

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4317-I

Appeal PA21-00038

Ministry of the Solicitor General

October 28, 2022

Summary: In this interim order, the adjudicator orders the ministry to provide contact information to the IPC that it has in its custody or under its control for individuals whose interests may be affected (affected parties) by disclosure of information at issue in this appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 50(3) and 52(4).

Orders Considered: Interim Order PO-4269-I.

Cases Considered: *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, 2014 ONSC 3295 (CanLII).

OVERVIEW:

[1] This order addresses the refusal of the Ministry of the Solicitor General (the ministry) to provide to the IPC the contact information for affected parties, that is, individuals who may have an interest in disclosure of information contained in a record that is at issue in this appeal.

[2] The issue of notification arises in the context of an appeal to the IPC of the ministry's decision to partially deny a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request is for access to information relating to intimate partner violence (IPV), and, more specifically, to a list of all homicides

involving intimate romantic partners¹ cleared by the Ontario Provincial Police (OPP) for a five-year period between 2015 and 2020.²

[3] In response to the request, the ministry created a chart containing the information sought. The ministry issued a decision granting access to some information contained in the chart, but denied access to four categories of information. Access to these four categories is at issue in this appeal. The four categories are:

- i. the names of the victims and accused;
- ii. the date of the homicide;
- iii. the location (city) of the homicide; and,
- iv. list of any charges/convictions, including associated peace bonds.

[4] The ministry claims that this information is exempt under the mandatory personal privacy exemption in section 21(1) of the *Act*. The requester, a member of the media conducting research into intimate partner violence, submits that there is a compelling public interest in disclosure of the information that outweighs the purpose of the section 21(1) exemption, so that the public interest override in section 23 of the *Act* applies.

[5] After mediation did not resolve the appeal, it was moved to the adjudication stage of the appeal process.

[6] In this interim order, I direct the ministry to provide me with the contact information of affected parties that the ministry has in its custody or under its control, so that I can continue with my inquiry by making best efforts to notify these affected parties and give them an opportunity to make representations. These affected parties are the next-of-kin of the victims (such as an adult child, parent or sibling), next-of-kin of deceased perpetrators (who died either as part of a murder-suicide in which the victim was killed, or by other means after they were charged), and perpetrators who are still alive. For ease of reference, I use the term "perpetrator" to refer to accused or convicted perpetrators, as the case may be, since nothing turns on the distinction for the purposes of this order.

Notification of Affected Parties

[7] At the start of the adjudication process, I began an inquiry by inviting the ministry first to submit representations on the section 21(1) exemption claimed in its decision to deny access to the information at issue.

¹ Identified in the request as a "current or former spouse, common law partner, boyfriend/girlfriend, same-sex partner or other intimate partner.

² January 1, 2015 to June 30, 2020.

[8] In its representations, the ministry raised the issue of affected party notification by writing that:

It is our stated position throughout our representations that **all affected third party individuals be provided with an opportunity to be heard prior to a decision being made about the disclosure of their personal information** to the appellant which could in turn lead them to being contacted by the appellant, a major media organization. This opportunity to be heard has not yet been provided **and it needs to happen**. Without it, we submit no disclosure is authorized to occur. [emphasis added]

[9] In representations submitted in reply to the appellant's representations, the ministry repeated its objection that affected parties had not yet been notified, stating that procedural fairness demands that such notification occur before any consideration can be given to the issues on appeal. The ministry wrote that:

The affected third parties who are identified in the record have not been notified that this appeal is taking place, and specifically, that the disclosure of a record containing their personal information is being contemplated. The Ministry maintains that disclosing records containing affected third parties' personal information without prior notification is contrary to jurisprudence, such as *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2956. **We submit that this decision stands for the principle that affected third parties, such as the ones in this appeal, have a duty to be notified of the appeal, and an opportunity to be heard, prior to a decision being rendered about the disclosure of their personal information.** [emphasis added]

[10] I agree that procedural fairness requires some or all of the affected parties to be notified and given the opportunity to submit representations. Accordingly, after I received representations from the ministry and the appellant, I decided that I would notify the affected parties. I asked the ministry to provide their contact information.

[11] The ministry responded by stating that "victims' personal information (which includes close relatives) should [n]ever be ordered disclosed in the circumstances of this appeal." The ministry wrote that the predominant consideration should be the ministry's obligation to protect the privacy of victims, as enshrined in the *Victims' Bill of Rights, 1995* (VBR).³ The ministry also wrote that whatever contact information it may have for victims may be outdated and therefore inaccurate, resulting in a heightened risk of infringing privacy where correspondence is sent to a wrong address. For contact information for incarcerated perpetrators, the ministry directed the IPC to Corrections

³ S.O. 1995, c. 6.

Canada.

[12] After this exchange, the IPC issued an interim order in two appeals unrelated to this one. In that order, Interim Order PO-4269-I, Adjudicator Colin Bhattacharjee ordered the ministry to provide contact information for affected parties in the appeals, so that affected parties, including family of a deceased inmate, could be notified and given an opportunity to submit representations. I sent the ministry a copy of the interim order and reiterated my request for affected party contact information.

[13] The ministry again refused, repeating its earlier objections and citing its "obligation to protect the privacy of victims, as enshrined in the [VBR]." The ministry submits that:

We understand that individuals whose interests might be affected by disclosure should be notified and provided with an opportunity to prepare submissions...We do not believe, however, that victims' personal information (which includes close relatives) should ever be ordered disclosed in the circumstances of this appeal.

DISCUSSION:

[14] Under section 10(1)(a) of the *Act*, every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under section 12 to 22.⁴

[15] In accordance with section 50(1), a person who makes an access request for records under the *Act* to an institution may appeal any decision of the head of that institution to the IPC. Section 50(3) gives the IPC discretion to inform other parties that an appeal has been received if those parties have "an interest" in the appeal. Section 50(3) states, in part, that:

Upon receiving a notice of appeal, the Commissioner shall inform the head of an institution concerned with the notice of appeal and may also inform any other institution or person with an interest in the appeal...

[16] Any determination as to whether parties should be notified in the interests of procedural fairness rests with the adjudicator, not the parties.⁵

[17] In *Ministry of Community Safety and Correctional Services v. Information and*

⁴ The right of access also does not apply to records that are excluded from the *Act*, but no provision excluding the record from the application of the *Act* is at issue in this appeal.

⁵ Interim Order PO-4269-I.

Privacy Commissioner,⁶ the Divisional Court considered the discretionary nature of section 50(3) in similar circumstances. The Court held that, although the IPC has discretion as to whether to inform persons with an interest in the appeal, "such discretion under section 50(3) of the [Act] has to be informed having regard to the principles of natural justice."

[18] In that case, the IPC did not notify victims of a convicted serial killer (or the victims' representative, in the case of deceased victims) of the access appeal before it. The court held that the "failure to inform the victims and representatives of deceased victims constitutes, in our view, a breach of the duty of procedural fairness."

[19] In referring the matter back to the IPC for reconsideration on notice to victims and representatives of victims, the Divisional Court wrote that:

In order to properly determine that there is a compelling public interest in disclosure requires a full and complete balancing of interests. This has not occurred due to the lack of information being provided to the victims and direct representatives of victims and the consequent incomplete record resulting from this oversight.

[20] I agree with the Divisional Court's reasoning and adopt it here.

[21] The ministry submits that, in requesting victims' contact information, I have not addressed the application of the VBR. The ministry says that I must consider "all applicable statutory considerations" and that, in not considering the VBR, I have not exercised my discretion appropriately in this instance.

[22] One of the reasons cited by the ministry for its refusal to provide affected party contact information is that the information at issue in this appeal (i.e. the four categories of information listed above) is information that ought never to be disclosed. The ministry relies on the VBR as a reason not to provide contact information to the IPC. In its representations on the section 21(1) exemption, the ministry submits that section 2(1) of the VBR states that victims of crime "should be treated with courtesy, compassion and respect for their personal dignity and privacy by justice system officials." The ministry says that, as the law enforcement agency involved in investigating the homicides that fall within the period of the appellant's research, the OPP fits within the definition of "justice system officials" and must therefore respect victims' privacy and dignity in the broad, purposive manner envisioned by the VBR. This includes consideration of the ministry's argument that the VBR is a factor that applies to weigh against disclosure of personal information.

[23] Before I can consider disclosing this information, however, it is my view that affected parties should be given the opportunity to be heard, and that only once I have given them this opportunity can I consider whether disclosure of the information at

⁶ 2014 ONSC 3295 (CanLII).

issue is warranted either because it is not subject to the section 21(1) exemption or because of the public interest override.

[24] I have not yet decided whether the record should be disclosed to the appellant. I will only do so after I review the record and consider the parties' representations and the relevant statutory provisions. One possible outcome, however, is that I may order that the information at issue in the record be disclosed to the appellant.

[25] I am not persuaded that the VBR acts as a barrier to notifying victims that a request has been made for access to their personal information, or that honouring their right to be heard where such a request has been made is contrary to the VBR's stated goal of treating victims with courtesy, compassion and respect, including where privacy interests are at issue. In fact, the reverse may be true.

[26] Moreover, the affected parties in this appeal include perpetrators (or their next-of-kin in the case of deceased perpetrators), to whom the VBR does not apply. The ministry has not set out an objection to their notification, and has referred me to Corrections Canada to obtain the contact information of incarcerated perpetrators.⁷ In my view, to give the perpetrators (or their next-of-kin) the opportunity to be heard, but not victims or their families, would be unfair and a violation of the duty of procedural fairness owed to the victims.

[27] The ministry also states that notice may serve to retraumatize victims' families and cause distress. In *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, cited above, the Divisional Court considered the potential distress engendered by notification of victims, and held that, "[n]otice would have given the victims an opportunity to advise by letter whether or not they would suffer distress if the records were disclosed to the media and public."

[28] I agree with this reasoning and also adopt it here. While I am mindful that notifying victims' families may trigger distress, I find that the requirement of procedural fairness, that is, giving these affected parties the right to be heard during the adjudication stage of an appeal, outweighs the ministry's concerns. As noted above, I am not persuaded that the VBR prevents notifying victims that a request for access to their personal information has been made so that they can be given the opportunity to have their voices heard.

[29] Finally, the ministry argues that Interim Order PO-4269-I is distinguishable because it only dealt with staff and inmate contact information.⁸ I disagree. As I have already noted, the appeals in Interim Order PO-4269-I include as an affected party the family member(s) of a deceased inmate. In any event, the ministry has not provided any reasonable basis on which I could conclude that procedural fairness would require

⁷ Although the ministry has not provided their contact information either, it has suggested that the IPC obtain it from Corrections Canada.

⁸ Note that one of the inmates was deceased.

me to notify perpetrators or their families, but not representatives of deceased victims.

[30] Section 52(4) of the *Act* authorizes the IPC to require an institution to provide information to the IPC, despite Parts II and III of the *Act*, or “any other Act or privilege.” As the ministry is the institution whose decision is under appeal to the IPC, it is wholly appropriate for the IPC to seek the contact information in question from the ministry. The IPC has previously found that section 52(4) gives it the authority to require an institution to produce to the IPC the contact information of affected parties that are found in records that are in the custody or under the control of an institution.⁹ As noted above, the contact information will assist the IPC in making best efforts to notify affected parties of the appeal under section 50(3) and give them an opportunity to be heard.

[31] In summary, I find that the duty of procedural fairness requires that some or all affected parties, which includes living perpetrators, as well as next-of-kin of victims and deceased perpetrators, be given an opportunity to make submissions to the IPC on the issues in this appeal. The ministry’s refusal to provide me with this information impairs my inquiry into whether the information at issue in this appeal should be disclosed to the appellant. Accordingly, I order the ministry to provide the IPC with the contact information for all affected parties that it has in its custody or under its control.

ORDER:

1. I order the ministry to provide me with:
 - a. contact information that it has in its custody or under its control for the immediate next-of-kin for victims, such as an adult child, parent, or sibling;
 - b. contact information that it has in its custody or under its control for the immediate next-of-kin for deceased perpetrators, such as an adult child, parent or sibling;
 - c. contact information that it has in its custody or under its control for perpetrators, whether or not they are currently incarcerated;
 - d. upon request, contact information for any other affected parties I may subsequently decide to notify during the remainder of my inquiry for this appeal.
2. I order the ministry to provide me with the contact provisions set out in order provisions 1(a), (b) and (c) by **November 18, 2022.**

⁹ Interim Orders PO-3718-I and PO-4269-I.

Original signed by: _____
Jessica Kowalski
Adjudicator

October 28, 2022 _____