

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4028

Appeal PA18-133

Archives of Ontario

February 13, 2020

**Summary:** An individual submitted a request under the *Freedom of Information and Protection of Privacy Act* to the Archives of Ontario (the archives) for access to records of the Office of the Fire Marshall related to the 1975 death of her mother and siblings. The archives disclosed the responsive records, in part, but denied access to portions of the records based on the mandatory personal privacy exemption in section 21(1) of the *Act*. The appellant appealed the archives' access decision, because she still continues to seek access to the personal information of one particular individual and asserted that she is entitled to it under the compassionate reasons exception in section 21(4)(d) of the *Act*. The adjudicator finds that the exception in section 21(4)(d) does not apply and upholds the archives' decision to withhold the individual's personal information under section 21(1).

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definitions of "personal information" and "close relative"), 2(2), 21(1), 21(2)(d), 21(2)(f), and 21(4)(d).

**Orders Considered:** Orders MO-2237, MO-2245, MO-3666-I, and PO-3732.

### OVERVIEW:

[1] This order addresses the issues raised in the appellant's appeal of an access decision issued by the Archives of Ontario (the archives) in response to her request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to the death of her mother and siblings in a fire in 1975. In particular, the request was for access to:

... all documents, information, correspondences, and communications available, accessible, and/or in the possession of the Office of the Fire Marshall, notwithstanding which department, what format, purpose, and/or

qualification of the creator of the documents, correspondences, and communications related to the [specified date] 1975 tragic death ... of [named relatives] at [specified address] from [specified date] 1975 to the current date above.

[2] The requester identified herself as the daughter and sibling of the deceased persons. In response to the request, the archives granted partial access to 90 pages of records, but withheld information from some of the records under section 21(1) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the archives' access decision to this office and a mediator was appointed to explore the possibility of resolution. During mediation, the appellant narrowed the scope of her request to the personal information of one specific individual (the affected party), thereby removing the personal information of other individuals from the scope of the appeal and leaving portions of 15 pages at issue. The appellant expressed the view that she is entitled to access the affected party's personal information under section 21(4)(d) (compassionate reasons) of the *Act*. The archives maintained its position that section 21(4)(d) does not apply to the information the appellant seeks.

[4] Since the appellant continued to seek access to the information remaining at issue, the file was transferred to the adjudication stage where an adjudicator may conduct an inquiry. I began my inquiry by sending a Notice of Inquiry to the archives seeking their representations on the issues, which I received. I then provided a non-confidential copy of these representations to the appellant to seek her submissions. Portions of the archives' representations were withheld from the appellant in accordance with the confidentiality criteria in section 7 of the *IPC Code of Procedure* and Practice Direction 7. After receiving the appellant's representations, I completed my inquiry by seeking reply and sur-reply representations from the archives and the appellant, respectively. I did not notify the affected party of this appeal to seek his views on the possible disclosure of his personal information, as it was not possible to locate him.

[5] In this order, I find that the personal information of the affected party is exempt under the mandatory personal privacy exemption of section 21(1) of the *Act*. As the compassionate reasons exception in section 21(4)(d) does not apply to it, I uphold the archives' access decision and dismiss this appeal.

## **RECORDS:**

[6] The records at issue consist of portions of two fire investigation reports<sup>1</sup> and the handwritten notes of a fire investigator (15 pages).<sup>2</sup>

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<sup>1</sup> In all, three Fire Investigation Reports were identified as responsive, but only portions of two of the reports are at issue.

<sup>2</sup> Although the mediator's report and notices of inquiry sent to the parties identified 14 pages of records as being at issue, there is one more page from which the affected party's name has been severed by the archives, thereby bringing the total number of pages at issue to 15.

## ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) apply to the information at issue?

## DISCUSSION:

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

[7] The archives relies on the mandatory personal privacy exemption in section 21(1) to withhold the information at issue. In order to determine whether the personal privacy exemption may apply, I must first decide whether the records contain "personal information" and, if so, to whom it relates. This is because section 21(1) only applies to *personal* information, which is defined in section 2(1) to mean "recorded information about an identifiable 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.<sup>3</sup> To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[9] Sections 2(2), (3) and (4) also relate to the definition of personal information and provide exceptions to the definition. Sections 2(3) and (4) are exceptions for business identity information, which are not applicable in this appeal, while section 2(2) provides an exception related to long-deceased individuals, which states:

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

[10] 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.<sup>5</sup> 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.

[11] Since the information about the affected party dates back to 1975, I asked the archives to specifically address its efforts to determine the whereabouts of the affected party and whether that individual may be deceased. The appellant was given an opportunity to respond to the archives' representations on this point.

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<sup>3</sup> Order 11.

<sup>4</sup> Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

<sup>5</sup> Order M-731.

### ***The archives' representations***

[12] The archives submits that the information contained in the records qualifies as the affected party's "personal information" because paragraphs (d) and (h) of section 2(1) of the *Act* define "personal information" to include an individual's address, telephone number and "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."

[13] In its confidential and non-confidential representations, the archives describes its efforts to locate the affected party and determine if he is deceased, using information from the responsive records to conduct an electronic database and manual search of records with the Office of the Registrar General. According to the archives' non-confidential representations, the three records about individuals with the same name that were identified did not match the approximate birth year of the affected party. The archives observes that because the initial search of the electronic database of the Office of the Registrar General "is not a guarantee that death records do not exist for the affected party," it proceeded with an additional manual search of paper records, which resulted in the identification of two additional records, which also did not match the approximated birth year of the affected party. Based on its efforts, the archives submits that because "there is nothing to suggest that the affected party is deceased," the exception to the definition of personal information in section 2(2) of the *Act* does not apply.

### ***The appellant's representations***

[14] The appellant submits that it would be reasonable to assume that the affected party's current phone number and address are not the same as they were in 1975, given the age of the investigation and the fact that the archives was unable to locate him. Because of this, she also submits that "it is neither reasonable nor logical to expect that [the affected party] may be identified if the information [in the records] is disclosed" and "[t]o state that [the affected party] is alive OR is deceased is purely an assumption and not a fact."

[15] In response to the archives' submission that "there is nothing to suggest that the affected party is deceased," the appellant argues that this "does not indicate [the affected party] isn't deceased if an exhaustive search was not conducted." She also claims that the "Archives did not perform an earnest, diligent or intense search to determine whether the affected party was alive or deceased," arguing that the archives only searched the Office of the Registrar General and did not conduct a search for the affected party through other possible government sources, departments and agencies.

### ***Analysis and finding***

[16] As a whole, the fire investigation reports and handwritten notes that were identified as responsive to the request by the archives contain the personal information of numerous individuals identified in the course of the investigation, including the appellant's mother and siblings, witnesses and other individuals who knew the appellant's mother. The archives disclosed most of this personal information to the appellant, including descriptions given of the events surrounding the tragic 1975 fire that took the lives of the appellant's mother and siblings.

[17] The limited information about other individuals that the archives withheld is the personal information of witnesses and other individuals that were interviewed in the investigation. This personal information mainly consists of names, addresses and other identifying information about them. However, as confirmed by the representations provided during this inquiry, the appellant does not pursue access to information about any individual other than the affected party, with whom she understands her mother to have had a relationship.<sup>6</sup> Based on my review of the records remaining at issue, I find that the records contain personal information about the affected party that fits within paragraphs (a), (d) and (h) of the definition in section 2(1), because it consists of his name, age, addresses, telephone numbers, occupation and place of employment in 1975 when he was interviewed.

[18] The records at issue do not contain the appellant's personal information.

[19] As I noted above, section 2(2) of the *Act* excludes from the definition of personal information "information about an individual who has been dead for more than thirty years." In the circumstances of this appeal, and based on the evidence provided, there is insufficient evidence that the affected party is deceased or, further, that he has been deceased for more than thirty years, as the exception in section 2(2) requires.

[20] The appellant expressed concern in her representations that the archives' search for proof of death relating to the affected party was not adequate or exhaustive. The archives' search for records that might establish whether the affected party is alive or deceased is only relevant to the extent that it may support the reasonableness of the conclusion about whether the exception in section 2(2) applies.<sup>7</sup> I am satisfied that the archives made reasonable efforts to determine whether the affected party is deceased. Therefore, as there is not sufficient evidence that the affected party is deceased, I find that his personal information does not fit within the exception in section 2(2).

[21] I will now review whether the affected party's personal information is exempt under the mandatory personal privacy exemption in section 21(1).

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

[22] The archives maintains that disclosure would result in an unjustified invasion of the affected party's personal privacy under section 21(1) and relies on the factor in section 21(2)(f) (highly sensitive) to support this position.

[23] Where a requester seeks personal information of another individual in a record that

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<sup>6</sup> Related to this narrowed scope is the appellant's comment that "...the Fire Marshall's office states that it has a cassette tape of the 911 call, which was NOT included in the disclosure from the [archives]." This 911 audio recording falls outside the scope of the discussion in this order because the 911 call was not made by the affected party and it is only his personal information the appellant seeks at this time. I make no finding on whether the 911 call recording would have been responsive to the appellant's request before she narrowed its scope at adjudication.

<sup>7</sup> In any event, I make no finding as to whether proof of death relating to the affected party is "reasonably related" and, therefore responsive, to the appellant's request. The issue of reasonable search under section 24 of the *Act* is not before me in this appeal.

does not contain their own personal information, 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. The section 21(1)(a) to (e) exceptions are relatively straightforward. 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.

[24] I find that none of the exceptions at section 21(1)(a) to (e) apply. The appellant says that the affected party has not had an opportunity to provide consent in writing to disclosure of his name under the exception in section 21(1)(a) because the archives never contacted him. Therefore, the appellant submits that the archives cannot reasonably claim that he did not consent. However, I am satisfied that as the affected party could not be located, his written consent to disclosure in the context of this access request could not be obtained.

[25] I will now consider whether the exception at section 21(1)(f) applies.

[26] Under section 21(1)(f), if disclosure of the personal information would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. Sections 21(2) through (4) provide guidance in determining whether disclosure would be an unjustified invasion of an individual's personal privacy under section 21(1).

[27] Specifically, 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 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).<sup>8</sup>

[28] 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.<sup>9</sup> 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. The list of factors under section 21(2) is not exhaustive and the institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).<sup>10</sup>

[29] Once a presumed unjustified invasion of personal privacy is established under section 21(3), it can only be overcome if an exception in section 21(4) or the "public interest override" at section 23 applies.<sup>11</sup> In the circumstances of this appeal, the public interest override has not been raised by the appellant and, in my view, it does not apply. However, the appellant does raise the possible application of section 21(4)(d), which states:

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

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<sup>8</sup> John Doe v. Ontario (Information and Privacy Commissioner), (1993), 13 O.R. (3d) 767 (Div.Ct.).

<sup>9</sup> Order P-239.

<sup>10</sup> Order P-99.

<sup>11</sup> John Doe v. Ontario (Information and Privacy Commissioner), cited above.

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

[30] The application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative 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?<sup>12</sup>

[31] 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).<sup>13</sup>

[32] 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."<sup>14</sup>

## ***Representations***

### *The archives' representations*

[33] The archives argues that disclosure of the personal information in the records would result in an unjustified invasion of personal privacy, so the section 21(1)(f) exception does not apply, and the information is exempt under section 21(1). Stating first that none of the paragraphs in section 21(3) applies, the archives relies on the factor in section 21(2)(f) of the *Act* in asserting that the information at issue is highly sensitive personal information of the affected party, given the context in which this request arises.

[34] The archives acknowledges that for personal information to be considered highly sensitive, it must be found that its disclosure could reasonably be expected to cause significant personal distress.<sup>15</sup> The archives submits that the subject matter of the records at issue and the nature of the relationship between the appellant's mother and the affected party result in the personal information being highly sensitive in character.<sup>16</sup>

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<sup>12</sup> See Orders MO-2237 and MO-2245.

<sup>13</sup> Order MO-2237.

<sup>14</sup> Order MO-2245.

<sup>15</sup> The archives refers to Orders PO-2518, PO-2617 and PO-2262.

<sup>16</sup> The archives relies on Order PO-1657.

[35] The archives notes that the records are fire investigation reports, including handwritten notes of the investigator's interview with the affected party, which contain the affected party's name, age, telephone number, address and occupation in 1975. The archives says that it has disclosed the portions of the records that indicate that the appellant's mother periodically met with the affected party during their fifteen-year relationship and that she was at the affected party's cottage the day before the fire. Further, the archives notes, the investigator's notes suggest that the relationship was a secret and that the deceased's husband was unaware of the relationship. It says that all of this information was disclosed to the appellant, except for the affected party's personal information.

[36] The archives suggests that the appellant may be seeking the withheld information in order to contact the affected party on behalf of a sibling. It submits that personal information may be considered highly sensitive under section 21(2)(f) if it is intended to be used to make contact with the individual concerned.<sup>17</sup> According to the archives, it is possible that contact with the affected party, in connection with the information contained in the records, could cause him significant personal distress. The archives refers to Order PO-1983, where the adjudicator held that "witness statements containing identifying information would permit the requester to contact the witness" and as such, the disclosure of the personal information in the witness statements would cause extreme personal distress and favoured the protection of privacy. The archives says that in this appeal, given the context of the request, disclosure could reasonably be expected to cause the affected party significant personal distress.

[37] With respect to the application of section 21(4)(d), the archives submits that there are no records to suggest that the affected party is deceased and as such, the information at issue does not contain the personal information of a deceased individual. Moreover, the archives says, there is no evidence to suggest that the appellant is a "close relative" of the affected party, as defined under the *Act*. The archives maintains that neither part 1 nor part 2 of the test for section 21(4)(d) has been met.

#### *The appellant's representations*

[38] The appellant submits that disclosure of the information at issue would not be an unjustified invasion of personal privacy. The appellant agrees with the archives that the presumptions in section 21(3) do not apply.

[39] The appellant submits that the personal information at issue is relevant to a fair determination of rights affecting her, according to the factor in section 21(2)(d). She acknowledges, however, that there is no proceeding planned or contemplated and also says that she does not know if the personal information at issue has some bearing on or is significant to the determination of the right in question, which she identifies as her "common law ... right to the full document with no redactions, with the understanding that I do no harm." The appellant states, otherwise, that the factors in sections 21(2)(a), (b) and (c) (which would favour disclosure) do not apply.

[40] Regarding the section 21(2) factors that would weigh against disclosure, the

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<sup>17</sup> Order P-12.



appellant claims that either the individual factor does not apply, or she is not able to assess whether it applies. She does assert that if the archives has not been able to locate the affected party, "it is highly unlikely and improbable that anyone could locate [him]," which lessens the likelihood of the application of several of the factors weighing against disclosure. She also points out that the archives, by its own admission, is not concerned about the physical safety of the affected party, and this is likely a reference to the non-application of the privacy-protecting factor in section 21(2)(e) (pecuniary or other harm). With respect to section 21(2)(h) (supplied in confidence), the appellant adds that there is no evidence that the affected party spoke in confidence to the Fire Marshall and she submits that "it is to be assumed that [the affected party] was aware that his information could be disclosed."

[41] Regarding section 21(2)(f), in particular, the appellant asserts that since the affected party did not tell the investigator to ensure that all meetings were confidential, and "[i]f there was no personal or emotional distress 43 years ago, then it is unlikely there would be any today." She also submits that the archives has not provided "any examples of 'significant personal distress' to the affected party that would result from the disclosure of his personal information and she asserts that because the record dates back to 1975, any expectation of distress could not be reasonable. She submits that there is "no indication, evidence, or assumption that any 'personal distress' will be caused" and "the word 'could' in the archives' representations does not state that it 'will' only that it 'might' and they are making an assumption with no evidence to validate this statement." Further, she says, with the archives' admission that it cannot locate the affected party, there should be no concern that significant personal distress would be caused by releasing the affected party's name "after 43+ years."

[42] The appellant also disputes the archives' position that she "may be seeking this information in order to contact the affected party." According to the appellant, she is seeking the affected party's information to compare it to what is written in letters from her mother to her family prior to 1975, to understand and perhaps learn that her mother may have had a "wonderful friend and confidante" in the affected party. Her submissions suggest this may be an unlisted factor favouring disclosure.

[43] With respect to the application of section 21(4)(d), the appellant submits that all three parts of the statutory test are met. She believes that her circumstances present the type of situation that the exception is intended to help, noting that "[c]ompassionate reasons have generally been described as information that will assist a close relative in understanding the events leading up to and surrounding the death of an individual." Commenting that the investigation report "details her [mother's] last 24 hours," the appellant submits that she is trying to "piece together as much as possible regarding her [deceased mother's] life and death" and to try to confirm if the affected party is named in her deceased mother's letters. According to the appellant, the "Fire Marshall's report with the events leading up to and surrounding the fire are only missing one item so I can have complete closure" and that is the identity of the affected party. She submits that disclosure would be compassionate because it would permit her to read "a complete report on [her] mother's death, which would be comforting and [put] closure to this tragic event."

*The archives' reply representations*

[44] In reply, the archives states that it understands the appellant's reasons for seeking disclosure of the affected party's personal information, but the legal test for the application of section 21(4)(d) has not been met. In response to the appellant's position that all three parts of the test for section 21(4)(d) have been met, the archives reiterates its position that the personal information at issue in this appeal belongs to the affected party, not the appellant's deceased mother and explains, again, its reasons for concluding that the other parts of the test are not met.

*The appellant's sur-reply representations*

[45] The appellant comments that she cannot locate the test being applied in this appeal for section 21(4) in the legislation and she questions its foundation and requirements. She also reiterates that the "Archives did not perform an earnest, diligent or intense search to determine whether the affected party was alive or deceased," and that the archives only searched the Office of the Registrar General, not other government sources, departments and agencies.

***Analysis and findings***

[46] Based on the representations provided and the circumstances of this appeal, I find that the disclosure of the affected party's personal information would result in an unjustified invasion of personal privacy and that, under the mandatory exemption in section 21(1), the archives is prohibited from disclosing it. My reasons for this finding follow.

[47] As I stated previously, where a requester seeks personal information of another individual in a record that does not contain their own personal information, 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. I am satisfied that only the exception in section 21(1)(f) (not an unjustified invasion of personal privacy) could be relevant in the circumstances of this appeal. Sections 21(2) through (4) provide guidance in determining whether disclosure would, or would not, be an unjustified invasion of an individual's personal privacy under section 21(1).

[48] 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. The appellant did suggest, in comments that I did not set out above, that the personal information she seeks may have been part of an investigation into a possible violation of law under the Criminal Code of Canada, raising the possible application of the presumption in section 21(3)(b). However, there is no evidence before me to support the application of this presumption against disclosure. And, in any event, this office has previously found that investigations by the Office of the Fire Marshall do not qualify as investigations into possible violations of law for the purpose of section 21(3)(b).<sup>18</sup>

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<sup>18</sup> This is because the Office of the Fire Marshall (OFM) is not carrying out the function of enforcing or regulating compliance with a law. If an OFM investigation points to the possibility of a Criminal Code offence (arson, for example), any such possible violation of law would be investigated by the police, which is an

[49] In the circumstances, I find that none of the presumptions against disclosure in section 21(3) apply.

*Section 21(2) factors favouring disclosure*

[50] I will now consider the possible application of factors in section 21(2), under which the head of an institution is required to consider "all the relevant circumstances" in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. The appellant submits that section 21(2)(d) may apply and favour disclosure, while the archives relies on section 21(2)(f) as weighing against disclosure.

[51] Before I address section 21(2)(d), I agree with the appellant, and I find, that the factors favouring disclosure in sections 21(2)(a) (public scrutiny), 21(2)(b) (public health and safety) and 21(2)(c) (informed choice) do not apply to favour disclosure in this appeal.

[52] For the factor at section 21(2)(d) to apply, the appellant must satisfy the following four-part test to establish that:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.<sup>19</sup>

[53] The appellant suggests that the personal information at issue is relevant to a fair determination of rights affecting her, namely a "common law right to the full document with no redactions." However, she does not provide the source for her belief that such a legal right exists outside of the *Act*, and she admits that there is no proceeding planned or contemplated. In the circumstances, the first and second parts of the four-part test for section 21(2)(d) are not met. Further, it is not sufficient that the personal information at issue have some bearing on the determination of a right (the third part of the test); the requester must also establish that the personal information is required to prepare for the proceeding or to ensure an impartial hearing.<sup>20</sup> Neither the third nor the fourth parts of the test are met in these circumstances. As none of the requirements for the application of section 21(2)(d) have been established, I find that the factor does not apply to favour disclosure of the affected party's personal information.

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agency that carries out a law enforcement function for the purpose of section 21(3)(b). See Orders PO-2271 and PO-2339.

<sup>19</sup> Order PO-1764; see also Order P-312, upheld on judicial review in Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner) (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

<sup>20</sup> Order M-119.

*Section 21(2) factors weighing against disclosure*

[54] The archives argues that the factor in section 21(2)(f) applies to the affected party's personal information because there is a reasonable expectation of significant personal distress with its disclosure. The appellant refutes the archives' position, arguing that there is no evidence that the affected party asked for their meeting with the fire investigator to be confidential or that, after "43+ years," the affected party would suffer distress from the disclosure of his personal information.

[55] As noted by the archives, past orders have established that for information to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed<sup>21</sup> and, additionally, it has been held that distress may result if the information is intended to be used to make contact with the individual concerned.<sup>22</sup>

[56] Based on my review of the records, and the circumstances surrounding the investigation into this fatal house fire, I accept that the personal information of the affected party was gathered in a highly sensitive context. I also find persuasive the reasoning in past orders of this office that have held that significant personal distress may be experienced by individuals who receive unexpected or unwelcome contact from individuals they do not know.<sup>23</sup> I am satisfied that the factor favouring non-disclosure in section 21(2)(f) applies. However, I find that the weight of this factor is diminished by several things that impact the reasonableness of the expectation of significant personal distress in this appeal: the appellant's evidence that her intention is not to contact the affected party, even if provided his personal information; and the low likelihood that she would be able to do so, given the passage of time, and the archives' (and this office's) inability to locate the affected party. I find, therefore, that the factor in section 21(2)(f), which favours privacy, applies, but weighs very modestly against disclosure.

[57] The archives did not rely on, or address, the factor in section 21(2)(h) (supplied in confidence). The appellant addressed it by suggesting that it does not apply because there is no evidence that the affected party spoke in confidence to the fire investigator and she therefore assumes the affected party knew that his information could be disclosed. Section 21(2)(h) requires an objective assessment of the reasonableness of the confidentiality expectation of both supplier and recipient.<sup>24</sup> There being no evidence of any confidentiality assurances in this fire investigation at all, I find that this factor does not apply. I also considered whether any of the other factors in section 21(2) that weigh against disclosure could apply, and I am satisfied that none do.

*Possible unlisted factor in favour of disclosure – understanding the deceased's life circumstances*

[58] As stated, the archives was also required to consider any circumstances that are relevant, even if they are not listed under section 21(2).<sup>25</sup> I have considered the appellant's

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<sup>21</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

<sup>22</sup> Order P-12.

<sup>23</sup> Orders PO-3321 and PO-2802-I.

<sup>24</sup> Order PO-1670.

<sup>25</sup> Order P-99.

submissions about seeking the affected party's name in order to see if her mother wrote about the affected party in letters sent to her family before 1975. She suggests that her desire to understand her mother and find out, in particular, if her mother had a "wonderful friend and confidante" in the affected party may be an unlisted factor favouring disclosure. In my view, there is not a sufficient basis for me to find that a desire to better understand a deceased relative's life circumstances constitutes an unlisted factor favouring disclosure. I am satisfied that considerations related to this desire are already accounted for in part three of the test under section 21(4)(d); that is, whether, in the circumstances, disclosure is desirable for compassionate reasons.

[59] I find that there are no unlisted factors favouring, or weighing against, disclosure in the circumstances of this appeal.

*Section 21(2) conclusion*

[60] In the preceding analysis, I concluded that the privacy protecting factor in section 21(2)(f) weighed very modestly in favour of non-disclosure. However, as there are no factors favouring disclosure that would outweigh the protection of the affected party's privacy rights under the *Act*, I find that the exception in section 21(1)(f) is not established and that section 21(1) applies to the personal information at issue, subject to my findings on section 21(4)(d).

[61] In light of this conclusion I will now review the appellant's claim that section 21(4)(d) applies and that, "in the circumstances, disclosure is desirable for compassionate reasons."<sup>26</sup> If the exception at section 21(4)(d) applies, disclosure is not an unjustified invasion of personal privacy, meaning that the section 21(1)(f) exception is made out and the information is not exempt under section 21(1).

*The compassionate reasons exception at section 21(4)(d) does not apply*

[62] For the reasons that follow, I find that the requirements for the application of the compassionate reasons exception in section 21(4)(d) are not met, and that there is no legal basis for the disclosure of the affected party's personal information under the *Act*.

[63] Before explaining the basis of my finding, I will respond to a concern expressed by the appellant in her sur-reply representations, where she acknowledged the three-part test for the application of section 21(4)(d), but said she wanted to know "the foundation (document) of where this consideration is shown to be required." The origin of the three-part test is found in Orders MO-2237 and MO-2245, which are the two decisions of Commissioner Brian Beamish that established this office's interpretation of the compassionate reasons exception in section 14(4)(c) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*, which is the equivalent of section 21(4)(d) of the *Act* before me in this appeal.

[64] In both of these orders, the Commissioner outlined the legislative history leading up to the enactment of the provision, including noting the "obvious legislative intent... of assisting relatives in coming to terms with the death of a loved one." Similarly, in both

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<sup>26</sup> Order MO-2245.

orders, which dealt with section 14(4)(c) of *MFIPPA*, the Commissioner ordered the disclosure of personal information relating directly to the circumstances surrounding the death of an individual to the parents of a deceased individual. In ordering the disclosure of information that had been found to be highly sensitive, the 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."

[65] The Commissioner concluded his review of the legislative background and purpose of the provision with the observation that:

... by using the words "in the circumstances" the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons." In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. ***It is recognized that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.***<sup>27</sup> [Emphasis added in original]

[66] With this background in mind, I will consider how the test for section 21(4)(d) developed in Orders MO-2237 and MO-2245 applies to the affected party's personal information in the specific circumstances of this appeal.

[67] The archives argues that the section 21(4)(d) compassionate grounds exception to section 21(1) does not apply to the personal information at issue. The explanation given by the archives is that it has already, for compassionate reasons, released the personal information of the appellant's mother and siblings to her, as well as information about the affected party's interaction with the appellant's mother prior to her death that was obtained by the fire investigator by interviewing the affected party. The archives maintains that the remaining personal information of the affected party was withheld to protect his privacy.

[68] The appellant does not accept the decision of the archives. She submits that she is entitled to receive access to the affected party's personal information for compassionate reasons and that she has met all three parts of the test for section 21(4)(d).

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<sup>27</sup> See page 8 of Order MO-2245.

Part 1 - personal information of the deceased

[69] The first part of the test for the application of section 21(4)(d) is to ask whether the records contain the personal information of a deceased individual. The records identified by the archives as responsive to the appellant's request do contain the personal information of deceased individuals – the appellant's mother and two siblings. However, that personal information has already been disclosed to the appellant. The personal information that remains at issue is the personal information of the affected party. As I concluded above, in the absence of evidence to establish that the affected party is deceased, it must be presumed that he is still alive.<sup>28</sup>

[70] I disagree with the archives that the compassionate grounds exception could only apply if the affected party is deceased. Orders MO-2237 and MO-2245 acknowledged that personal information about a deceased individual can include information that also qualifies as that of another individual, in certain circumstances. However, I find the circumstances of this appeal distinguishable from those orders. Typically, the circumstances are such that information or details about the deceased individual's death are entwined with the personal information of witnesses whose connection with the death is direct or proximate. There is not, in my view, a sufficient nexus between the personal information of the affected party and that of the appellant's mother (or her siblings) to support such a finding in this appeal.

[71] Accordingly, I find that part one of the test for the application of section 21(4)(d) is not satisfied. Although this conclusion would be reason enough for finding that section 21(4)(d) does not apply, for the reasons below, I also find that part three of the test is not satisfied in any event.

Part 3 – desirable for compassionate reasons

[72] To satisfy part three of the test under section 21(4)(d), the evidence must establish that disclosure of the personal information of a deceased individual would, in the circumstances, be desirable for compassionate reasons.

[73] To begin, I am satisfied that the archives has already released most of the information in the records to the appellant, including the affected party's interview with the fire investigator, with the exception of the affected party's identifying information. The records disclosed to the appellant reflect the complete investigation by the Office of the Fire Marshall into, and narrative of, the circumstances surrounding the tragic fire that took the lives of her mother and two siblings.

[74] This office has previously declined to apply the compassionate grounds exception at section 21(4)(d) in circumstances where the institution had already granted the grieving family access to most of the information in the requested records. For example, in Interim Order MO-3666-I, the Timmins Police Service disclosed witness statements to the grieving family, but withheld the names and contact information of the witnesses. The adjudicator found that the compassionate grounds exception in section 14(4)(c) of *MFIPPA* did not apply to the witnesses' names and contact information and upheld the decision. In Order

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<sup>28</sup> In the discussion of the "personal information" exception in section 2(2), above, I was satisfied that the archives had made reasonable efforts to ascertain whether the affected party is deceased.

PO-3732, the adjudicator accepted that the Ministry of Community Safety and Correctional Services<sup>29</sup> had disclosed most of the responsive records to the requester and was satisfied that this information provided the grieving family with an understanding of the events leading up to and surrounding the death of their brother.

[75] I accept that the appellant seeks the personal information at issue in this appeal to give her a greater sense of closure. However, having considered the parties' representations and based on the nature of the personal information about the affected party that remains at issue, I find that disclosure of the particular personal information is not, in the circumstances, desirable for compassionate reasons. I have specifically considered the highly sensitive nature of the affected party's identity in this context. Having done this, I am not persuaded that disclosure of the affected party's personal information would provide the appellant with additional information about the circumstances leading up to the death of her mother and siblings. Therefore, I find that part three of the test under section 21(4)(d) is not met.

### Conclusion

[76] For the reasons given above, I conclude that disclosure of the personal information that remains at issue would result in an unjustified invasion of the personal privacy of the affected party. Since the exception in section 21(4)(d) does not apply to this personal information, I find that it is exempt by reason of the mandatory personal privacy exemption at section 21(1), and I uphold the archives' decision to withhold it.

### **ORDER:**

I uphold the archives' access decision, and I dismiss the appeal.

Original signed by \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

February 13, 2020 \_\_\_\_\_

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<sup>29</sup> Now known as the Ministry of the Solicitor General.