

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4104

Appeal PA17-505

Ministry of the Attorney General

January 20, 2021

Summary: The Ministry of the Attorney General received a request under the *Freedom of Information and Protection of Privacy Act* for video footage capturing the moments before and after the appellant's brother was shot and killed by a police officer. The ministry denied the appellant access to the record identified as responsive, claiming that disclosure would constitute an unjustified invasion of personal privacy under section 21(1). The appellant appealed the ministry's decision to this office claiming that the compassionate grounds exception in section 21(4)(d) applies in the circumstances of this appeal. In this order, the adjudicator finds that the exception in section 21(4)(d) applies and orders the ministry to disclose the entire video to the appellant.

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"), 21(1), 21(2)(f), 21(3)(b), and 21(4)(d).

Orders and Investigation Reports Considered: Order PO-2976.

OVERVIEW:

[1] This decision addresses an appeal of a decision of Ministry of Attorney General (the ministry) to deny access to video footage capturing a police shooting. The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the ministry for video footage relating to an incident which resulted in her brother being shot and killed. The incident was investigated by the Special Investigation Unit (SIU) and a Coroner's Inquest followed after the SIU's determination that no criminal charges were warranted against the subject police

officer.

[2] The ministry located responsive video footage but denied access to the appellant claiming that disclosure would constitute an unjustified invasion of personal privacy under section 21(1) taking into consideration the presumption at section 21(3)(b) (investigation into possible violation of law). The ministry also claimed that certain law enforcement exemptions under section 14(1) applied to the record.

[3] The appellant appealed the ministry's decision to this office and a mediator was assigned to the appeal. No mediation was possible and the file was transferred to the adjudication stage of the appeals process in which an adjudicator conducts an inquiry. During the inquiry, I invited the representations of the ministry, which were shared with the appellant in accordance with this office's confidentiality criteria. In its representations, the ministry indicated that it no longer relied upon any of the law enforcement exemptions previously claimed. I also invited the representations of the subject police officer and relevant police service. The relevant police service responded that it had spoken with the subject officer and it was decided that neither the officer nor the police service would submit representations in this matter.

[4] In this order, I find that the compassionate grounds exception at section 21(4)(d) applies in the circumstances of this appeal and order the ministry to disclose the record to the appellant.

RECORD:

[5] The record at issue is video footage of an interaction between the appellant's brother and a police officer that resulted in the appellant's brother being shot and killed. The video is approximately five and a half minutes long and contains no audio.

ISSUES:

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

DISCUSSION:

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

[6] The ministry relies on the mandatory exemption in section 21(1) to withhold the record. Before I can determine which sections of the *Act* may apply to the record, it is

necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

[7] 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.¹

[8] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.² The ministry takes the position that the record contains the personal information of not just the appellant's brother, but that of the officer involved in the incident. The ministry states:

... that the record contains information that qualifies as personal information in relation to both the deceased and the subject officer, whose personal conduct as a police officer was under investigation.

[9] The ministry refers to Order PO-2976 in which this office found that a record capturing the images of a police officer constituted that officer's personal information because his performance as an employee was being evaluated in the context of a SIU investigation.

[10] The appellant did not make representations addressing this specific issue. As noted above, the subject officer and relevant police service decided not to submit representations.

[11] Having reviewed the record, I am satisfied that the video footage contains the personal information of the appellant's brother and the subject officer as defined in paragraphs (a), (b) and (h) of the definition of "personal information" in section 2(1).³ In making my decision, I agree with, and adopt, the reasoning in Order PO-2976 and a long line of orders from this office that have found that information about police officers in records originally created in the course of these officers' professional duties

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Orders P-1409, R-980015, PO-2225 and MO-2344.

³ "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,
- (h) the individual's name if 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;

constitutes their personal information when their conduct is later called into question.⁴ In this case, I find that the subject officer's images in the record, which are associated with his professional duties, qualify as his personal information as they reveal something of a personal nature about him.⁵ Specifically, I note that the subject officer's actions resulted in a SIU investigation and were also considered in a Coroner's Inquest.

[12] In its representations, the ministry says that the images of civilian witnesses and other officers involved in the incident and subsequent investigation are also captured in the record. I have reviewed the record and am satisfied that no civilian witnesses are identifiable based on what appears in the record.⁶ I accept that the images of several police officers are captured in the footage immediately after the appellant's brother is shot. However, I am satisfied that these other police officers appear solely in the course of carrying out their professional or official duties, because their actions were not later called in to question. Therefore, I find that the images of the other police officers do not constitute their "personal information" under section 2(1); nor is there sufficient evidence before me demonstrating that disclosure of the other police officers' images would reveal something of a personal nature about them. Accordingly, I am satisfied that these other officers' images are not their personal information under the *Act*.

[13] Having regard to the above, I find that the video footage at issue contains the personal information of the appellant's brother and the subject officer within the meaning of the definition of "personal information" set out in section 2(1) of the *Act*.

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

[14] The ministry has withheld the video in its entirety because it claims that disclosure would be an unjustified invasion of personal privacy under section 21(1) of the *Act*.

[15] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 21(1). If the information fits within any of the paragraphs (a) or (f) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 21(1). The parties have not claimed that any of the exceptions in paragraphs (a) to (e) apply, and I am satisfied that none apply.

⁴ See for example Orders PO-1912, PO-2215, PO-2414, PO-2524, and PO-2633.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ I note that in the beginning of the footage, an individual who is not facing the camera appears to walk past the appellant's brother. The image of this individual's back is partially captured in the footage and I am satisfied that the individual cannot be identified. I also note that several cars and buses appear in the vicinity of the incident. However, the individuals in vehicles and their licence plates cannot be identified in the footage.

[16] 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.

[17] In determining whether disclosure of the personal information in the record to the appellant would constitute an unjustified invasion of personal privacy under section 21(1), this office will consider, and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.

[18] The ministry claims that the presumption in section 21(3)(b) applies in the circumstances of this appeal. I will first consider the ministry's argument and then move to the appellant's claim that the compassionate grounds exception at section 21(4)(d) applies.

Does the presumption section 21(3)(b) apply?

[19] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁷

[20] As noted above, the ministry takes the position that the presumption at section 21(3)(b) applies, and this provision states:

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

[21] 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.⁸

[22] The appellant's representations did not specifically address this issue. In its representations, the ministry submits that the personal information in question was compiled and is clearly identifiable as "part of an investigation into a possible violation of law", namely, the criminal law as set out in the *Criminal Code of Canada*. The ministry also refers to the *Police Services Act*⁹ and submits that it establishes that the

⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁸ Orders P-242 and MO-2235.

⁹ Section 113 of the *Police Services Act*.

SIU is a law enforcement agency which conducts criminal investigations.

[23] Having regard to the record and the submissions of the police, I am satisfied that the video footage at issue was created as part of an investigation into a possible violation of law, namely a *Criminal Code* offence. As the presumption only requires that there was an investigation into a possible violation of law, it applies even if no proceedings were commenced as a result of that investigation. Accordingly, I find that the presumption at section 21(3)(b) applies and that disclosure is presumed to be an unjustified invasion of personal privacy.

Does the compassionate grounds exception at section 21(4)(d) apply?

[24] The appellant submits that disclosure of the withheld record would not constitute an unjustified invasion of personal privacy under section 21(1), given the application of section 21(4)(d) in the circumstances of this appeal. Section 21(4)(d) states, in part:

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

[25] The ministry does not dispute that the appellant is a "close relative" of the individual shot and killed in the footage.¹⁰ However, the ministry takes the position that section 21(4)(d) does not apply to overcome the presumption at section 21(3)(b) because, in this case, the record also contain the personal information of an individual other than the deceased. The ministry goes on to state:

The Ministry acknowledges that the record also contains information which is the personal information of the deceased. However, the Ministry submits that this information is so interwoven with the personal information of individuals other than the deceased that severance is not reasonably feasible. In order to avoid disclosing information which is properly exempted from disclosure, any such attempt at severance in the circumstances would result in the disclosure of information that is substantially unintelligible and, therefore, meaningless.

Moreover, the Ministry respectfully submits that the appellant has not established that access to this information, in whole or in part, is desirable for compassionate reasons.

¹⁰ The term "close relative" is defined in section 2(1) of the *Act* as "a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption".

[26] The ministry submits that the SIU lead investigator liaised with the appellant and other family members during the investigation to provide updates. The ministry submits that during this time, the SIU investigator met personally with the appellant to discuss the findings of the investigation, including the contents of the record.

[27] The ministry states that “[g]iven the nature and extent of information that has already been provided to the appellant, it is the ministry’s position that the appellant has not shown that the disclosure of the deceased’s personal information in the record at issue is desirable for compassionate reasons such that it would outweigh the privacy interests of the other individuals contained in the record.”

[28] The appellant concedes that she seen portions of video footage during the inquest and was provided materials that formed part of the Coroner’s Brief during the inquest. The appellant indicates that the materials she had access to during the inquest were provided to her on the condition that they would no longer be accessible at the conclusion of the inquest. The appellant confirms that she no longer has access to the materials in the Coroner’s Brief, including the responsive footage.

[29] The appellant’s submissions in this regard were shared with the ministry who confirmed the practice of inquest materials being made available to family members only during the inquest. The ministry accepted the appellant’s evidence that she no longer has access to the Coroner’s Brief, including a copy of the record at issue.

[30] The ministry argues that if section 21(4)(d) is found to displace the section 21(3)(b) presumption, disclosure would nonetheless constitute an unjustified invasion of personal privacy because the factor favouring privacy protection at section 21(2)(f)¹¹ applies as “the information contained in the record is highly sensitive (e.g. depicts the shooting of the deceased).”

[31] The ministry also adds that none of the factors favouring disclosure under section 21(2) apply to the circumstances of this appeal; it submits that disclosure is not necessary for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny¹², nor is it necessary to promote public health and

¹¹ Section 21(2)(f) states: A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether, the personal information is highly sensitive.

¹² Section 21(2)(a) states: A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether, the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny.

safety.¹³

[32] Finally, the ministry reiterates its concern that the personal information of the deceased and the subject officer is “interwoven” and raises concerns that any “attempt at severance would result in the disclosure of information that is substantially unintelligible and, therefore, meaningless.”

[33] As previously noted, the subject officer and relevant police service decided not to submit representations in this matter.

Decision and Analysis

[34] 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. Does the record 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?¹⁴

Parts 1 and 2: Does the record contain the personal information of a deceased individual and is the requester a “close relative” of that individual?

[35] As noted above, the ministry does not dispute, and I find, that the record contains the personal information of a deceased individual (the appellant’s brother) and that the appellant is a “close relative” of this individual. Accordingly, the first two requirements for the application of section 21(4)(d) have been met.

Part 3: Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

[36] 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.”¹⁵

¹³ Section 21(2)(b) 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, access to the personal information may promote public health and safety.

¹⁴ Orders MO-2237 and MO-2245.

¹⁵ Order MO-2245.

[37] 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).¹⁶ The ministry argues that the factor favouring privacy protection under section 21(2)(f) applies in the circumstances of this appeal. Section 21(2)(f) provides that in determining whether disclosure of personal information constitutes an unjustified invasion of personal privacy, the ministry shall consider all the relevant circumstances, including whether the personal information is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁷

[38] In this matter, I have found that the record contains the personal information of the subject officer and the appellant’s brother. However, the ministry did not adduce evidence suggesting that disclosure of the record would result in a reasonable expectation of significant personal distress to the subject officer. Instead, the ministry states that the footage is highly sensitive because it depicts the shooting of the deceased. In my view, the appellant’s brother’s privacy interests are diminished by his death along with the fact that the record captures the moment he was shot and killed by a police officer, which was the subject of an SIU investigation and inquest. Similarly, I find that any privacy interests the subject officer may have are greatly diminished by the media attention to the shooting, including the publication of officer’s name, and the public outcome of the inquest.

[39] I also note that the only personal distress identified by the ministry in its representations is that which would be experienced by family members of the deceased. The underlying intent of section 21(4)(d) is to leave the determination of what is in the best interests of grieving family members up to them.

[40] Based on my review of the file, I am satisfied that the appellant is seeking access to the record in an effort to deal with her brother’s sudden death. The appellant submits that she is her brother’s next of kin and that she should have a copy of the record. Though the appellant previously had access to the record, or portions of it, there is no dispute between the parties that the appellant no longer has access to the record at issue.

[41] Taking into consideration the evidence of the parties and the unique circumstances of this appeal, I find that disclosure of the record to the appellant is

¹⁶ Order MO-2237.

¹⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

desirable for compassionate reasons.

[42] I find that the application of the presumption under section 21(3)(b) is overcome by the compassionate grounds exception under section 21(4)(d) and order the ministry to disclose the record to the appellant.

[43] Given my finding that section 21(4)(d) applies in the circumstances, it is not necessary for me to address the ministry's argument that the factors favouring disclosure at section 21(2)(a) and (b) do not apply. Similarly, I need not consider the ministry's submission that the record cannot be reasonably severed as I have found that the disclosure of the entire record to the appellant is desirable for compassionate reasons.

ORDER:

1. I order the ministry to disclose the record in full to the appellant by **February 24, 2021** but not before **February 17, 2021**.
2. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellant.
3. The timelines noted in order provision 1 may be extended if the ministry is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by: _____
Jennifer James
Adjudicator

_____ January 20, 2021