



Information and Privacy  
Commissioner/Ontario  
Commissaire à l'information  
et à la protection de la vie privée/Ontario

## **ORDER P-1381**

Appeal P\_9600435  
[Reconsideration]

Ministry of the Solicitor General and Correctional Services



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## **BACKGROUND:**

In September 1990, a boating accident occurred in which two individuals were killed and a third was seriously injured. The accident was investigated by the Ontario Provincial Police, and resulted in two persons being charged with offences under the Criminal Code. In 1992, the Chief Coroner determined that an inquest into the circumstances of the deaths should be held, and assigned two members of the Metropolitan Toronto Police to conduct the investigation on behalf of the Coroner's office and to prepare the Coroner's Brief.

Following the conclusion of the Coroner's Inquest, a number of civil litigation actions were commenced by the families of the accident victims. The Plaintiffs in these actions have claimed a total sum in excess of \$10,000,000 against the Defendants.

One of the Defendants named in the actions is a licensed establishment which is alleged to have served liquor to the driver of one of the boats on the night of the boating accident to the extent that the driver's ability to operate a vessel was impaired. This Defendant's insurance company claims to have had no knowledge of the boating accident nor any information as to the potential liability of their insured until some months after the conclusion of the Coroner's Inquest.

After being served with the Statements of Claim relating to the civil actions, the insurance company retained the services of a private investigation firm to make inquiries into the boating accident.

The private investigator requested access to the investigation briefs prepared for the Coroner's Inquest into the boating accident. The Ministry of the Solicitor General and Correctional Services (the Ministry) processed the request under the Freedom of Information and Protection of Privacy Act (the Act) and denied access to the responsive record under the following exemptions:

- invasion of privacy - section 21
- law enforcement - sections 14(1) and 14(2)(a)
- third party information - section 17(1)

The private investigator (the appellant) appealed this decision and Appeal Number P-9500734 was opened. During the inquiry stage of that appeal, the Ministry withdrew its reliance on sections 14(1) and 14(2)(a) of the Act. The remaining issues in that appeal were subsequently disposed of in Order P-1208, issued June 14, 1996 by former Inquiry Officer Holly Big Canoe.

### **The Record in Order P-1208**

The record which the Ministry had identified as responsive to the request consists of 1242 pages of material bound into four volumes.

In correspondence with the Ministry, the appellant confirmed that she was not seeking access to any medical or health information. Accordingly, former Inquiry Officer Big Canoe found that the call reports completed by the members of the ambulance service called to the accident scene

(pages 627 - 636, 660 - 663), the statement of the medical doctor called to the scene (page 73), and the Reports of Post Mortem Examination (pages 639 - 644, 655 - 659) were not responsive to the request and were not at issue in that appeal.

In her order, the former Inquiry Officer noted that:

While this inquiry was underway, the Ministry disclosed pages 1-66, 71-[72], 179-201, 203, 664\_676, and 1034-1057 of the Coroner's Brief to the appellant. The Ministry confirmed with me by telephone that each of these pages has been disclosed in its entirety to the appellant.

This allegedly disclosed information consists of:

- the verdict of the Coroner's Jury and the Coroner's Inquiry Recommendations;
- the Witness List (which includes names, addresses, telephone numbers and remarks regarding their relationship to the inquest);
- an exhibit list;
- photographs and background information regarding the two deceased, the injured victim and the driver of the vessel in which the injured and deceased individuals were passengers;
- a synopsis of the events surrounding the accident;
- information regarding the professional qualifications of a Crime scene Draftsman employed by the Metropolitan Toronto Police;
- verdicts and recommendations resulting from a number of other inquests into deaths which occurred under similar circumstances;
- a draft submission to the inquest by an association of residents who possess lake shore properties in the vicinity of the accident location;
- biographical information about a witness who, as a member of the Ontario Legislature, introduced a Private Member's Bill aimed at regulating the operation of motor boats on Ontario's waterways, a copy of the Private Member's Bill and information associated with it; and
- a position paper on boating safety, operator licensing and education written by the Council of Boating Organizations of Canada.

The Ministry denied access to:

- transcription of interviews with 10 members of the Ontario Provincial Police who assisted in the investigation of the accident;
- notes from a police officer's notebook;
- transcription of interview with the Fire Chief whose department responded to the accident scene;
- statements regarding the qualifications of the pathologists who performed the post mortem examinations;
- report of the Centre of Forensic Sciences on material recovered from the accident scene;
- information about the qualifications of 14 individuals who were contacted in anticipation of their being called to testify as witnesses; and

- transcription of interviews or statements of 21 individuals who were interviewed or contacted in anticipation of their being called to testify as witnesses.

### Decision in Order P-1208

In her decision, former Inquiry Officer Big Canoe found that section 17(1) of the Act did not apply to the information. She found that pages 161 - 168, 171, 174, 308, 311 - 317, 969 - 971, 973 - 974 and 977 did not contain personal information, other than information which had already been disclosed to the appellant by the Ministry. Additionally, she found that, with the exception of the first paragraph on page 70 and the first three paragraphs on page 160, the remaining portions of these two pages did not contain personal information. She found that the first paragraph on page 70 and the first three paragraphs on page 160, and the remainder of the record contained the personal information of individuals other than the appellant. As the exemption in section 21(1) did not apply to the parts of the record that did not contain personal information, she ordered the Ministry to disclose them to the appellant.

The former Inquiry Officer balanced the appellant's rights to the personal information against the rights of the individuals referred to in the record to privacy protection. She found that the factor in section 21(2)(d) (fair determination of rights) was relevant in the circumstances.

She also found that disclosure of the personal information contained in the record would cause a number of individuals excessive personal distress. Accordingly, she found that the information was highly sensitive (section 21(2)(f)). She concluded:

Having balanced these two competing considerations, it is my view that the consideration favouring disclosure is outweighed in the circumstances of this appeal by the consideration in favour of privacy protection. Accordingly, it is not necessary for me to consider the Ministry's position on sections 21(2)(e) or (i), or whether the record contains personal information whose disclosure would constitute a presumed unjustified invasion of privacy under sections 21(3)(a) (medical information), 21(3)(b) (law enforcement) or 21(3)(d) (employment history).

In undertaking her analysis in this order, it was apparent that former Inquiry Officer Big Canoe took into consideration the information she had been given regarding the pages of the record which the Ministry indicated it had disclosed to the appellant. This can be seen in the following statements she made in the body of her order:

- The appellant submitted that personal identifiers could be severed from the record to "depersonalise" the remaining information. **The Ministry, however, has disclosed the names of all witnesses identified in the brief and their relationship to the inquest.** Given the level of publicity this accident and the inquest received and the appellant's proximity to the case, I find that severing names or other personal identifiers would not render any of the individuals whose personal information is contained in the record unidentifiable. [emphasis added]

- The appellant has established that her client and its insured are involved in ongoing legal proceedings, during which questions of liability and damages will be determined. While the inquest was not aimed at finding fault or determining liability, I believe that the details and analysis contained in the record would be relevant to a determination of these issues. Accordingly, I am satisfied that this factor is a relevant consideration favouring disclosure in this appeal. **However, in determining the weight this factor should be given in my analysis, I have considered the fact that a complete list of the witness names, addresses, telephone numbers and their relationship to the inquest has been disclosed to the appellant.** [emphasis added]

Following the issuance of Order P-1208, the Ministry contacted the Commissioner's office and advised that the information provided to the former Inquiry Officer regarding the disclosure of pages 1 - 66 of the record was in error. The Ministry indicated that it had only disclosed a portion of this group of pages to the appellant. This office contacted the appellant and apprised her of the error.

### **THE RECONSIDERATION REQUEST**

The appellant submitted a request that former Inquiry Officer Holly Big Canoe's decision in Order P-1208 be reconsidered. This reconsideration request is based on the grounds that in Order P-1208, former Inquiry Officer Big Canoe made several findings in which she took into account the fact that pages 1 - 66 of the record had been disclosed. In particular, she submitted that:

- as these undisclosed pages were not considered by the former Inquiry Officer in her decision, they should now be reviewed in the context of the overall issues in the appeal, and
- the extent of the information she believed had been disclosed may have influenced former Inquiry Officer Big Canoe's overall decision. Therefore, all of the documents at issue in the original appeal should be reviewed again.

I invited the appellant, the Ministry and 29 other individuals who may have an interest in the record (the affected persons) to make submissions as to whether I should reconsider the order. Such a reconsideration would entail conducting a second inquiry and issuing a new order to supersede those portions of Order P-1208 which address the definition of personal information and the application of section 21(1) to this information. In the interests of expediency, I also invited the parties to make submissions on these two substantive issues (the definition of personal information and the application of section 21(1) of the Act). In response, I received representations from the appellant, the Ministry and three affected persons. Two of the affected persons object to disclosure of their personal information and one affected person consents to disclosure. Copies of my letter to six of the affected persons were returned to this office as undeliverable.

In its representations, the Ministry confirms that the following pages were not disclosed to the appellant:

- page 11 cover page to Coroner's Brief
- pages 12 - 25 witness list
- page 26 exhibit list
- pages 27 - 39 background information on the four victims of the boating accident (including the two deceased, the injured occupant and an uninjured occupant)
- pages 40 - 49 synopsis of the events surrounding the accident
- pages 50 - 51 qualifications and duties of a member of the Metropolitan Toronto Police Force who was a witness at the inquest.

In my view, the decision in Order P-1208 was based on a misapprehension concerning fundamental facts. For this reason, I have decided to grant the request for reconsideration. Accordingly, this order will supersede those portions of Order P-1208 which address the definition of personal information and the application of section 21(1) of the Act. In determining the issues in this reconsideration, I have incorporated the pages which were not disclosed to the appellant into the remaining record at issue and have reviewed the entire record at issue to determine whether the exemption in section 21(1) applies to it in its entirety or in part.

## **DISCUSSION:**

### **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the pages of the record that were at issue in Order P-1208, and I concur generally with the findings of the former Inquiry Officer regarding the characterization of the information in these pages.

In particular, I find that, with the exception of the first paragraph on page 70 and the first three paragraphs on pages 160, the remaining portions of these pages and pages 161 - 168, 171, 174, 308, 311 - 317, 969 - 971, 973 - 974 and 977 do not contain personal information, other than information which has already been disclosed to the appellant by the Ministry. Accordingly, section 21(1) does not apply to these pages and parts of pages and they should be disclosed.

I find that the remaining pages, including parts of pages 70 and 160, contain the personal information of a number of individuals other than the appellant. As I indicated above, one affected person has consented to the disclosure of his personal information. This information, in the nature of a statement which describes his background, is found on page 67. This page contains only the personal information of this affected person and should be disclosed to the appellant.

With respect to pages 11 - 51, I find that pages 24, 27 - 49 and 51 all contain the personal information of a number of individuals other than the appellant.

Portions of pages 12 - 23, 25 and 50 contain information about individuals in their professional capacity and this does not qualify as personal information. Further, page 20 contains the name of the affected person who consented to disclosure of his personal information. Only items 1) and 2) on page 11 contain personal information. Finally, once two names are removed from page 26, there is nothing remaining which can serve to identify any individual. Accordingly, I find that the remaining portions of this page do not contain personal information.

I have highlighted in yellow, on the copy of the record being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, the portions of pages 12 - 23, 25 and 50 which do not contain personal information, as well as the name of the individual who consented to disclosure of his personal information. This information should be disclosed to the appellant. The remaining portions of these pages contain the personal information of individuals other than the appellant.

Further, I have highlighted in orange, the two names on page 26 and items 1) and 2) on page 11. This information should **not** be disclosed. The remaining portions of these two pages should be disclosed to the appellant.

In Order P-1208, former Inquiry Officer Big Canoe noted that:

The appellant submitted that personal identifiers could be severed from the record to "depersonalize" the remaining information.

In reviewing the appellant's representations in their entirety, I am of the view that the appellant submitted this as one option, among others, to assist the decision-maker in viewing the record in such a way as to enable her to disclose as much of the information in the record as possible. I do not interpret the inclusion of this option in the appellant's representations as indicating that the appellant is no longer interested in obtaining the names of individuals.

I have reviewed the record in its entirety. The vast majority of the record pertains to the five individuals involved in the boating accident, primarily through the observations of witnesses and in connection with the investigation into the accident. Because of the appellant's proximity to the civil proceedings arising from the accident, I find that, even with the names removed, these five individuals, in particular, would be identifiable. In my view, only page 26 (which I have already severed) is amenable to "depersonalization".

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies.

In Order P-1208, the former Inquiry Officer discussed the possible application of the exception to the exemption in section 21(1)(a), which relates to consent by affected persons. Following my review of the representations, I agree fully with her reasoning and her decision, and I adopt them for the purposes of this reconsideration. Accordingly, I find that, apart from my finding above concerning pages 20 and 67, section 21(1)(a) has no application in the circumstances.

The only remaining exception which may apply is section 21(1)(f). This section permits disclosure if it "... does not constitute an unjustified invasion of personal privacy". Since section

21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances which are relevant in the circumstances of the case.

The appellant relies on section 21(2)(d) to support disclosure of the record, and has raised two other considerations (which I will refer to later in this discussion), which she argues support disclosure of the record. The Ministry relies on sections 21(2)(e), (f) and (i) and 21(3)(a), (b) and (d) to support privacy protection in this case. These sections state:

- (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
  - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
  - (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
  - (f) the personal information is highly sensitive;
  - (i) the disclosure may unfairly damage the reputation of any person referred to in the record.
- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
  - (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
  - (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to



prosecute the violation or to continue the investigation;

(d) relates to employment or educational history.

I will begin my discussion with the factors and considerations which weigh in favour of disclosure.

I agree with the findings in Order P-1208 that the appellant has established that her client and its insured are involved in ongoing legal proceedings, during which questions of liability and damages will be determined. I also agree that while the inquest was not aimed at finding fault or determining liability, the details and analysis contained in the record would be relevant to a determination of these issues. Accordingly, I am satisfied that this factor is a relevant consideration favouring disclosure in this appeal.

As I indicated above, in her representations, the appellant also raises a number of circumstances which she argues are relevant in the circumstances of this case. She notes that two of the individuals whose personal information is at stake are deceased. As a result, she submits that their privacy interests are diminished. I disagree. In my view, because the very issues in the civil action stem from the accident which resulted in the deaths of these two individuals, their privacy rights remain intact. Thus the consideration raised by the appellant that the deceased individuals' privacy rights are diminished is not relevant in the circumstances.

The appellant also argues that, apart from the relevance of the personal information to a fair determination of rights, disclosure of this information is relevant to the issue of fairness. In this regard, the appellant states:

[The client and its insurer] had no knowledge of the boating accident nor of any alleged involvement of [the client] until some months after the conclusion of the Coroner's Inquest. If our client had been served with the legal proceedings prior to the Coroner's Inquest or had had knowledge of the boating accident, then it would have sought and obtained standing at the Coroner's Inquest pursuant to section 41 of the Coroner's Act, R.S.O. 1990, c.C-37. Our client would then have had access to the Coroner's Brief and hence be in the same position as counsel presently representing the other parties in the litigation proceedings ... The main witnesses who testified at the Coroner's Inquest are also parties to the legal proceedings and have sued [the client]. It is patently unfair and an affront of the administration of justice that [the client] and its insurer be denied access to information previously disclosed to the other parties.

Based on the evidence before me, I am satisfied that the personal information contained in the record is relevant to the issue of fairness. This consideration weighs in favour of disclosure.

Turning to the factors weighing in favour of privacy protection, I agree with former Inquiry Officer Big Canoe's reasoning and findings regarding section 21(2)(f), in which she states:

In the context of section 21(2)(f), the Ministry submits that the accident resulted in the deaths of two individuals, left another severely injured, and resulted in the

other two individuals involved being charged with offences under the Criminal Code. The Ministry points out that this tragic accident is described in detail in the witness statements, and the personal privacy of the individuals involved and their family members should be considered, as disclosure may cause personal distress to the families. As well, the views and opinions of persons with respect to the conduct of the individuals involved in the accident and its investigation are presented in a candid manner. Witnesses trace the involved parties prior to, during and after the accident, and discuss associates and reputations of these individuals. The record also describes the events leading up to the accident, the evidence secured for the criminal code charges which were laid, and describes the employment history of several witnesses.

I am satisfied that disclosure of the personal information contained in the record would cause a number of individuals excessive personal distress. Accordingly, I find that the personal information in the record is highly sensitive.

The Ministry did not address the application of sections 21(2)(e) and (i) to the record in its representations. In reviewing the record and the representations in their entirety, I am not satisfied that disclosure of the record would expose anyone **unfairly** to pecuniary or other harm. Nor am I satisfied that disclosure may **unfairly** damage the reputation of any person referred to in the record. Accordingly, I find that neither of these factors are relevant in the circumstances.

Having balanced the competing considerations, I find that, with the exception of the non-highlighted portions of pages 12 - 23, 25, and pages 24 and 40 - 49, the considerations favouring disclosure are outweighed by the consideration in favour of privacy protection. With respect to the non-highlighted portions of pages 12 - 23, 25, and pages 24 and 40 - 49, however, the combined effect of the factor in section 21(2)(d) and "fairness" outweigh the factor favouring privacy protection.

I have reviewed the information in pages 12 - 25 and 40 - 49, and the Ministry's representations regarding the presumptions in sections 21(3)(a), (b) and (d).

The Ministry states that the record contains the post mortem reports on the deceased as well as the ambulance call reports. As I noted above, this information is not, and never was, at issue in this appeal or reconsideration. The Ministry also states that the witnesses make observations regarding the condition of the accident victims. Even if I were persuaded that the observations of non-medical witnesses qualified under section 21(3)(a) (medical information), this information is contained in the portions of the record which I have already found to be exempt pursuant to the balancing under section 21(2).

With respect to section 21(3)(b) (information compiled and identifiable as part of an investigation into a possible violation of law), the Ministry claims this presumption applies to pages 70, 204 - 205, 209, 308 - 310, 313 - 317, 574 - 626, 647 - 651, 687 - 697, 822 - 892 and 968 - 971. Because I have already found these pages to be exempt pursuant to the balancing under section 21(2), it is not necessary for me to consider section 21(3)(b) in the circumstances.

Finally, the Ministry states that several of the witnesses relate their employment history as a preamble to their statement, and submits that this falls within the meaning of section 21(3)(d) (employment history). As I have found the witness statements to be exempt pursuant to the balancing under section 21(2), it is not necessary for me to consider the application of this section.

In summary, I find that the non-highlighted information in pages 12 - 25 and 40 - 49 is not exempt under section 21(1). As no mandatory exemption applies to this information and no discretionary exemptions have been claimed, I order the Ministry to disclose these pages and parts of pages to the appellant. As the appellant has failed to establish that disclosure of the remaining pages would not constitute an unjustified invasion of personal privacy, I find that the section 21(1)(f) exception to the mandatory exemption for personal information does not apply, and the personal information withheld by the Ministry qualifies for exemption under section 21.

### **PUBLIC INTEREST IN DISCLOSURE**

In her representations, the appellant submits that section 23 should be considered with respect to the information which I have found qualifies for exemption under section 21(1). This section provides:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The appellant submits that:

The public interest in this case is the preservation of the administration of justice. Not only must justice be served but it must be seen to be served. By refusing to disclose the Coroner's Brief, the Inquiry Officer is effectively interfering with the administration of justice in that it is denying access to information to one party which was entitled to have access to and should have had access to and which other parties involved in the same proceeding have had disclosure. In the trial of this matter, if the information was not disclosed, there would exist a real possibility that the judicial process will fail in that settlement prospects will be hampered, the truth will not be arrived at, the trier of fact will make the decision without consideration of all of the available evidence such that justice will not be, and will not be seen to be, served. This is a public [interest] of the highest order and compels disclosure to [the client].

In Order P-984, former Inquiry Officer Big Canoe made the following observations about the application of the "public interest override" contained in section 23:

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern. Accordingly, in my view, there is a basic public interest in knowing more about the operations of government.

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

I agree with the former Inquiry Officer and I adopt the approach expressed in Order P-984 for the purposes of this reconsideration. I am also mindful of the fact that section 21 of the Act is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

In considering the appellant’s arguments, I note that the information which I have ordered to be disclosed will provide the appellant with a considerable amount of information regarding the events surrounding the accident and the witnesses who appeared at the inquest. I am not persuaded that there exists a compelling public interest in the disclosure of the remaining information that clearly outweighs the purpose of the invasion of privacy exemption. Moreover, I find that the appellant’s interest in the record is essentially a private one, that is, to assist in defending the claims brought against the client.

Accordingly, I find that section 23 of the Act does not apply in the circumstances. The result is that the information at issue in this discussion is properly exempt from disclosure under section 21(1) of the Act.

## **ORDER:**

1. I order the Ministry to disclose page 70, with the exception of the first paragraph, page 160, with the exception of the first three paragraphs, pages 11 and 26, with the exception of the portions which are highlighted in orange, the highlighted portion of page 50, and pages 12 - 25, 40 - 49, 67, 161 - 168, 171, 174, 308, 311 - 317, 969 - 971, 973 - 974 and 977 in their entirety to the appellant. I order this disclosure to take place on or before **May 29, 1997** but not earlier than **May 26, 1997**.
2. I uphold the Ministry’s decision not to disclose the remaining parts of the record.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_ April 24, 1997  
Laurel Cropley  
Inquiry Officer