter of the information sought does not suggest a public scrutiny interest.

Unlisted factor: "open" coroner's inquest

[61] In their representations, the appellants refer to an "open" coroner's inquest suggesting that the investigation into the deceased's death was subject to scrutiny by the press and public. If the information in the records had been disclosed in an open inquest, this could be an unlisted factor in support of disclosure.

[62] While coroner's inquests are normally open to the public, there is insufficient evidence before me to conclude that the information remaining at issue in the records was released to the public. As noted, the records consist of witness statements, a summary of those statements, an OPP report and a letter from the superintendent; they do not include the coroner's verdict and recommendations. In its representations, the ministry notes that the office of the chief coroner collected the records including the witness statements of the affected parties. Since there is insufficient evidence before me to conclude that information in the records was released to the public, this factor is given no weight.

Summary

[63] In conclusion, I find that significant weight should be given to the factor at section 21(2)(f) as the information is highly sensitive while there are no factors weighing in favour of disclosure. Therefore, I conclude that it would be an unjustified invasion of personal privacy to release information that identifies the affected parties. Since no exceptions listed in section 21(1) apply, the mandatory personal privacy exemption at section 21(1) applies to this information.

ORDER:

1. I uphold the ministry's section 21(1) exemption claim, in respect of the affected parties' personal information. For the sake of clarity, I have highlighted the records in the manner in which they should be disclosed.

2. I order the ministry to disclose the remaining information in the records to the appellants by **August 8, 2018** but not before **August 3, 2018**.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellants.

Original Signed by: _____

Alec Fadel
Adjudicator

June 29, 2018 _____