Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3900

Appeal PA16-528

Ministry of Community Safety and Correctional Services

November 9, 2018

Summary: The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all police reports relating to the death of the appellant's brother. The ministry granted partial access to the records it located taking the position that certain information in them was not responsive to the request and that other information qualified for exemption under the *Act*. The appellant challenged the ministry's determination on responsiveness, the reasonableness of its search for records and the application of the exemptions it claimed. In this order, the adjudicator finds that certain information is not responsive to the request and that the ministry conducted a reasonable search for responsive records. He also finds that certain specific information does not qualify as personal information and should be disclosed to the appellant but that the remainder of the withheld information qualifies for exemption under the section 14(1)(l) (law enforcement) exemption, either alone, or in conjunction with section 49(a) (refuse to disclose requester's own information), or qualifies for exemption under either the mandatory personal privacy exemption at section 21(1) or the discretionary personal privacy exemption at section 49(b), and that the exception in section 21(4)(d) of the *Act* (disclosure for compassionate reasons) does not apply.

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), 2(3), 14(1)(l), 21(1), 21(2)(a), 21(2)(f), 21(3)(b), 21(4)(d), 24, 49(a) and 49(b).

Orders Considered: MO-2245, P-1014, PO-2955, PO-3421 and PO-3732.

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for all police reports relating to the death of the appellant's brother. The ministry explains that the appellant's brother died in 1998, and submits that the records at issue were all created or collected by the OPP shortly after his death, which was concluded to be self-inflicted.

[2] The ministry identified responsive records and granted partial access to them, relying on sections 49(a) (discretion to refuse requester's own information), in conjunction with the sections 14(1)(l) (facilitate commission of unlawful act), 14(2)(a) (law enforcement report), section 15(b) (relations with other governments), and section 49(b) (personal privacy), with specific reference to sections 21(3)(b) (law enforcement investigation) and 21(2)(f) (highly sensitive information) of the *Act* to deny access to the portions it withheld. The ministry advised in its access decision that in making its determinations it considered the possible application of section 21(4)(d) (disclosure for compassionate reasons) of the *Act*. The ministry also indicated that some information was withheld as not being responsive to the request.

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

[4] During mediation, in addition to outlining the type of records that ought to exist, the appellant provided to the ministry a written consent to disclosure of information that she obtained from her mother (also the mother of the deceased). The ministry conducted an additional search for records and issued a supplementary decision letter. As set out in its supplementary decision letter the ministry disclosed additional information to the appellant and advised it conducted a further search but no additional records were located. The letter also informed the appellant that the ministry was no longer relying on the exemption at section 15(b) of the *Act* to withhold information. As a result, the possible application of that section is no longer at issue in the appeal.

[5] The appellant maintained that additional records ought to exist and indicated that she wanted access on compassionate grounds to all the withheld information from the records she received. The ministry subsequently reconsidered its position on access and issued a further supplementary decision disclosing additional information to the appellant.

[6] The appellant maintained her position that the ministry failed to conduct a reasonable search for responsive records and that all withheld information should be disclosed.

[7] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] This inquiry began by the originally assigned adjudicator inviting representations

from the ministry on the facts and issues set out in a Notice of Inquiry. The ministry provided responding representations. In its representations, the ministry advised that it no longer sought to rely on section 14(2)(a) (law enforcement report) of the *Act* to deny access to the information it withheld. As a result, the possible application of that section is no longer at issue in the appeal.

[9] The adjudicator then sent a Notice of Inquiry to the appellant along with a copy of the ministry's representations. The appellant provide representations in response. A non-confidential portion[1] of those representations was shared with the ministry for reply. The adjudicator also provided to the ministry a consent form from another individual to release information about them that may appear in the records to the appellant, except for their date of birth. The ministry provided reply representations. The ministry advised in its reply representations that as it had received a partial consent to disclosure from an individual whose information appeared in the records, it would disclose this additional information to the appellant. The ministry sent the appellant a supplementary decision letter along with the additional information that it had decided to disclose. The ministry's representations were shared with the appellant in sur-reply. The appellant provided responding representations which she supplemented with additional materials.

[10] The appeal was subsequently assigned to me to complete the inquiry.

[11] In this order, I find that certain information is not responsive to the request and that the ministry conducted a reasonable search for responsive records. I also find that certain specific information does not qualify as personal information and should be disclosed to the appellant but that the remainder of the withheld information qualifies for exemption under the section 14(1)(l) exemption, either alone, or in conjunction with section 49(a), or qualifies for exemption under either the mandatory personal privacy exemption at section 21(1) or the discretionary personal privacy exemption at section 49(b), and that the exception in section 21(4)(d) of the *Act* does not apply.

RECORDS:

[12] At issue in this appeal are the withheld portions of an Occurrence Summary Report, a Homicide/Sudden Death Report, Supplementary Occurrence Reports, a handwritten document, a Witness Statement and a police officer's notes.

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[1] Certain portions of the appellant's representations were withheld from the ministry as they met the criteria for withholding representations found in Practice Direction 7.

ISSUES:

A. What is the scope of the request? What information is responsive to the request?

B. Did the institution conduct a reasonable search for records?

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

D. Does section 14(1)(l), either alone, or in conjunction with section 49(a), apply to the withheld police codes?

E. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

F. Did the institution exercise its discretion under sections 14(1)(l), 49(a) and/or 49(b) as the case may be? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: What is the scope of the request? What information is responsive to the request?

[13] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[14] Institutions should adopt a liberal interpretation of a request, in order to best

serve the purpose and spirit of the *Act*. To be considered responsive to the request, records must "reasonably relate" to the request.[2]

The ministry's representations

[15] As set out above, the ministry withheld some information as being non-responsive to the request, which included information pertaining to the printing of the records at issue in this appeal.

[16] The ministry advises that it adopted a "liberal and literal" interpretation of the request. It submits:

> The request was for police reports relating to the death of the appellant's brother, as described in the Notice of Inquiry. The request provided sufficient detail for the ministry to identify the records responsive to it. Indeed, as a law enforcement agency, the OPP [Ontario Provincial Police] routinely receives these types of requests. We believe that the appellant had the same understanding of the request as we did. […] we submit we have complied with all of our obligations under [the *Act*], with respect to identifying and responding to the scope of the request.

The appellant's representations

[17] The appellant submits that she has been clear and straightforward about what documents she wants to see and that her position is that other responsive records must exist.

Analysis and finding

[18] There is certain information that the ministry withheld as being non-responsive, because it pertained to matters that did not relate to the request at issue in this appeal or is administrative information.

[19] At Paragraphs 17 to 19 of Order PO-3421, Adjudicator Daphne Loukidelis wrote:

> Past orders of this office have upheld the severance of "administrative information," such as printing date information, as non-responsive because the information does not reasonably relate to the subject matter of the request or, alternately, the appellant's "interest."[3] In this appeal, I accept the ministry's position that some of the information withheld as non-responsive fits within this category.

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[2] Orders P-880 and PO-2661.
[3] Adjudicator Loukidelis references Orders MO-2877-I, PO-3228 and PO-3273.

> I note that there are also parts of the officers' notes withheld as non-responsive that consist of details about weather and road conditions, which are entered as standard information at the beginning of a shift. I agree with the ministry that this type of information is also unrelated to the appellant's request.
>
> Finally, I accept the ministry's submissions respecting information in the officers' notes that relates to other investigations or police matters. Based on my review of these officers' notes, I am satisfied that these larger portions of the records have also been properly withheld because they do not relate to the incident involving the appellant.

[20] I agree with Adjudicator Loukidelis' analysis, and find that the printing date information is not responsive to the request. I have also carefully reviewed all the other portions of the records that the ministry claimed as non-responsive and agree that those portions are indeed not responsive to the request because they relate to other matters not involving the death of the appellant's brother. Therefore, I uphold the ministry's decision to deny access to this non-responsive information.

Issue B: Did the institution conduct a reasonable search for records?

[21] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[4] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[22] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[5] To be responsive, a record must be "reasonably related" to the request.[6]

[23] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[7]

[24] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

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[4] Orders P-85, P-221 and PO-1954-I.
[5] Orders P-624 and PO-2559.
[6] Order PO-2554.
[7] Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.[8] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[9]

The ministry's representations

[25] In support of the reasonableness of its search, the ministry provided an affidavit of a Detachment Administrative Clerk, in the Thunder Bay Detachment of the Ontario Provincial Police (OPP), in which she sets out the steps she took to identify responsive records.

[26] She deposes that the search for responsive records consisted of the following steps:

> (a) [She] searched the following police records data bases: OMPACC, an Ontario police information retrieval system, which was then in use, but which no longer is in use; and RMS, which is a similar record keeping system, which the OPP does currently use.
>
> (b) [She] contacted, by email, representatives of North West Region's (NWR) OPP long-term storage location and Forensic Identification Services, OPP and asked that they search for responsive records.
>
> (c) Finally, [she] also contacted [named individual], Technical and Administrative Support Clerk of Forensic Identification Services - Thunder Bay OPP and Detective/Sgt. [named individual], Area Crime Sergeant of the OPP, who [she] requested conduct checks and they advised [her] of their findings. Their search included their respective OPP long-term storage location, where old records are archived.

[27] She deposes that these searches provided her with the records at issue in the appeal, which were identified as being responsive to the request.

[28] She further deposes that she subsequently received a second request to search for responsive records and this second search consisted of the following steps:

> (a) [She] searched the OMPACC and RMS databases a second time;
>
> (b) [She] received an email from the OPP's FOI Liaison Officer confirming there was no 911 Audio for this incident in the OPP's Provincial Communications Centre, … ;

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[8] Order MO-2185.
[9] Order MO-2246.

> (c) [She] reviewed a record consisting of an email from D/Sgt [named individual] to his supervisor OPP Crime Unit D/Staff/Sgt. [named individual] advising he had reviewed the file, …; and,
>
> (d) [She] reviewed the record consisting of a letter from OPP Thunder Bay Detachment Commander S/Sgt. [named individual] to [the appellant] … .

[29] She deposes that this second search did not identify any new responsive records and that, "[a]s a result of these searches, I have no reason to believe that any other responsive records exist".

[30] She concludes by deposing that:

> I believe that the searches have been diligent and thorough, in that two searches were conducted of record holdings, and involved personnel have been contacted and involved in the searches. It is possible that due to the age of the records, some of the records may have been destroyed as part of standard OPP retention policies.

The appellant's representations

[31] The appellant acknowledges that the ministry and the OPP know "where the key documents are"; however, she submits, "that only means, they know exactly what to hold back, and why". She takes the position that in light of the complicated nature of the case, there must be more documents. She submits that:

> The presence of nine policemen on site, and the possibility that the RCMP were involved, confirms it. I am not sure if it is regular practice for a ministry to provide a sworn affidavit, but it strikes me as overkill.

[32] She adds that her viewing of a news program about the death of another individual led her to believe that there should be "an extensive investigation checklist which helps them make their final determination about cause of death". She adds that the work required to check off all the items on the checklist can take weeks to months, even a year. She submits:

> Again, the OPP made their decision about my brother's death literally within 48 hours, or less. We know that because they returned my brother's car to the family, as soon as they arrived, when it should have been seized as possible evidence.
>
> I speculate that the OPP used a similar checklist for my brother, and yet no such checklist was included in the police report that I received. I also speculate they did not complete the majority of tasks on the list. Unless it was part of the redacted portion of the police report. Again, I will not know until I see the entire police report.

[33] In additional materials that the appellant provided in the course of adjudication she sets out additional reasons why, in her view, a checklist, as well as additional records, should exist.

Analysis and finding

[34] As set out above, the *Act* does not require the institution to prove with absolute certainty that further records do not exist. In order to satisfy its obligations under the *Act*, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody and control. The Notice of Inquiry sent to the ministry asked for a sworn affidavit in support of the reasonableness of its search, which the ministry provided as requested. I find that, based on the two searches it conducted and the explanations provided, the ministry has made a reasonable effort to locate records responsive to the request. I am also satisfied that the appellant's submission regarding the possible existence of a checklist or other records does not mean that the ministry did not conduct a reasonable search for responsive records. In that regard, even if a checklist, or other records, may have existed in 1998, upon which I make no determination, the deponent of the affidavit indicates that "[i]t is possible that due to the age of the records, some of the records may have been destroyed as part of standard OPP retention policies." I accept this explanation.

[35] Accordingly, I find that the ministry has conducted a reasonable search for records that are responsive to the appellant's request at issue in this appeal.

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

[36] In order to determine which sections of the *Act* may apply, it is necessary to decide 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,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,

> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[37] 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.[10]

[38] Sections 2(2), (3) and (4) 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.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[39] 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.[11] Even if information relates to an individual in a professional, official or

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[10] Order 11.
[11] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[13]

[40] The enactment of section 2(2) of the *Act* demonstrates that the Legislature turned its mind to the issue of when an individual's privacy rights in personal information ought to cease, and determined that this should occur 30 years after death.[14] The corollary is that it represents a clear indication by the Legislature that, until that time, the privacy protections afforded under the *Act* to the personal information of a deceased individual continue.

The ministry's representations

[41] The ministry takes the position that the records contain personal information within the meaning of the definition in section 2(1) of the *Act*. It states that the personal information belonging to affected third party individuals includes their names, their street addresses, their dates of birth, their gender, their relationships to the deceased individual, and statements they provided both as to their own actions and those of others before, during and immediately after the time of death of the deceased individual.

[42] The ministry submits that due to the subject matter of the records, severing identifying information of the affected third party individuals, such as names, might not serve to remove personal information from the records. The ministry submits that this same reasoning was applied in Order PO-2955 to police records, and it ought to be adopted for the purpose of this appeal.

The appellant's representations

[43] The appellant submits that information from a police report she received contradicts information she received from her mother regarding the incident, which causes her concern. In addition, she submits that members of her family told her that they were not formally interviewed by the police, which she states is contradicted by information in the records she received. She submits that it is in the public interest that the names of the people staying at the motel that night be disclosed so that a new investigation can begin.

[44] In addition, she submits that:

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[12] Orders P-1409, R-980015, PO-2225 and MO-2344.
[13] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[14] Order M-731.

> Names of policemen present at the scene of the alleged crime were withheld from me when I first asked for the police report, but after the appeal some, but not all of the other names were provided. In so far as they were working in their official capacity as officers I, as a member of the public, have a right to know who or who was not present. Likewise, I have a right to know if RCMP and/or CSIS officers were involved.

[45] In her supplemental materials she sets out the reasons for her belief that, although this was an OPP investigation, the name of an RCMP officer must appear in the records at issue and was improperly withheld.

Analysis and finding

[46] I have reviewed the records at issue and I am satisfied that they contain the personal information of the deceased as well as other identifiable individuals that falls within the scope of the definition of personal information at section 2(1) of the *Act*. In addition, I find that some of the records also contain the personal information of the appellant.

[47] That said, there is information about individuals on pages 36, 37 and 40 of the records at issue that appears in their business, professional or official capacity. In my view, that information does not qualify as personal information because, its disclosure would not reveal something of a personal nature about the individual. Accordingly, because I have found this information not to be personal information and the ministry has only claimed that this information is subject to the personal privacy exemptions, I will order that it be disclosed to the appellant. I have highlighted this information in green on a copy of the pages of records that I have sent to the ministry along with this order.

[48] I will now address the balance of the withheld information.

Issue D: Does section 14(1)(l), either alone, or in conjunction with section 49(a), apply to the withheld police codes?

[49] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[50] Section 49(a) reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[51] Section 49(a) of the *Act* recognizes the special nature of requests for one's own

personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[15]

[52] In this case, the ministry relies on section 14(1)(l), either alone, or in conjunction with section 49(a), to withhold access to police codes in the records. If the record contains the personal information of the appellant, the information qualifies for exemption under section 49(a) in conjunction with section 14(1)(l). If it does not, the information qualifies for exemption under section 14(1)(l) alone.

[53] Sections 14(1)(l) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > facilitate the commission of an unlawful act or hamper the control of crime.

[54] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[16]

[55] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.[17] The institution must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[18]

The ministry's representations

[56] The ministry maintains that it has withheld the codes in accordance with its usual practice, and in particular because the disclosure of the codes could make it easier for individuals carrying out criminal activities to have internal knowledge of how systems within the OPP operate. The ministry submits that the disclosure of internal police codes could jeopardize the security of law enforcement systems and the safety of the OPP staff identified by them.

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[15] Order M-352.
[16] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[17] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

The appellant's representations

[57] The appellant submits that the ministry's submissions on the importance of the secrecy of police codes is "self-serving". After taking issue with the adequacy of the OPP investigation into her brother's death and, in her view, the premature conclusion that it was a suicide, she submits:

> If the OPP used a police code for suicide as early as I think they did, it would prove my point that the so-called investigation was a charade from the start. That said, before I could make that claim, I would have to know what the code for suicide was. Apart from that, there also might be other police codes used to describe family members who are already under police surveillance. This, of course, would also be pertinent to the case, as it would prove that they knew who I was when they called me. Finally, I am at a total loss to understand how knowing the code for suicide would: "... facilitate the commission of an unlawful act or hamper the control of a crime," but would be interested to learn more.

Analysis and finding

[58] A long line of orders[19] has found that police operational codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm from their release. I make the same finding here. In my view, there is nothing in this matter that would lead me to conclude otherwise. As a result, I find that section 14(1)(l) applies to the police operational codes (including the "ten" codes). Accordingly, if a record contains the personal information of the appellant, the information qualifies for exemption under section 49(a) in conjunction with section 14(1)(l). If it does not, the information qualifies for exemption under section 14(1)(l) alone.

Issue E: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

[59] Under section 49(b), found in Part III of the *Act*, where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[60] In contrast, under section 21(1), found in Part II, where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of

[19] For example, Orders M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, PO-2339 and PO-2409.

personal privacy.[20]

[61] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[62] If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy and the information will be exempt unless the circumstances favour disclosure.[21]

[63] The ministry claims that the remaining withheld information, which appears on pages 1, 11, 16, 25, 26 and 40 of the records, falls within the scope of the presumption at section 21(3)(b) and the factor at section 21(2)(f). The ministry also refers to two unlisted factors, in support of its decision to withhold the remaining information at issue. The appellant challenges the application of those sections and the unlisted factors. Her representations also question the sufficiency of the OPP investigation and the foundation for their conclusion that the death was self-inflicted, thereby raising the factor at section 21(2)(a). In addition, the possible application of the compassionate grounds exception at section 21(4)(d) of the *Act* is at issue in the appeal.

[64] Sections 21(2)(a), 21(2)(f), 21(3)(b) and 21(4)(d) read:

> 21(2) 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,
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (f) the personal information is highly sensitive;
>
> (3) 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;

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[20] Section 21(1)(f).
[21] Order P-239.

> (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > (d) discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

The ministry's representations

[65] The ministry submits that the presumption at section 21(3)(b) of the *Act* applies to the information at issue because the records were created or collected by the OPP, a law enforcement agency, as a result of a law enforcement investigation they initiated arising from the death of the appellant's brother. The ministry submits that:

> Although the death turned out to be self-inflicted, the police had to investigate in order to determine that there was no foul play or other criminal offences that had been committed, and that could have resulted in charges.

[66] The ministry submits that based on the content of the records, there clearly was an OPP investigation into a possible violation of law and if the investigation had led to a different finding, charges could have been laid by the OPP.

[67] The ministry also relies on the factor set out at section 21(2)(f) of the *Act* and submits that the information at issue is highly sensitive personal information of affected third party individuals. The ministry's position is that even with the passage of time, the context in which the personal information was collected supports a finding that the records contain highly sensitive personal information and that it remains highly sensitive.

[68] The ministry submits that there are also two unlisted factors favouring non-disclosure which, based on my conclusion below, it is not necessary for me to address.

[69] With respect to the application of the exception to the section 21(1) exemption at section 21(4)(d) of the *Act*, the ministry submits that it has severed and released most of the records to the appellant, including information relating to third parties who provided their consent. It takes the position that it has acted in accordance with the principle of compassionate disclosure prescribed in section 21(4)(d).

[70] The ministry adds:

> We note that we have disclosed the majority of the information in the records to the appellant, and that only a relatively small amount of information was withheld. It is our position that the records we have disclosed provide the appellant with an understanding of the death of her

> brother. In light of these circumstances, and in reliance upon Order PO-3732, which came to a similar conclusion with respect to the application of section 21(4)(d), we submit that we have appropriately considered and applied the provision in respect of this appeal.

The appellant's representations

[71] The appellant submits that the information should not be withheld on the basis of section 21(3)(b) because "there is enough evidence to suggest that there was no proper investigation. The investigation itself needs investigating." She adds that she cannot definitively prove the degree to which the investigation was faulty if she cannot access the withheld information. She states that until she can see all the information, she has no way of being completely sure, and serious questions will remain.

[72] With respect to the application of the factor at section 21(2)(f), she submits:

> These people are possibly witnesses to a crime that the OPP was and remains reluctant to properly investigate. It is true, they are also, possibly potential suspects, which indeed, would cause them distress. However, again, because of the nature of the crime it would be in the public interest for their names to be known. Distress or no distress, we are talking about a possible murder and/or coverup.

[73] With respect to the application of section 21(4)(d), the appellant submits that she cannot verify that the investigation was complete, unless she sees all the withheld information at issue. She adds:

> I submit that the ministry and the OPP have improperly severed the records in a calculated act of self-serving malfeasance to protect themselves and the Canadian government against accusations of criminal incompetency or worse (I do not even know what the technical terms are to describe these kinds of crimes). Because it pertains to several serious criminal matters, which may implicate several different government institutions, it is in the public interest that these documents be made accessible to anyone who wants to read them.

The ministry's reply representations

[74] The ministry submits that with respect to the allegation that the OPP failed to "conduct a proper investigation" into the cause of the death of the appellant's brother:

> The OPP reviewed the investigative file last year in response to this concern, and it is our position that a proper investigation was conducted. In any event, the Freedom of Information process exists to provide access to government records, subject to any applicable exemptions, not to review OPP investigations.

The appellant's sur-reply and supplementary materials

[75] In the appellant's sur-reply and supplementary materials, she reiterates her position regarding her belief that investigation was inadequate, that the ministry is withholding information for improper reasons, and that the RCMP must have been involved in the matter.

Analysis and findings

21(2)(a): public scrutiny

[76] Section 21(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.22 Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 21(2)(a).[23]

[77] In Order P-1014, Adjudicator John Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Adjudicator Higgins agreed with the appellant in that appeal that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, on the facts of that appeal, Adjudicator Higgins concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one." Accordingly, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," Adjudicator Higgins found that the factor at section 21(2)(a) did not apply.

[78] Although the records in the current appeal are not related to an investigation into a complaint of workplace harassment, in my view, the analysis of Adjudicator Higgins provides some guidance in the matter before me. In this regard, I am not satisfied that the appellant's motives in seeking access to the records are more than private in nature to satisfy her that the conduct of the OPP in relation to its investigation into the death of her brother were appropriate. As in Order P-1014, this is a private interest, and I therefore find that section 21(2)(a) is not a relevant consideration. Accordingly, I find that the factor in section 21(2)(a) does not apply to the information in the records that remains at issue.

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[22] Order P-1134.
[23] Order P-256.

21(2)(f): highly sensitive

[79] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[24] Based on my review of the information at issue and the representations, I find that due to its subject matter and the context in which it was gathered, the personal information remaining at issue is highly sensitive and the factor listed in section 21(2)(f) applies to weigh against disclosure of the information.

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

[80] 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.[25] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[26]

[81] The ministry submits that the presumption against disclosure in section 21(3)(b) applies to the remaining information at issue because it was gathered as part of an investigation into possible violations of law, namely the *Criminal Code of Canada*. The appellant takes the position that because it was inadequate, it is as if no investigation ever occurred.

[82] I accept the ministry's position. Even if the appellant takes issue with the adequacy of the OPP's investigation, based on the content of the records, it is clear that the remaining undisclosed personal information was compiled by the OPP and is identifiable as part of their investigation into possible violations of law. I therefore find that this personal information fits within the ambit of the presumption against disclosure in section 21(3)(b).

[83] Therefore, I conclude that the remaining undisclosed information is subject to the presumption at section 21(3)(b) and the factor at section 21(2)(f). I concluded above that section 21(1)(a) does not apply and, in my view, there are no other factors favouring disclosure. In light of this conclusion, it is not necessary for me to consider whether the unlisted factors referenced by the ministry might also apply.

Initial Conclusion

[84] I find that section 21(1) applies to information in the records that do not also contain the personal information of the appellant. Under section 21(1), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if

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[24] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[25] Orders P-242 and MO-2235.
[26] Orders MO-2213 and PO-1849.

section 21(4) or the "public interest override" at section 23 applies. I address the application of section 21(4)(d) below, and I find that the appellant has failed to provide sufficient evidence to establish the application of the public interest override at section 23. Accordingly, subject to my analysis with respect to the application of section 21(4)(d) below, I find that section 21(1) of the *Act* applies to the information that is subject to analysis pursuant to Part II of the *Act*, specifically, the appellant's brother's personal information where it is mixed with that of identifiable individuals other than the appellant. Accordingly, subject to my analysis on the possible application of section 21(4)(d) below, I find that this information qualifies for exemption under section 21(1) of the *Act*.

[85] Section 49(b) of the *Act* applies to the information that is subject to analysis pursuant to Part III of the *Act*, specifically, the appellant's own personal information where it is mixed with the personal information of other identifiable individuals, including the appellant's brother. In determining whether the disclosure of the information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[27] I concluded above that the remaining undisclosed information is subject to the presumption at section 21(3)(b) and the factor at section 21(2)(f). I concluded above that section 21(2)(a) does not apply and, in my view, there are no other factors favouring disclosure. Considering and weighing the factor and presumption and balancing the interests of the parties, subject to my analysis in the application of section 21(4)(d) below, I find that disclosure of the withheld information in the records would be an unjustified invasion of personal privacy under section 49(b).

21(4)(d) – disclosure is desirable for compassionate reasons

[86] I will now consider the application of the exception in section 21(4)(d) to the information that I have found to be subject to section 21(1) or 49(b), as the case may be. As the section 21(4)(d) exception can only apply to the personal information of the deceased, I will not be considering its application to the personal information that relates solely to other identifiable individuals[28]. I find that the personal information that solely relates to another identifiable individual appears on page 1 of the records and consists of their name, contact information, address, description and date of birth. I find therefore, that the disclosure of this information would constitute an unjustified invasion of the personal privacy of an individual other than the appellant and it is exempt under section 21(1) of the *Act*.

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[27] Order MO-2954.

[28] Even if information relating solely to other individuals could still be considered to be "about" the deceased within the meaning of section 21(4)(d), my analysis below applies to it and it is not subject to the section 21(4)(d) exception in any event.

[87] I will now turn to the remaining information at issue.

[88] The application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?

2. Is the requester a spouse or "close relative" of the deceased individual?

3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?[29]

[89] Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the "circumstances" to be considered would include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 21(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 21(4)(d).[30]

[90] After the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons."[31]

Step 1 - Personal Information of the Deceased

[91] I find that the information that remains at issue is the personal information of the deceased that is inextricably intertwined with the personal information of identifiable individuals other than the appellant. I find that this requirement for the application of section 21(4)(d) is satisfied.

Step 2 - Spouse or "Close Relative"

[92] "Close Relative" is defined in section 2(1) of the *Act*:

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[29] Orders MO-2237 and MO-2245.
[30] Order MO-2237.
[31] Order MO-2245.

> "close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption;

[93] I am satisfied that the appellant is the sister of the deceased individual whose personal information is contained in the records at issue, and that she is a "close relative." I find that this requirement for the application of section 21(4)(d) is also satisfied.

Step 3 - Desirable for Compassionate Reasons

[94] With respect to the application of section 21(4)(d) of the *Act*, the ministry submits that it has severed and released most of the information in the records to the appellant, including information relating to third parties who provided their consent. It takes the position that it has acted in accordance with the principle of compassionate disclosure prescribed by section 21(4)(d).

[95] The appellant submits that she is interested in disclosure of the withheld information for the purposes of scrutinizing the conduct of the OPP investigation and to challenge the OPP's conclusion that her brother's death was self-inflicted.

[96] In Order MO-2245, which dealt with an equivalent provision in the municipal version of the *Act*,[32] former Assistant Commissioner Brian Beamish[33] ordered the disclosure of highly sensitive personal information about the circumstances surrounding the death of an individual to a close relative. In doing so, the then-Assistant Commissioner stated the following:

> By means of section 14(4)(c), the Legislature has recognized a group of individuals who have a special interest in gaining access to the personal information of a deceased individual. The intent of the section is to allow for the disclosure of information to family members even though that information would not have been disclosable to them during the life of the individual. In my view, it is a tacit recognition by the Legislature that, after the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution, and this office on appeal, is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons." This does not place the institution "*in loco parentis*" in the manner suggested by the Police when the disclosure is to

[32] Section 14(4)(c) of the *Municipal Freedom of Information and Protection of Privacy Act*.
[33] Now Commissioner.

> adult relatives. Again, on the question of what is "compassionate", I accept the evidence and representations of the appellant.

[97] I adopt this approach in this appeal. I accept that the appellant requires the information about the events surrounding her brother's death for closure. However, based on my review of the information that remains at issue and the parties' representations, I find that section 21(4)(d) does not apply in the circumstances of this appeal. The ministry disclosed a great deal of information to the appellant which is supplemented by the information that I have ordered to be disclosed. The information that remains at issue is not the personal information of the deceased alone, but also qualifies as the personal information of other identifiable individuals. The personal information of the deceased is inextricably intertwined with that of the other identifiable individuals. In my view, the information already provided to the appellant as supplemented by the information that I have ordered disclosed, provides her with an understanding of the events leading up to and surrounding the death of his brother and of the investigation that ensued. In light of these circumstances, I find that it has not been established that the disclosure of the specific information remaining at issue is desirable for compassionate reasons as contemplated by the third part of the section 21(4)(d) test.

[98] As the third part of the test was not established, I find that the exception permitting the disclosure of personal information in compassionate circumstances at section 21(4)(d) does not apply in the circumstances of this appeal.

Final conclusion

[99] I conclude that disclosure of the information that remains at issue would amount to an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, I find that the exemption at section 21(1) or 49(b), as the case may be, applies to the information.

Issue F: Did the institution exercise its discretion under sections 14(1)(l), 49(a) and/or 49(b), as the case may be? If so, should this office uphold the exercise of discretion?

[100] The section 14(1)(l), 49(a) and 49(b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[101] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations;

- it fails to take into account relevant considerations.

[102] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[34] This office may not, however, substitute its own discretion for that of the institution.[35]

The ministry's representations

[103] In exercising their discretion to withhold the information that I have not ordered disclosed, the ministry submits that it considered a number of factors, including the following:

- The public policy interest in safeguarding the privacy of affected third party individuals, whose personal information has been collected as part of, or created pursuant to, an OPP law enforcement investigation, and who have not been notified of its potential disclosure;

- The fact that the appellant is seeking access to the records for compassionate reasons;

- That the information it disclosed should provide the appellant with an understanding of the events leading up to her brother's death.

The appellant's representations

[104] The appellant takes the position that the ministry is inappropriately exercising its discretion to withhold information because it provides the link between what happened to her brother, and what happened to her before and since his death. She submits that if such a link exists, it would make it that much more important for her to see it.

Analysis and finding

[105] In my view, the ministry properly exercised its discretion. The ministry properly considered the appellant's right to information for compassionate reasons and other individuals' right to privacy. I find the ministry took into consideration only relevant factors to withhold the information that I have not ordered disclosed and I uphold its exercise of discretion.

ORDER:

1. I uphold the reasonableness of the ministry's search for responsive records.

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[34] Order MO-1573
[35] Section 54(2).

2. I order the ministry to disclose to the appellant the information that I have highlighted in green on a copy of the records that I have provided to the ministry along with a copy of this order by sending it to her by **December 17, 2018**, but not before **December 12, 2018.**

3. In all other respects, I uphold the ministry's decision.

4. In order to ensure compliance with paragraph 2, I reserve the right to require the ministry to send me a copy of the records as disclosed to the appellant.

Original Signed by: November 9, 2018

Steven Faughnan
Adjudicator