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

ORDER PO-2271

Appeal PA-030305-1

Ministry of Public Safety and Security

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BACKGROUND:

On December 13, 2000, at a residential property, an excavator operator damaged an underground natural gas pipeline, resulting in an explosion. No one was injured in the incident.

The Office of the Fire Marshal (OFM), part of the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry), conducted an investigation into the incident. In addition, the incident was investigated by:

- the Ministry of Labour (under the *Occupational Health and Safety Act*), and
- the Technical Standards and Safety Authority (TSSA) (under the now repealed *Energy Act*)

The contractor who employed the excavator operator (the company) was charged with an offence under the *Energy Act*, and was convicted by the Ontario Court of Justice on March 21, 2002, and fined $45,000.

NATURE OF THE APPEAL:

The appellant, a journalist, made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry for access to records held by the OFM regarding the incident.

The Ministry identified 21 pages of responsive records and attempted, unsuccessfully, to notify the owners of the house (the homeowners) and the company to obtain their views on disclosure. The Ministry explained that it had been unable to locate the new address for the homeowners, and that it did not receive a response to its letter to the company. (Later, during the adjudication stage of the appeal, this office also was unsuccessful in determining, with any reasonable degree of certainty, the location of the homeowners, the company and the other affected individuals.)

The Ministry then advised the appellant that it was granting partial access to the records, relying on the personal privacy exemption (section 21) to deny access to information.

The appellant appealed the Ministry's decision to this office, taking issue with the application of the exemption and citing public interest concerns with the withholding of information.

Mediation was not successful in resolving all of the issues in the appeal and the matter was streamed to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry, which provided representations in response. I then sent the Notice together with a copy of the Ministry's representations to the appellant, who in turn provided representations.

RECORDS:

There are 21 pages of records at issue in this appeal, consisting of various OFM fire investigation report forms, which include statements given by the homeowners and other witnesses to the incident.

DISCUSSION:

PERSONAL INFORMATION

General principles

The section 21 personal privacy exemption can apply only to personal information. Therefore, first issue for me to decide is whether the records contain personal information and, if so, to whom it relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

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 their professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

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 [Orders P-1409, R-980015, PO-2225].

Representations

The Ministry submits:

> Personal information is defined in section 2(1) of [the *Act*] in part as follows:
>
> > . . . recorded information about an identifiable individual . . .
> >
> > (a) information relating to the age, sex, ..., or family status of the individual,
> >
> > (b) information relating to the... employment history of the individual ...,
> >
> > (d) the address ... of the individual;

> (e) the personal opinions or views of he individual except where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

. . . the record at issue contains personal information about the homeowners and witnesses in accordance with the above-noted sections.

. . . [I]n the circumstances of the OFM investigation, the responsive record also contains personal information about named employees of the construction company. In support of its position, the Ministry notes that in Order PO-1983 former Adjudicator Laurel Cropley accepted that certain information provided by employees in relation to a fire investigation constituted the employees' personal information. Former Adjudicator Cropley commented:

> The individuals referred to in the records are identified as employees of specific companies. However, I do not accept the appellant's interpretation of the information in the records as being "professional" in nature. In my view, in the context in which they were given, the comments these individuals made to the OFM would not be considered to be made in the course of their employment responsibilities, but are rather, their observations as witnesses to the event in their personal capacities. In addition, some of the information pertains to their own actions at the time of, or in connection to, the fire. In my view, these portions of the records are personal in nature and thus qualify as personal information within the meaning of the *Act*.

The appellant takes the position that the records do not contain personal information or that, alternatively, any personal information can be severed out and the remaining information disclosed:

> The [appellant] agrees that the s. 2(1) definition of "personal information" includes the address or telephone number of an individual [s. 2(1)(c)]. To the extent that this is what the Ministry has identified as the "personal information" contained in the Responsive Record, . . . this information can be simply severed by blacking it out. The balance of the record can then be released . . .

The Ministry has stated in its submissions that it sought to contact the "construction company" to obtain its view on the release of the Responsive Records. It is unclear why the Ministry did this. Previous decisions of the [IPC] have found that "personal information" can only relate to natural persons and not to other entities: Order 16 . . . So, for example, information about a sole proprietorship, partnership, unincorporated association, corporation, trade union or law firm cannot qualify as personal information for the purpose of s. 2(1): Order P-300 . . . Accordingly, to the extent that the records contain information about the construction company, this is not "personal information" and there is no basis for refusing to release this information pursuant to s. 21 . . .

The Ministry also submits that the Responsive Records contain personal information of named employees of the construction company. However, previous decisions of the [IPC] have made it clear that information about a person in his or her professional or official capacity will not be considered to be "personal information" within the meaning of s. 2(1): Orders P-2573, P-4274. In its submissions, the Ministry fails to explain why, contrary to the previous decisions of the [IPC], the information of the named employees of the construction company qualify as personal information. For example, to the extent that the information relates to the employees' evidence as to the work they were doing prior to the explosion or the work related protocol that they followed after the explosion, this would clearly be information in the employees' professional capacity and not personal information.

The Ministry does cite the decision of former Adjudicator Laurel Cropley in Order PO-1983 . . . to support its submission that the information in the Responsive Records relating to employees of the construction company is personal information. However, in Order PO-1983, Adjudicator Cropley specifically accepted that information about a person in his or her professional or official capacity is not "personal information" for the purposes of s. 2(1) . . .:

> For the most part, any references to identifiable individuals in the records at issue pertain to these individuals in their professional capacity, such as in representing the interests of the stakeholder companies during the investigation conducted by the OFM. Consistent with previous orders of this office, I find that this information does not qualify as "personal information" within the meaning of the *Act*.

In Order PO-1983, what made the information about the employees of the companies "personal information" is the fact that they consisted of "their observations as witnesses to the event in their personal capacities . . . [or] their actions at the time of, or in connection to, the fire" . . . The Ministry has not submitted that this is the nature of the information about the named employees of the construction company. The [appellant] notes that it does not appear that the

> employees in Order PO-1983 were, as in the within appeal, construction workers whose very job involved the digging that resulted in the natural gas line puncture. So, while the observations made by the employees in PO-1983 may very well have been observations in their personal capacity, some or all of the observations of the employees in the within appeal, i.e. steps taken prior to digging, natural of digging undertaken, safety protocol executed afterwards - would be in their professional capacity and not personal information.
>
> The Ministry also submits that the Responsive Records contain personal information about the "homeowners and witnesses". There is, however, no elaboration as to the nature of this information and why it qualifies as "personal information". As indicated earlier, to the extent that this consists of the names, addresses and telephone numbers of homeowners and witnesses, this information can be severed from the Responsive Records.

Findings

Having carefully reviewed the records, I am satisfied that several portions of them contain personal information of various individuals.

First, the records reveal the homeowners' names and, in this context, this reveals information about them, that is, that they were the owners of the house that was destroyed in the incident. In addition, the records contain a statement given by one of the homeowners. The statement reveals information about what this individual was doing, and what she observed, in the time leading up to the incident. This clearly is information about this individual in her personal capacity. The records also reveal the homeowners' address and telephone number, which is clearly personal information within the meaning of the section 2(1) definition.

Second, the records reveal information about other civilian witnesses, specifically their names, addresses and information about their observations leading up to and following the incident. This information clearly is information about these individuals in their personal capacity and therefore it qualifies as personal information under the section 2(1) definition.

Third, the records contain statements of employees of the gas company, the construction company, and a construction inspection company. Although these individuals were at the scene of the incident in their professional capacities, I agree with the Ministry that, consistent with Order PO-1983, these statements should be considered their personal information. As indicated above, even if information is connected to an individual in a professional capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225]. In my view, as in Order PO-1983, this is one of those cases. When an individual in a professional capacity provides a statement about his or her actions and observations to an investigator, in a context where there is a reasonable prospect that the individual may be found at fault, the information "crosses the line" from the purely professional to the personal realm. The fact that the incident took place in the course of

these individuals doing their job in no way undermines this conclusion. Therefore, I find that the statements given by the employees of the three companies to be personal information.

To conclude, I find that the records contain personal information relating to the homeowners, and the other witnesses.

INVASION OF PRIVACY

Introduction

Where a requester seeks personal information of another individual, 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 only exception that could apply in these circumstances is section 21(1)(f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) provide guidance in determining whether disclosure of information would constitute an unjustified invasion of personal privacy. Here,

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

The Ministry claims that the section 21(3)(b) presumption of an unjustified invasion of privacy applies. That section reads:

> 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;

The Ministry submits:

> The requested record documents the investigation undertaken by the OFM and the TSSA, as well as the Ministry of Labour, into the circumstances of the natural gas pipeline incident that resulted in an explosion and related house fire. The Ministry is of the opinion that the exempt information contains highly sensitive personal information that was compiled and is identifiable as part of an investigation into a possible violation of law. Fire investigations may reveal

possible violations of law relating to federal *Criminal Code* offences, such as arson, and provincial offences, such as violations of the Fire Code. As reflected in the record at issue, in the course of the investigation, a number of identifiable individuals were interviewed,

As noted earlier, the investigation did ultimately lead to charges being laid under the *Energy Act* against the construction company.

The Ministry has considered the conclusions reached by Adjudicator Laurel Cropley in Order PO-2066 in the context of this appeal. Order PO-2066 disposed of appeal issues arising from a request from a business for access to OFM fire investigation records that contained the personal information of other identifiable individuals. Adjudicator Cropley concluded that release of the requested information would constitute an unjustified invasion of the personal privacy of identifiable individuals in the circumstances of that particular appeal.

The appellant submits:

For the Ministry to establish that s. 21(3)(b) presumed invasion of privacy applies, it must prove that these OFM fire investigation forms were "compiled and is identifiable as part of an investigation into a possible violation of law..." This it cannot do.

The Ministry has cited Order PO-2066 to support its submission that s. 21(3)(b) applies to the Responsive Records. In Order PO-2066, the Requester sought access to records relating to the OFM investigation into an explosion and fire at an insured property consisting of a business and two basement apartments. The responsive records in Order PO-2066 consisted of 132 pages of records made up of reports, notes, administrative forms, a memo and photographs. The records were created/prepared by either the OFM or the Centre of Forensic Sciences.

In Order PO-2066, the Ministry denied access to the responsive records, relying in part on s. 21(3)(b). The Ministry had asserted that OFM investigations are "law enforcement investigations" and that accordingly, the records in issue were "compiled and identifiable as part of an investigation into a possible violation of law." However, former Adjudicator Cropley, relying on previous decisions of the [IPC], expressly rejected this assertion and concluded that "the OFM investigation does not qualify as law enforcement." Former Adjudicator Cropley stated . . .:

> In the Notice of Inquiry, I referred the Ministry to Orders PO-1833 and PO-1921 and asked it to comment on them in addressing this issue. In these orders, Senior Adjudicator David Goodis concluded that in conducting its investigation into the cause of a fire, the OFM is not carrying out the function of enforcing or regulating compliance with a law. Although recognizing that OFM

investigations may reveal possible violations of law, the Senior Adjudicator noted in Order PO-1833 that any criminal investigation or prosecution would be conducted by the local police and the Crown Law Office - Criminal of the Attorney General for Ontario, not the OFM.

The Ministry's representations do not address either of these orders, but rather, as I noted above, argue that the findings in the earlier orders support its position that OFM investigations qualify as "law enforcement investigations".

In Order PO-1833, Senior Adjudicator Goodis commented on this earlier line of orders as follows:

> The Ministry refers to previous orders of this office in which it states that investigations by the OFM were found to fall under the definition of "law enforcement" (Orders P-1150, P-1449, PO1650 and PO-1719). These decisions are distinguishable from this case. Each of these orders applied sections 14(1)(a) and (b), but did not consider section 14(2)(a), and also involved a concurrent police investigation. Sections 14(1)(a) and (b) contain a "harms test", requiring that disclosure interfere with a law enforcement matter or a law enforcement investigation. In those cases, it was found that disclosure would interfere with an ongoing police investigation. Unlike section 14(2)(a), these sections do not require that the agency in question be one which has the function of "enforcing and regulating compliance with a law."

Although Senior Adjudicator Goodis distinguished the role of the OFM from that of the police and the Crown, he recognized that the OFM may share information with them, stating:

> By this finding I do not suggest that the OFM cannot or does not routinely cooperate with the police and the Crown in certain cases, by sharing information at various stages throughout the criminal investigation and prosecution, and by providing expert testimony. However, the fact remains that, in this role, the OFM does not carry enforcement or regulatory responsibility. As in Order P-352, upon completion of its investigation,

> the OFM was not in a position to enforce or regulate compliance with the *FMA*, the *FPPA* or any other law in these circumstances.
>
> I agree with the reasoning and conclusions of the latter orders of this office and find that the OFM investigation does not qualify as law enforcement....

As is clear from the preceding, investigations by the OFM of fires do not qualify as "law enforcement investigations" and accordingly, records generated by the OFM in the course of their investigation do not qualify for exemption pursuant to s. 21(3)(b).

The unique fact in Order PO-2066 which made s. 21(3)(b) relevant to the records generated by the OFM in the course of their investigation was that (1) the OPP was conducting an investigation into possible violations of the law concurrently with that of the OFM and that (2) information was shared between the OFM and the OPP. Further, in Order PO-2066, former adjudicator Cropley noted at para. 35 that "the Ministry has provided detailed representations on the nature of the OPP investigation and I am satisfied that the OFM records were collected and used by the OPP as part of their investigation."

In the within appeal, the Ministry has not submitted that the Responsive Records were "shared" with any body engaged in law enforcement or that a body involved in law enforcement has compiled and used the Responsive Records as part of its investigation of the fire . . . Rather, the Ministry has merely asserted that the Responsive Records "document" the investigation undertaken by the OFM, the TSSA and the Ministry of Labour. This is not enough. Further, unlike in Order PO-2066, the Ministry on the within appeal provides no submissions as to the nature of the investigations conducted by the TSSA and Ministry of Labour. There is no evidence, therefore, as to whether these were even "law enforcement" investigations. The onus was clearly on the Ministry to lead the evidence necessary to establish the applicability of the s. 21(3)(b) exemption. This it has clearly failed to do.

I agree with the appellant that the Ministry has failed to establish that the information in the records was compiled and is identifiable as part of an investigation into a possible violation of law. As I found in Order PO-1833, the OFM, in the context of investigating the cause of a fire, is not engaged in a law enforcement role. While I accept that, by contrast, the Ministry of Labour and the TSSA were conducting law enforcement investigations, the Ministry has not bridged the evidentiary gap between the OFM's investigation and an external law enforcement investigation, a gap that it did bridge in Order PO-2066. It is not sufficient for the Ministry to state simply that the records "document" the investigations of the other bodies.

Therefore, I find that the personal information in the records does not fit within the terms of the section 21(3)(b) presumption.

Section 21(2): factors for and against disclosure

Introduction

The Ministry submits that the factors at paragraphs (e), (f) and (h) weigh against disclosure. Those sections read:

> 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,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The appellant submits that none of those factors applies, and that other factors weighing in favour of disclosure apply, both listed and unlisted. The listed factors cited by the appellant are:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny
>
> (g) the personal information is unlikely to be accurate or reliable

The appellant also asserts that much of the information at issue is publicly available, and that this is an unlisted factor favouring disclosure.

I will first consider the application of the factors cited by the Ministry.

Section 21(2)(e): pecuniary or other harm

The Ministry submits:

> . . . [I]n the circumstances of the appellant's request disclosure of the record at issue has the potential to unfairly expose the homeowners to pecuniary or other harm. The homeowners experienced a significant loss when their home was damaged as a result of the pipeline incident. It is the Ministry's understanding that the house has apparently since been demolished. Release of the requested

information to an uninvolved third party has the potential to unfairly expose the homeowners to possibly unwelcome contact from third parties.

The appellant submits:

> The Requester does not dispute that certain homeowners suffered pecuniary or other harm as a result of the natural gas explosion on December 13, 2000.
>
> It is unclear, however, how release of the Responsive Records could produce such harm. The only submission on this point is the statement by the Ministry that such a release "has the potential to unfairly expose the homeowners to possibly unwelcome contact from third parties . . ." On the basis of this submission alone, . . . it is clear that s. 21(2)(e) is not relevant on the within appeal. For s. 21(2)(e) to be relevant, the Ministry must show that as a result of the release of the responsive records, the "individual to whom the information relates will [not may or could] be exposed unfairly to pecuniary or other harm.". The speculative harm set out in the Ministry's submission is not sufficient. It is not enough that the "potential" for harm exists or that the homeowners may be exposed to "possibly" unwelcome contact.
>
> The Ministry's submissions also contain no plausible explanation as to why persons would want to make contact with these homeowners three years after the tragic accident.
>
> Nor does the Ministry explain how persons would be able to contact the affected persons as a result of the release of the Responsive Records. In its submissions, the Ministry stated that it "attempted to contact both the construction company and the involved homeowners to seek their reviews regarding the disclosure of the requested OFM report" but was not successful in contacting them. Presumably, in attempting to make these contacts, the Ministry would have referred to the Responsive Records. The fact that the Ministry, with its extensive resources, is not able to contact the affected persons with the Responsive Records makes it unlikely than any member of the public would be able to do so.
>
> In addition to failing to provide any evidence that the alleged harm will come to pass, the Ministry also fails to elaborate on what is meant by "unwelcome contact" or to explain why such "unwelcome contact", i.e. a knock on a door, would qualify as the "pecuniary or other harm" described in s. 21(2)(e).
>
> The failure of the Ministry to lead evidence to support their claim of "pecuniary or other harm" should deprive it from relying on s. 21(2)(e). As Inquiry Officer Jiwan noted in Order M-347:
>
> > The City and the affected persons claim that disclosure of the information may result in harm and/or harassment to the affected

> persons. The City and two of the affected persons describe an incident at the fire station where the members were warned to watch out for the "back stabbers".
> In my view, neither the City nor the affected persons have provided evidence to show how and in what manner the individuals to whom the information relates will be exposed unfairly to pecuniary or other harm. I find that section 14(2)(e) is not a relevant consideration in this appeal.

> For the same reason as in Order M-347, . . . s. 21(2)(e) ought not to be a consideration on the within appeal.

In my view, the appellant suggests an evidentiary standard under section 21(2)(e) that is unreasonably high. The Ministry is simply not in a position to provide strong and conclusive evidence on the effect disclosure will have on the affected persons and, unfortunately, the affected persons could not be contacted and given an opportunity to provide their views.

On the other hand, I accept the appellant's evidence that these individuals are not easily contacted, given the difficulty both this office and the Ministry encountered in attempting to notify them.

In the circumstances, I have decided that the risk of harm is remote, and that there is only a low likelihood that one or more of the affected parties (the homeowners and other witnesses) could be contacted. Still, I am satisfied that it is possible these individuals could be contacted as a result of disclosure, and that this contact could be unwanted. The incident was serious and perhaps traumatic for the homeowners and others, and resulted in a provincial offences conviction for a company. On the other hand, fortunately, it did not result in injury or loss of life, and no individuals were found to have committed an offence personally. Moreover, there is nothing in the contents of the statements that suggests any individual is likely to suffer harm as a result of unwanted contact. In the circumstances, I am prepared to consider this to be a relevant factor, but I assign it only low weight.

Section 21(2)(f): highly sensitive

To be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual [Orders M-1053, P-1681, PO-1736].

The Ministry submits:

> The Ministry submits the requested record contains highly sensitive information about the homeowners, witnesses and other individuals . . .

> In Order PO-1983 former Adjudicator Laurel Cropley considered whether [section] 21(2)(f) . . . applied to personal information provided by individuals in

the context of an OFM fire investigation. Former Adjudicator Cropley commented:

> Disclosure of [the witnesses'] names and other identifying information, particularly in connection with their statements, would permit the appellant to contact the witnesses, regardless of whether this contact was welcome or necessary. In these circumstances, I find that disclosure of the personal information of the individuals referred to in the records in the absence of their consent would cause extreme personal distress. Accordingly, I find that the factor favouring privacy protection in section 21(2)(f) is relevant.

The appellant submits:

> The [IPC] has stated that for information to be regarded as "highly sensitive", it must be established that its release would cause excessive personal distress to the individuals affected. It is not sufficient that release might cause some level of embarrassment to those affected: This principle was set out in Order P-434 . . ., where Assistant Commissioner Mitchinson stated:
>
> > As far as the severed portions of pages 51-52 are concerned, the Ministry submits that the severed information is highly sensitive because it conveys an emotional reaction on the part of the affected person to a particular situation involving the appellant, and makes reference to a comment made by the affected person about the appellant which could "create bad feelings and make it difficult for the people involved to work together in the future". The severances on pages 106-7 and 100 are, in the Ministry's view, highly sensitive because disclosure would "reveal a personal disagreement between the [two affected persons], and the emotional nature of the exchange between the two individuals was private and, hence, highly sensitive.
> >
> > Having reviewed these severances, I do not agree that they contain "highly sensitive" information. Although I can accept that release of this information might cause some level of embarrassment to certain affected persons, I do not feel this is sufficient to bring it within the scope of section 21(2)(f). In my view, in order to properly be considered "highly sensitive", the Ministry and/or the affected persons resisting disclosure must establish that release of the information would cause excessive personal distress to the affected persons. The one affected person who raises section 21(2)(f) provides no representations which deal specifically with why the severances are highly sensitive, and I find that the reasons provided by the Ministry are not sufficient to establish that the

> affected persons could reasonably be expected to experience excessive personal distress if this information is released . . . Therefore, I find that section 21(2)(f) is not a relevant consideration in the circumstances of this appeal.

> . . . [F]or the same reasons set out by Assistant Commissioner Mitchinson in Order P-434, s. 21(2)(f) is not a relevant consideration in the circumstances of this appeal. The Requester submits that the evidence and submissions of the Ministry in the within appeal in support of the s. 21(2)(f) claim are weaker than in Order P-434. There is no submission by an "affected person", i.e. homeowner, witness etc. to the effect that release of the Responsive Records will cause even "embarrassment" [which is not enough to support a s. 21(2)(f) claim], let alone "excessive" personal distress. Further, unlike in Order P-434, the Ministry does not even attempt to articulate how or why the information in the Responsive Record is "highly sensitive" or why its release would cause "excessive personal distress". In Order P-434 the Ministry unsuccessfully argued that the information was "highly sensitive" because it revealed the "emotional reaction" of the affected person to a particular situation. In the circumstances of the within appeal, we do not even have this submission.

Based on my review of the records and the submissions, I accept the appellant's position that the evidence does not support a finding that disclosure could reasonably be expected to cause excessive personal distress to the individual witnesses. The statements given by the witnesses are done in a "matter of fact" tone, and there is little if any information that could be considered to have a strong "emotional" element to it. In addition, the fact that there were no injuries in the incident and that no individuals were found personally responsible weighs against a "highly sensitive" finding. I note also that unlike the situation in Order PO-1983, there is reason to believe (as indicated above) that it is unlikely the witnesses could or would be contacted. Therefore, I find that the paragraph (f) "highly sensitive" factor does not apply.

Section 21(2)(h): supplied in confidence

The Ministry submits:

> The Ministry submits the requested record contains highly sensitive information about the homeowners, witnesses and other individuals. These individuals would have a reasonable expectation of confidentiality in respect of the information they provided to the OFM.
>
> In Order PO-1983 former Adjudicator Laurel Cropley considered whether sections 21(2)(f) and (h) applied to personal information provided by individuals in the context of an OFM fire investigation. Former Adjudicator Cropley commented:

> The fact that an individual may choose to provide his or her personal information in some contexts does not support a conclusion that the individual, thereafter, does not have a privacy interest in it. In the circumstances of this appeal, the witnesses provided information to an "official" representative of the OFM, perhaps because they wished to be of assistance or, perhaps because they felt compelled to respond. As I indicated above, their statements contain their observations as witnesses to the event. In addition, some of the information pertains to their own actions at the time of, or in connection with, the fire. In this context, I accept the Ministry's submission that these statements were provided to assist the OFM investigator in determining the cause of the fire.
>
> It does not necessarily follow that co-operation during the investigation should be taken to imply that these individuals would expect that their identities and comments could then be shared with other parties. In my view, it is reasonable to expect the contrary. Accordingly, I find that the individuals who gave statements to the OFM investigator would likely have had an expectation of confidentiality at the time and the factor in section 21(2)(h) is, therefore, relevant.
>
> Disclosure of their names and other identifying information, particularly in connection with their statements, would permit the appellant to contact the witnesses, regardless of whether this contact was welcome or necessary. In these circumstances, I find that disclosure of the personal information of the individuals referred to in the records in the absence of their consent would cause extreme personal distress. Accordingly, I find that the factor favouring privacy protection in section 21(2)(f) is relevant.

The appellant states:

> There is no evidence that the information in the Responsive Records was supplied in confidence. The requirement for relying on this factor was set out in Order M-347 wherein Inquiry Officer M. Jiwan denied the applicability of s. 21(2)(h) as follows:
>
> > All of the affected persons claim that the information in the records was requested by the department head who had assured them that it would be held in confidence. While I am prepared to accept that in the circumstances of this appeal, there was a probable expectation of confidentiality on the part of the affected persons, there is no evidence from the City that such assurances of confidentiality were given. Nor is there anything on the face of the records themselves

> that indicates that they were provided in confidence. I find, therefore, that section 14(2)(h) is not a relevant consideration in this appeal.

Similarly, in Order P-516 . . ., Inquiry Officer Seife stated the following in denying that s. 21(2)(h) was relevant to the circumstances of that appeal:

> With regard to section 21(2)(h), many of the petitioners state they signed the petition in the privacy of their homes and on the understanding that their identities would only be disclosed to the Ministry.
>
> The Ministry relies on the representations of the petitioners. It states: "The petitioners indicate that the petition was circulated in confidence". There is nothing on the petition or the covering letter to indicate that the petition was signed in confidence or that it was submitted to the Ministry in confidence. The Ministry states that "the Township could request a Commission of Inquiry, were one to be called, to verify formally that sufficient signatures existed, and to disclose identities. In this manner, and at the appropriate stage, those interested could know their 'accusers'".
>
> I have not been provided with sufficient evidence that the petition was actually communicated to the Ministry on the basis that it was to be kept confidential or that the Ministry has promised such confidentiality. Having considered the representations of the parties and based on the evidence provided to me, I am unable to conclude that the personal information in the record was supplied to the Ministry in confidence. Therefore, I find that section 21(2)(h) is not a relevant consideration in the circumstances of this appeal.

There is no evidence that the persons whose information is contained in the Responsive Records communicated this information to the OFM on the basis that it remain confidential. Indeed, in the circumstances that the information was communicated, it would have been unreasonable for them to have assumed that it would remain confidential. This was a massive, sudden explosion in a residential neighbourhood resulting in significant property damage. In these circumstances, the affected person should reasonably have contemplated public examination or inquiry of the circumstances surrounding the explosion and court proceedings arising from the same. In the event of such inquiry or proceedings, they should reasonably have contemplated having to testify or to give evidence as to their information relating to the explosion/fire.

> . . . [O]ne should start with the presumption that information that a person provides to the [OFM] in the course of an investigation will not be maintained in confidence. A presumption to the contrary simply does not make sense. The OFM is a public body charged with the responsibility for determining the cause of fires. Its function is to report fully to the public as to the cause of fires and to make recommendations as to fire prevention measures. This function cannot be adequately carried out if the OFM is required to censor its reports to protect the confidentiality of witnesses who provide the information used to prepare its reports. Further, it is important to the public's assessment of an OFM report to know the identity of these witnesses relied on to prepare the report. For example, to the extent that the OFM is relying on the account of witnesses whose opportunity to observe is impaired due to age, disability etc. this is relevant to the public in its assessment of the OFM's findings.
>
> Further, if the affected persons desired confidentiality, it would have been very simple for them to have asked for protection of confidentiality prior to speaking to authorities. There is no evidence that any of them did so.
>
> In its submissions in support of the assertion that ss. 21(2)(f) and 21(2)(h) are relevant, the Ministry has cited Order PO-1983. In that appeal, former Adjudicator Cropley found, in the specific factual circumstances of that appeal, that sections 21(2)(f) and 21(2)(h) militated against the release of responsive records generated in the course of an investigation by the [OFM]. However, in the within appeal, the Ministry has not stated that the same or similar circumstances present in Order PO-1983 are present in the within appeal. It is axiomatic that each freedom of information request is dealt with based on its facts. The mere fact that OFM records were not released in Order PO-1983 does not mean that OFM records should not be released in the within appeal.

The Ministry states that the witnesses had a reasonable expectation of confidentiality, yet the Ministry provides no evidence of any such assurances given by OFM staff. Despite this, I find Adjudicator Cropley's findings in Order PO-1983 are applicable here, and I see no basis for distinguishing her finding that the witnesses had an expectation that their statements would be held in confidence, as witnesses generally do in the context of an OFM investigation into an incident such as this. However, given that (i) at least one of the witnesses voluntarily spoke to the media, (ii) there is no evidence of OFM staff giving witnesses express assurances of confidentiality and (iii) the overall low sensitivity of the information in the circumstances, I assign this factor low to moderate weight.

Unlisted factor: information in the public domain

The appellant submits:

> . . . [T]he question of whether release of records constitutes an "unjustified invasion of personal privacy" must be considered in the context of what

> information in the records is already public. To the extent that information is already public, logic dictates that release of this information cannot and should not constitute an unjustified invasion of privacy.

The appellant provides excerpts from newspaper and press release accounts of the incident reciting various facts and details surrounding the incident. The appellant also relies on the fact that various witnesses would have recited details about the incident in open court during the trial of the construction company. The appellant states:

> As is clear from the preceding, there is information about the fire that is already in the public domain. To the extent that the Responsive Records contain information that is already in the public domain, the Requester submits that this minimizes, if not altogether eliminates, the concern that their release would constitute an unjustified invasion of privacy. Certainly, witnesses to the fire such as [named individuals] who shared their observations with the Hamilton Spectator and the Toronto Star respectively could not have expected their observations to remain confidential. Persons whose observations were recounted in open court could similarly not expect that the observations remain confidential.

The fact that much information about the incident is already in the public domain is clear, although it is not clear that the names and statements of some of the witnesses have been disclosed to the public. In the circumstances, I find that this factor carries moderate weight in favour of disclosure.

Section 21(2)(a): public scrutiny

The appellant submits:

> The OFM investigated the explosion that took place on . . . December 13, 2000 - an explosion that levelled a home and could have resulted in many human fatalities. It occurred during a relatively common occurrence on city streets, namely digging to repair sewage and water lines. The public has a compelling interest in ensuring that this explosion was fully and completely investigated and that findings acted upon so that similar accidents do not occur again. This will permit members of the public to scrutinize, discuss and criticize the investigation and the safety of natural gas pipelines and demand improvements if either are found to be lacking. In order to engage in this scrutiny, discussion and criticism, the public must have access to the full details of the investigation.
>
> The importance of public scrutiny in the circumstances of this case is heightened by the fact that despite the investigation of the December 13 explosion, fires and explosions caused by the punctured natural gas pipelines continue to occur. This includes the recent tragic explosion that occurred at Poplar Ave. at Bloor Street West on April 24, 2003 that demolished a plaza housing four retail businesses and five apartments above the plaza. This fire resulted in 7 deaths [see attached

> Toronto Star article dated November 28, 2003 headlined: "3 companies charged in explosion: West-end gas accident took seven lives, Enbridge, contractors face largest fine ever".
>
> Further, a recent investigation by the Star revealed that damage to natural gas pipelines is a serious public safety concern that public authorities do not appear to be adequately addressing [see attached Toronto Star article dated May 3, 2003 entitled "Danger lurks underground: Recent pipeline explosions two of thousands each year. Few incidents probed, fines range from $1,000 to $3,000"]. Among other things, the Star found that:
>
> (a) More than 21,000 incidents have occurred between 1997 and 2001. These incidents have ranged from a minor tear in the pipe to a major gas eruption;
>
> (b) Only a fraction of the ruptures are ever investigated, i.e. only 1013 in the past six years; and
>
> (c) 92% of those incidents were the result of human error, often due to careless excavation by construction firms.

The Ministry's submissions on the section 23 "public interest override" are, in part, pertinent to this factor. The Ministry accepts that there is a general public interest in relation to public safety and incidents such as the one that occurred in this case, but submits that disclosure of the records is not likely to significantly benefit public safety or the public interest.

I accept that there is a substantial public interest in scrutinizing the circumstances surrounding the incident, given the nature of the incident and the fact that similar incidents have in the past and may in the future result in injury, loss of life and significant property damage. On the other hand, the weight of this factor is lessened to some degree because the incident was investigated by at least three different authorities, and a related public trial took place respecting charges under the *Energy Act*. Despite this, I find that there is some degree of public interest in scrutinizing the conduct of the OFM and the other authorities in investigating the incident. As a result, I find that this factor carries moderate to high weight.

Section 21(2)(g): inaccurate or unreliable

The appellant submits:

> The information contained in the records of the OFM are likely to be the most accurate technical information relating to the cause of the fire. The OFM has a unique and specialized expertise in investigating fires not shared by any other investigative body. Access to the OFM's records of investigation is necessary to access information and conclusions obtained through use of this expertise.

The appellant has misapprehended the purpose of the section 21(2)(g) factor, which is intended to weigh against disclosure where the information is unlikely to be accurate or reliable, leading to potential negative consequences for the subject. This factor is not intended to assist a requester in arguing that information should be disclosed. In the absence of any evidence to indicate that the information at issue is unlikely to be accurate or reliable, I find that this factor is not relevant here.

Conclusion

I found above that the following factors weigh against disclosure:

- the individual to whom the information relates will be exposed unfairly to pecuniary or other harm (low weight)

- the personal information has been supplied by the individual to whom the information relates in confidence (low to moderate weight)

On the other hand, I found that the following factors weigh moderately in favour of disclosure:

- the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny (moderate to high weight)

- much of the information at issue is in the public domain (moderate weight)

Although the factors weighing against disclosure are not insignificant, I find that the factors weighing in favour of disclosure carry sufficient weight to override the non-disclosure factors. As a result, I find that the information may be disclosed because disclosure would *not* constitute an unjustified invasion of the privacy of the witnesses, pursuant to section 21(1)(f).

As a result, I find that the personal information in the records is not exempt under section 21 of the *Act*.

In the circumstances, it is not necessary for me to consider the application of the section 23 "public interest override".

ORDER:

1. I order the Ministry to disclose the records at issue to the appellant no later than **May 20, 2004.**

2. In order to verify compliance with provision 1, I reserve the right to require the Ministry to provide me with copies of the material disclosed to the appellant.

Original Signed By: April 30, 2004
David Goodis
Senior Adjudicator