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

ORDER PO-2756

Appeal PA-060072-1

Ministry of Community Safety and Correctional Services

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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry), received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from the spouse of a deceased individual. Through counsel, the requester sought access to:

> All records relating to the Coroner's file investigating the circumstances of the death of [a named individual]. Also, copies of all correspondence contained in the file, and any photographs, charts, or other images that may have been created during autopsy or subsequent investigations.

The Ministry located over 200 pages of records responsive to the request. The Ministry notified several individuals who are identified in the records, pursuant to section 28(1)(b) of the *Act*, to obtain their views on disclosure. These individuals (the affected parties) provided submissions objecting to the disclosure of certain information about them. The Ministry subsequently issued a decision letter granting partial access to the records. In denying access, the Ministry relied on section 49(a) (discretion to refuse requester's own information), read in conjunction with sections 14(1)(h) (law enforcement), 17(1) (third party information) and 19 (solicitor-client privilege); and section 49(b) (personal privacy), together with the presumptions against disclosure in section 21(3)(a), (b), (d) and (g), and the factor in section 21(2)(f).

The requester (now the appellant) appealed the Ministry's access decision, and questioned the adequacy of the Ministry's search for responsive records. In this order, the actions and positions taken by the appellant's legal representative are referred to as actions and positions taken by the appellant.

This office appointed a mediator to try to resolve the issues between the parties. During mediation, the appellant provided a detailed list of additional records believed to exist, and this formed the basis for further productive searches by the Ministry. The Ministry then issued a supplementary decision letter, disclosing some additional records while maintaining its previous exemption claims over others, with the exception of section 14(1)(h) of the *Act*, which it withdrew. The Ministry also advised that no responsive records could be located for certain parts of the request.

Further mediation did not result in complete resolution of the issues. Accordingly, the appeal was transferred to the adjudication stage of the appeal process to address the outstanding exemption claims respecting five records and the adequacy of the Ministry's search for responsive records.

This office issued a Notice of Inquiry to the Ministry initially, seeking its representations. In its representations, the Ministry advised that it was withdrawing its reliance on the solicitor-client privilege exemption to deny access to one of the records, but raised the factor in section 21(2)(h) with respect to information withheld from two of the records. Although this office did not notify the affected parties at this stage of the appeal, the Ministry's representations included copies of correspondence received in response to its own notification of them.

This office then sought representations from the appellant by sending a modified Notice of Inquiry, along with the non-confidential representations of the Ministry. In responding to the Ministry's submissions on whether information contained in the records qualifies as personal

information according to the definition of that term in the *Act*, the appellant stated that access to the affected parties' home addresses would not be pursued.

The appellant's representations were provided to the Ministry for reply. At this point, the appeal was transferred to me to continue the inquiry. Concurrent with providing its reply representations to this office, the Ministry issued a second supplementary decision to the appellant. The Ministry disclosed the remaining information withheld from one of the records, with the exception of the home email addresses of two affected parties.

Subsequently, I sought representations from the appellant on several additional issues, including access to the personal email addresses of the affected parties, whether the appeal was moot as regards to two records, the appellant's status as "personal representative" under section 66(a) of the *Act*, and the location of diagnostic images. I received these representations and confirmed that the appellant had obtained the diagnostic images in question. The other issues will be addressed in the body of this order.

RECORDS:

Record Number [page numbers]	**Description**	**Access Decision**	**Exemption [section]Claimed**
1 [pages 60 & 61]	Chief Coroner's file memo, dated December 4, 2002	Partial access	49(b) with 21(2)(f) 49(a) with 17(1)
2 [pages 155 to 157]	Letter and email between ICU resident & Chief Coroner's office	Partial access	49(b) with 21(2)(f)
3 [pages 174 & 175]	Correspondence from legal counsel for third party to Chief Coroners' Office	Denied in full	49(b) with 21(2)(f) 49(a) with 17(1)
4 [pages 230 to 232]	Correspondence from Chief Coroner's office to physician providing clinical opinion	Partial access	49(b) with 21(2)(f) & (h)
5 [page 233]	Correspondence from clinical opinion provider to Chief Coroner's office	Denied in full	49(b) with 21(2)(f) & (h), 21(3)(d)

DISCUSSION:

PRELIMINARY ISSUE – RECORDS 1 AND 3

The appellant provided copies of two of the records remaining at issue in this appeal as attachments to their representations: Record 1, a December 4, 2002 file memo prepared by the Chief Coroner; and Record 3, correspondence from legal counsel for a third party to the Chief Coroners' office. I asked for, and received, additional representations from the appellant on the issue of mootness given my preliminary view that no useful purpose would be served by adjudicating the Ministry's decision respecting these two records because it appeared that the records were already in the possession of the appellant. The appellant's representations on the issue were brief and focused on the possibility that the copies at issue could be different versions or may contain notations. The appellant submitted that these possible differences made it necessary to proceed with the inquiry as regards those records so that there could be an opportunity to compare the copies and determine any such differences.

I have considered the appellant's position on continuing my adjudication of Records 1 and 3. On my review of the two copies of these records, however, I am satisfied that the copies the appellant submitted are the same as those records provided to this office by the Ministry. In the circumstances, therefore, there is no live controversy in relation to Records 1 and 3, and I find that no useful purpose would be served by proceeding with my inquiry in relation to them (see Order MO-2049-F, relying on *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 and Order P-1295). Accordingly, I have removed the two records from the scope of the appeal and it is unnecessary for me to address the possible application of section 17(1) in this order.

ACCESS TO INFORMATION BY A PERSONAL REPRESENTATIVE [SECTION 66(a)] AND SECTION 18(2) OF THE *CORONERS ACT*

The request for access to records under the *Act* in this case was made by members of the deceased individual's immediate family. In my view, for the purposes of this order, a discussion of the two different points of access to Coroners records for family members would be useful.

Section 18(2) of the *Coroners Act* (R.S.O. 1990, Ch.C.37) reads:

> Every coroner shall keep a record of the cases reported in which an inquest has been determined to be unnecessary, showing for each case the identity of the deceased and the coroner's findings of the facts as to how, when, where and by what means the deceased came by his or her death, including the relevant findings of the post mortem examination and of any other examinations or analyses of the body carried out, and such information shall be available to the spouse, parents, children, brothers and sisters of the deceased and to his or her personal representative, upon request. R.S.O. 1990, c. C.37, s. 18 (2); 1999, c. 6, s. 15 (2); 2005, c. 5, s. 15 (3).

In its initial representations, the Ministry explains its response to this request in the following manner:

> The Ministry from time to time receives formal ... requests [under the *Act*] from families seeking access to information held by the [Office of the Chief Coroner] relating to deceased family members. In circumstances where an inquest has been deemed to be unnecessary, the Ministry's historic practice has been to provide the family members listed in section 18(2) of the *Coroners Act* with access to as much information as possible relating to the deceased individual. This approach was followed with respect to the request [under the *Act*] filed by the appellant on behalf of the requester. The Ministry is aware that the requester is the spouse of the deceased individual. One of the family members specified in section 18(2) of the *Coroners Act* is the spouse of the deceased individual.

In responding to the request with the provisions of the *Coroners Act* in mind, however, it appears that the Ministry also treated the request as though it had been made by the deceased individual's "personal representative," as that term is contemplated by section 66(a) of the *Act*. In my view, the presumed application of section 66(a) of the *Act* requires clarification in the circumstances of this appeal.

Section 66(a) states:

> Any right or power conferred on an individual by this *Act* may be exercised,
>
> > if the individual is deceased, by the individual's personal representative if exercise of the right or power relates to the administration of the individual's estate;

Under this provision, a requester can exercise the deceased's right of access under the *Act* if he can establish that (a) he is the "personal representative" of the deceased, and (b) that the right he wishes to exercise relates to the administration of the deceased's estate. A requester who meets the requirements of this section is entitled to have the same access to the personal information of the deceased as the deceased would have had. In other words, the request for access to the personal information of the deceased will be treated as though the request came from the deceased herself under section 47(1) of the *Act* [Orders M-927; MO-1315].

Indeed, in this appeal, the Ministry's decisions were issued based on sections 49(a) and 49(b), which are the exemptions in Part III of the *Act* that are applied in denying access to records containing the mixed personal information of the requester and other individuals.

However, although there seems to have been some discussion between the appellant and this office during mediation regarding the application of section 66(a) of the *Act*, this office did not seek representations on this issue from the parties during the initial part of the adjudication stage

of the appeal process. When I assumed carriage of the appeal, I wrote to the appellant, and stated the following:

> Based on the civil action brought by [the deceased individual's] family, it appears that section 66(a) may not apply to create the relationship of "personal representative" for the purposes of access under the *Act*.

In seeking representations on this issue, I noted that determination of the issue appeared to rest with the second part of the test under section 66(a): that the request must "relate to the administration of the estate." I referred the appellant to Order MO-1315; *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.)], and noted that requests have been found not to "relate to the administration of the estate" where, as in the present appeal, the records are

> sought to support a civil claim by family members under the *Family Law Act*, where any damages would be paid to the family members and not to the estate [Orders MO-1256 and MO-2025.]

In order to bring legal action within the framework of "administration of the estate," the estate itself must be a party to the litigation and the litigation must not relate to the wrongful death of that individual [Orders MO-1803 and PO-1849].

Representations

The appellant provided a notarized copy of the will to establish that the deceased individual's spouse had been appointed as executor, in satisfaction of the first part of the test. Regarding the second part, the appellant conceded that

> [the civil action] does not include the estate of [the deceased individual] as a party though that is likely to be amended. For your purposes, I recognize … that this is insufficient.

The balance of the representations provided regarding this issue are related to the appellant's entitlement to information under section 18(2) of the *Coroner's Act* and/or section 21(4)(d) of the *Act*, which is the compassionate grounds exception to the personal privacy exemption. For the purposes of my interpretation of section 66(a) of the *Act*, further review of these provisions in this section is not necessary, although they will be addressed briefly in my analysis of the personal privacy exemption.

Analysis and Findings

The term "personal representative" means an executor, an administrator, or an administrator with the will annexed with the power and authority to administer the deceased's estate [*Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont.

Div. Ct.)]. Based on the appellant's representations and supporting documentation, I am satisfied that the appellant is the deceased individual's personal representative for the purposes of section 66(a) of the *Act* [Orders MO-2025, MO-2042, and PO-2733].

However, as noted previously, section 66(a) has been found to not apply in cases where the only monetary claim being investigated was one the estate was clearly not entitled to pursue. In Order MO-1256, section 54(a) (the municipal equivalent of section 66(a)) was found not to apply where the only action contemplated was a wrongful death suit on the part of family members, under the *Family Law Act*, since damages from such a suit do not form part of the estate of the deceased, but go to the individual family member plaintiffs [referring to the decision in *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 (Div. Ct.)]. In the present appeal, there are similar circumstances whereby a personal representative is seeking records for the purpose of pursuing some kind of action connected to the death of an individual.

On the basis of the evidence before me, including the Statement of Claim, I find that the request for access in the present appeal is not "related to the administration" of the deceased individual's estate, as contemplated by section 66(a) and as interpreted by past orders of this office. Since the second requirement of section 66(a) is not met, the appellant is not, therefore, entitled to have the same access to the information in the records as the deceased would have had. Accordingly, I must review access to the information remaining at issue under the personal privacy exemption in section 21(1) of Part II of the *Act*.

PERSONAL INFORMATION

General principles

For the purpose of deciding whether or not the disclosure of the information would constitute an unjustified invasion of personal privacy under the mandatory exemption in section 21(1), it is necessary to decide first whether the record contains "personal information" and, if so, to whom it relates. Only personal information can be exempt under the personal privacy exemption at section 21(1).

The definition of personal information is found in section 2(1) of the *Act* and reads, in its entirety, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment

> history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

The Ministry submits that the records at issue contain the types of personal information described in paragraphs (b), (d), (f) and (h) of the definition of the term contained in section 2(1) of the *Act*. The Ministry adds that

> The withheld information includes information relating to individuals whose involvement with respect to the deceased individual appears to arise in a

> professional capacity. [Record 5] includes a small amount of personal information that is identifiable to the deceased individual.

The appellant submits that the family is entitled to access to any personal information about the deceased individual. With respect to information in the records about other individuals, the appellant states that the Ministry has identified the information as including the home, business and email addresses of affected parties and the employment and educational history of an affected party, and submits:

> Where the information pertains to the employment information of an individual other than one of the appellants, we respectfully submit that in the circumstances of this case, this does not qualify as "personal information". As a general rule, information about health practitioners and other employees or individuals discharging their official functions, does not qualify as their personal information, and the names and professional or business positions of the various individuals involved with the deceased "in a professional capacity" would not constitute their personal information, and should therefore not qualify for exemption under the *Act* [Orders P-257, P-427, P-1412, P-1612, R-980015, MO-1568, P-1409, PO-2225, MO-1803, MO-2025].
>
> …
>
> The appellants are not interested in any information regarding the home addresses of these other affected individuals.

As previously noted, I sought submissions from the appellant regarding the fact that in Record 2, all but the personal email addresses of the ICU resident and regional Coroner had been disclosed to them. Observing that the appellant had indicated that "home addresses" were not of interest to them, I requested that the appellant reconcile that statement with the information at issue. In sur-reply submissions, the appellant conceded that the "home addresses" of individuals are not of interest, but submitted that:

> with respect to emails, if the email address is being utilized for professionally-related communication, we believe we ought to be entitled to this information.

As I understand it, the appellant's submission on this point is based, in part, on the argument that the use of a personal email address for professionally-related communication renders it professional information, and thereby not eligible for exemption under section 21(1). Further support for this argument appeared in the appellant's initial representations in the form of reference to Order MO-2025, where Adjudicator John Swaigen stated:

> Information about an employee or professional does not constitute personal information where the information relates to the individual's employment or professional responsibilities or position.

Analysis and Findings

Under section 2(1) of the *Act*, "personal information" is defined as recorded information about an identifiable individual, including any type of information described in the paragraphs, as well as other types of information not listed.

I have reviewed the three records remaining at issue to determine whether they contain personal information and, if so, to whom the information relates. Having done so, I find that the records contain the personal information of the deceased individual and three other identifiable individuals (the affected parties referred to above), within the meaning ascribed to that term by paragraphs (b), (c), (d), (f) and (h) of the definition in section 2(1) of the *Act*.

With specific reference to Record 2, I reject the suggestion that the use of the personal email addresses by two of the affected parties for "professionally-related communication" renders that information professional, rather than personal. I find that the personal email address of each of these two individuals constitutes their personal information under the definition of that term in section 2(1).

Based on the representations of the Ministry and my review of Record 5, I find that it contains information relating to the employment or education of an individual (the clinical opinion provider) that would reveal information of a personal nature about that individual. In my view, disclosure of this individual's professional profile would reveal information relating to the individual's education and employment history according to paragraph (b) of the definition in section 2(1) of the *Act* [see Order MO-2283].

However, Records 4 and 5 also contain information that, in my view, does not qualify as "personal information." The name and practice address of the clinical opinion provider and an individual from the Coroner's office appear in several places in Records 4 and 5. I find that this information is about these individuals in a professional, not personal, capacity. Furthermore, reference to enclosures included with the original correspondence at Record 5 does not qualify as "personal information." As stated, the personal privacy exemption can only apply to "personal information." Consequently, the exemption in section 21(1) cannot apply to the name and work addresses of these individuals or to the enclosure line references. There being no other mandatory exemption applicable to this information, I find that this information must be disclosed to the requester. It will, therefore, be unnecessary to review Record 4 further in this order.

In addition, I note that the home address of the clinical opinion provider appears in Record 5. Given that the appellant has indicated that access to this information is not sought, that portion of Record 5 is removed from the scope of the appeal, and will not be reviewed further in this order.

I will now consider whether the information remaining at issue in Records 2 and 5 qualifies for exemption under section 21(1) of the *Act*.

PERSONAL PRIVACY

To be clear, the only information remaining at issue in this appeal is the personal email addresses of two affected parties in Record 2, as well as a small amount of personal information about the deceased individual and the professional profile of the clinical opinion provider in Record 5.

General principles

Where a requester seeks access to the 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 appellant has argued that section 21(1)(d) of the *Act* applies. In the circumstances of this appeal, the only other exception that could apply is paragraph (f), which provides an exception to the section 21(1) exemption "if the disclosure does not constitute an unjustified invasion of personal privacy."

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 21(1)(f). Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists criteria for the Ministry to consider in making this determination and section 21(3) identifies certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. As well, section 21(4) identifies information whose disclosure is not an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Effective June 22, 2006, the *Act* was amended to include an additional exception to section 21(1). Section 21(4)(d) permits disclosure of personal information about a deceased individual to the spouse or close relative of the individual where it is desirable for compassionate reasons. However, as the former adjudicator assigned to this appeal advised the parties, the date of the request in this appeal pre-dates the amendment and it does not apply retroactively.

While the former Adjudicator did not seek representations on the application of section 21(4)(d), she did request that the Ministry comment on whether it had considered the above-referenced amendment to the *Act* in exercising its discretion under section 49(b) (and 49(a)). The Ministry's representations assert that this amendment was considered as a factor. However, having found that the appellant is not a "personal representative" for the purposes of section 66(a) of the *Act*, the discretionary exemption in section 49(b) is inapplicable, and I will not review the Ministry's exercise of discretion in this order.

Representations

The Ministry submits that section 21(2)(f) and 21(2)(h) are relevant and weigh in favour of the non-disclosure of the remaining exempt information. The Ministry states:

> The exempt personal information … may be viewed as highly sensitive personal information within the meaning of section 21(2)(f) [and it] has been supplied in circumstances where there was an expectation of confidentiality within the meaning of section 21(2)(h).

One of the affected parties, the clinical opinion provider, whose personal information appears in Record 5, was not contacted during the inquiry, but was notified by the Ministry following the identification of the responsive records. Counsel for this affected party responded to the notification, stating that his client had conducted the independent review for the Coroner's Office on the understanding that his identity would remain confidential. In addition, the Ministry submits that:

> [Record 5 contains] personal information relating to the employment and educational history of an affected party as defined in section 21(3)(d). The Ministry refers to the contents of the [record] in support of its position in this regard.

The appellant submits that the exception in section 21(1)(d) applies to the information at issue because section 18(2) of the *Coroners Act* authorizes the release of the information. The appellant states:

> … [W]hen one looks to the *Coroner's Act,* it is clear that information collected in furtherance of an investigation into the death of a person is producible either to the family of the deceased or to the general public through the vehicle of a public Inquest."

The appellant's representations are also premised on the argument that the information remaining at issue does not, in the first instance, qualify as "personal information," but rather only as professional information. The appellant disputes the Ministry's argument that disclosing the personal information at issue could justify the application of the factor in section 21(2)(f), submitting that the Ministry has not established that its disclosure "could reasonably be expected to cause significant personal distress to the subject individual [Orders PO-2518, PO-2568]." With regard to the factor in section 21(2)(h), the appellant submits:

> [T]he Ministry has presented no arguments or objective evidence that this information was 'supplied by the individual to whom the information relates in confidence.' … In addition, as stated above, in the *Coroner's Act* there is no basis for a party to expect that any information provided to the Coroner's Office during the course of an investigation would be kept confidential.

The appellant's submissions regarding the possible application of the presumption against disclosure in section 21(3)(d) reflect the position outlined above that the exemption cannot apply because the information about the affected party in Record 5 does not qualify as that individual's "personal information."

The appellant also provided lengthy submissions on the application of section 21(2)(a), a factor that weighs in favour of disclosure. Briefly put, the appellant argues that section 21(2)(a) favours disclosure in this appeal because there is a significant interest in subjecting the Coroner's Office to public scrutiny. The appellant refers to the substantial media coverage surrounding the deceased individual's death. The appellant relies on Order P-1027, where Adjudicator Donald Hale found that section 21(2)(a) was a relevant factor weighing in favour of the disclosure of the requested information in similar circumstances.

Analysis and Findings

I will start by addressing the appellant's argument that the exception in section 21(1)(d) applies to the information at issue. For guidance on this issue, I turned to Order PO-1789 (Ministry of the Solicitor General), in which former Assistant Commissioner Tom Mitchinson stated the following with respect to the exception:

> Although not specifically raised by the appellant, the Ministry's representations address the possible application of the exception to the section 21 exemption provided by section 21(1)(d), which states:
>
> > A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
> >
> > > under an Act of Ontario or Canada that expressly authorized the disclosure;
>
> The Ministry submits that it gave careful consideration to whether section 21(1)(d) gives the appellant, as legal counsel to the Minister, a right of access to the record, but came to the conclusion that it does not. In reaching this conclusion, the Ministry relies on the findings of Senior Adjudicator David Goodis in Order MO-1179, where he made the following comments on the possible application of section 14(1)(d) of the *Municipal Freedom of Information and Protection of Privacy Act (*the equivalent of section 21(1)(d) of the provincial *Act*):
>
> > Previous orders of this Office have said that the interpretation of the words "expressly authorizes" in section 14(1)(d) of the *Act* closely mirrors the interpretation of similar words in section 28(2) of the *Act* and its provincial counterpart, section 38(2) of the *Freedom of Information and Protection of Privacy Act* (Orders M-292 and -1154). In the Commissioner's Compliance Investigation

> Report I90-29P, the following comments are made about the latter section:
>
> > The phrase "expressly authorized by statute" in subsection 38(2) of the [provincial] *Act* requires either that the specific types of personal information collected be expressly described in the statute or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation made under the statute, i.e., in the form or in the text of the regulation.
>
> The Ministry submits that sections 7 and 8 of the MVACA [*Motor Vehicle Accident Claims Act*] do not expressly authorize disclosure of the record. The Ministry also considered section 18(2) of the *Coroners Act*, which authorizes disclosure of the coroner's findings (where an inquest is determined to be unnecessary) to the spouse, parents, children, siblings and personal representative of a deceased, and came to the conclusion that it also does not expressly authorize disclosure of the record.
>
> I accept the Ministry's position. The MVACA does not provide an express statutory authorization to disclose the record to the appellant, and the appellant does not fit into any of the categories of the individuals set out in section 18(2) of the *Coroners Act*.
>
> Accordingly, I find that the exception under section 21(1)(d) does not apply in the circumstances of this appeal.

I agree with the reasoning outlined above and adopt it for the purposes of this appeal.

In my view, although the appellant fits within one of the categories of individuals outlined in section 18(2) of the *Coroners Act*, this provision does not expressly authorize the disclosure of the information remaining at issue. On my review of it, none of the information remaining at issue relates directly or specifically to the findings of the Coroner in this matter. More specifically, and in the language of section 18(2) itself, the information does not concern "the coroner's findings of the facts as to how, when, where and by what means the deceased came by his or her death, including the relevant findings of the post mortem examination and of any other examinations or analyses of the body carried out…" In the circumstances, I find that the exception in section 21(1)(d) does not apply.

As noted, the Ministry raised the possible application of section 21(3)(d) of the *Act*, which provides that a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information "relates to employment or educational

history." Past orders of this office have held that information contained in resumes and work histories falls within the scope of section 21(3)(d) [Orders M-1084, MO-1257 and MO-2283]. Based on my review of the professional profile of the affected party contained in Record 5, I am satisfied that it also falls within the scope of section 21(3)(d) of the *Act*. Disclosure of the personal information relating to the affected party's educational and employment history is, therefore, presumed to constitute an unjustified invasion of privacy under section 21(3)(d) of the *Act*. Subject to my finding on the application of the public interest override in section 23 of the *Act*, below, I conclude that the personal information relating to the educational and employment information of the clinical opinion provider in Record 5 is exempt under section 21(1) of the *Act*.

As for Record 2, it bears emphasis that all other information in Record 2 has previously been disclosed to the appellant and only the personal email addresses of the ICU resident and the regional Coroner remain at issue. It is important to make this point since the exemption of this particular information rests on a balancing of the factors in section 21(2) and, in my view, a sense of proportionality is required. To begin with, I reject the suggestion that disclosure of personal email addresses is necessary for the purpose of subjecting the activities of the Ministry or Office of the Chief Coroner to scrutiny. In my view, this information can serve no such purpose and I find that the factor in section 21(2)(a) is not relevant in the circumstances of this appeal.

No other section 21(2) factors were raised that would favour the appellant's right to disclosure of this information, and in those circumstances, I find that its disclosure would constitute an unjustified invasion of personal privacy. Accordingly, I find that the affected parties' personal email addresses contained in Record 2 are exempt under section 21(1) of the *Act*.

Absurd Result

There is also a very small amount of the deceased individual's personal information in Record 5 which, in my view, must be reviewed against the absurd result principle.

Whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 21(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]. The absurd result principle has been applied where, for example, the requester was present when the information was provided to the institution [Orders M-444, P-1414] and where the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]. It is this second set of circumstances with which I am concerned.

The Ministry submitted that it gave the absurd result principle careful consideration, but that in the circumstances of this particular request, disclosure on the basis of the absurd result principle would be inconsistent with the purpose of the exemption that has been applied. For its part, the appellant submitted that several pieces of information over which the Ministry is claiming an

exemption have already been provided to them. Records 1 and 3, which are not at issue in this appeal, are mentioned specifically.

Based on my review of the small amount of the deceased individual's personal information appearing in Record 5, I am satisfied that this information is clearly within the appellant's knowledge. In my view, disclosure of this information would not result in an unjustified invasion of another individual's personal privacy under section 21(1), whether or not any of the presumptions in section 21(3) or factors in section 21(2) are applicable.

Under the circumstances, I find that refusing to disclose this specific information about the deceased individual to the appellant would lead to an absurd result [Orders PO-1679 and MO-1755]. Therefore, I will order the Ministry to disclose this information.

PUBLIC INTEREST OVERRIDE

The appellant argues that the public interest override in section 23 of the *Act* applies to the information at issue. Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In the present appeal, then, section 23 could be applied to override the personal privacy exemption in section 21(1) that I have found applies to the affected parties' personal email addresses and professional profile if the following two requirements are satisfied: first, there must be a compelling public interest in disclosure of the records; and second, this interest must clearly outweigh the purpose of the exemption.

Representations

The Ministry acknowledges that there is a general public interest in public safety, but refutes the suggestion that the information remaining at issue in this appeal has significant implications for broader public safety. The Ministry submits that the public interest in relation to the matter of the alleged cause of death in this case has already been addressed through the Coroner's inquest held into the similar circumstances of the death of another individual, which resulted in a set of recommendations from the inquest jury. Finally, the Ministry submits that the appellant has a private interest in the "minimal information remaining at issue," and refers to awareness of the related civil litigation. In the circumstances, the Ministry argues that the requirements for the application of section 23 to override the exemption are not met.

The appellant refers to comments made by the Coroner's Office in relation to the decision not to hold a second public inquest in support of the assertion that there was a public interest in examining the cause of the deceased individual's death. The appellant enclosed a series of

newspaper articles related to the issue to demonstrate that the interest was not merely a private one, but rather a public one.

Analysis and Findings

In order for me to find that section 23 of the *Act* applies to override the exemption of the information I have found to qualify under section 21(1), I must be satisfied that there is a compelling public interest in the disclosure of that particular information that clearly outweighs the purpose of the personal privacy exemption.

Based on my review of the representations, and in the circumstances of this appeal, I am not satisfied that a public interest exists in the disclosure of the personal information remaining at issue. Moreover, I am not persuaded by the evidence that there is any relationship between the disclosure of the information remaining at issue and the *Act*'s central purpose of shedding light on the operations of government and other institutions subject to the *Act*.

In any event, and in the alternative, I am satisfied that the degree of disclosure which took place at the request stage, combined with the disclosure during this office's inquiry into the appeal, is more than sufficient to meet any public interest which may exist. In the circumstances, I find that section 23 of the *Act* does not apply to override the personal privacy exemption.

REASONABLE SEARCH

General Principles

In appeals, such as this one, that involve a claim that additional responsive records exist, the issue to be decided is whether the Ministry has conducted a reasonable search for the records as required by section 24 of the *Act*. If I am satisfied that the search carried out was reasonable in the circumstances, the Ministry's search will be upheld. If I am not satisfied, further searches may be ordered.

The *Act* does not require the Ministry to prove with absolute certainty that further records do not exist. However, the Ministry must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request [Orders M-282, P-458, M-909, PO-1744 and PO-1920].

Furthermore, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must still provide a reasonable basis for concluding that such records exist. In this appeal, the adequacy of the searches conducted by the Ministry's Office of the Chief Coroner was an ongoing and complicated matter, and I received several sets of correspondence from both the appellant and the Ministry on this issue. The submissions set out below represent select excerpts.

Representations

The appellant's representations on the adequacy of the Ministry's (Coroner's Office) search for responsive records question its thoroughness and suggest, by extension, concerns with record-keeping and retention practices. Considerable discussion between the parties and this office took place during the mediation and adjudication stages of the appeal regarding the locating of diagnostic images, and a substantial portion of the appellant's representations on this issue address the initial failure of the Coroner's office to locate the images. As these images were eventually located and are now in the possession of the appellant, this component of the search issue will not be addressed further, except insofar as reference to it is intertwined with other aspects of the appellant's representations on the search issue.

The records or types of records, listed by the appellant as being of specific interest, but still missing, are: notes taken by Coroner's Office staff during meetings with the family of the deceased individual, or their representatives; hospital Coroner's warrants; handwritten file notes related to discussions or meetings; and three scientific articles that had been attached to the amended final autopsy report. The appellant also expresses concern about the relative absence of documentation representing initial contacts by the Coroner's Office with other involved parties. The example given is of a record representing the original request to the ICU resident to document her involvement and whose response to that request appears in the records as page 155, which formed part of Record 2.

The appellant submits that although the Ministry "has taken great pains to make submissions alleging that it has done a thorough [search]," much of the success of such searches is attributable more to the efforts of the appellant to direct those search efforts than any independent effort on the part of the Ministry. The appellant states:

> It is of great concern to us that unless we can anticipate what might be in a file, the contents of which we have never seen and can only surmise, the Ministry will not conduct a thorough enough investigation to gather the records that ought to have been included in the file.

With respect to the diagnostic images referred to previously, the appellant submits:

> … if the Coroner's Office can be in possession of diagnostic images for two years, which form an integral part of the medical records of a patient, and is unaware that it possesses these records, … it is highly unlikely that the Coroner's Office has conducted a thorough enough investigation to locate documents which are responsive to our request. We also harbour these reservations regarding the adequacy of the investigation because certain documents which we have obtained on every other case we have, dealing with the Coroner's Office, are missing in this case [emphasis in original]

The Ministry submits that the Office of the Chief Coroner conducted a reasonable and comprehensive search for records based on the appellant's request and the clarification provided through ongoing communication. The Ministry takes the position that it has responded to the appellant's "numerous records search issues" through its two supplemental decision letters. Along with its representations, the Ministry provided an affidavit from the Manager of the Coroner's Information System (the CIS Manager) describing the search activities undertaken by the Office of the Chief Coroner.

The CIS Manager explains that she was contacted to coordinate the search for responsive records at the Coroner's Office after the request was received by the Ministry. She indicated that due to the large volume of records in the file relating to the deceased individual, the Ministry sought clarification of the request from the requester, which was received and acted upon. The CIS Manager states that after the requester filed an appeal of the Ministry's access decision with respect to the first group of identified records, she undertook further searches for responsive records. The renewed searches involved contact with the Deputy Chief Coroner (Investigations), the Deputy Chief Coroner (Inquests), the Regional Supervising Coroner, the Regional Coroner, a specific Neuropathologist, a specific Diagnostic and Therapeutic Neuroradiologist, and a specific Pathologist. These searches identified further responsive records.

The CIS Manager states that the Ministry addressed the specific categories of records that were of interest to the appellant in the supplementary decision letters. The CIS Manager notes that the second supplementary decision letter sent to the appellant included a copy of the records retention schedule for the Office of the Chief Coroner. This letter also refers to a Case Contact Log that was then in use, although it "did not exist at the time of [the deceased's] death." Copies of these supplementary decision letters were provided to this office, and I have reviewed them.

Analysis and Findings

As previously stated, in appeals involving a claim that additional records or information responsive to a request exist, the issue to be decided is whether an institution has conducted a reasonable search for these as required by section 24 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records or information might exist must still be provided.

I have considered the representations of both parties. I am also mindful of the overall circumstances of this appeal, including the ongoing issue with locating the diagnostic images.

The appellant urges me to draw an inference about the adequacy and effectiveness of the Ministry's search efforts overall due to the length of time taken to eventually locate the diagnostic images and because records which the appellant expected to be present in a Coroner's file have never been located. It seems that the appellant's perception that a number of records were identified only through her persistence in following up with the Ministry has contributed to an ongoing concern that there may yet be other records not identified by the Ministry.

However, my review of an institution's search for responsive records in the course of an inquiry under the *Act* is characterized by balancing certain factors. The appellant's detailed follow-up regarding additional specific records responsive to the request did indeed lead to further identification and disclosure of records. What remains for me to determine at this stage, however, is whether there is a reasonable basis for the appellant's belief that additional records should exist.

I am mindful that the Ministry conducted searches armed with knowledge of the nature of the records said to exist because the appellant was able to provide very specific direction in this regard. And ultimately, the issue comes down to whether or not I am satisfied that the Ministry made a reasonable effort to identify and locate any existing records that might be responsive to the appellant's request.

To reach my decision, I considered whether the Ministry engaged an experienced employee or employees to undertake to locate the specific records. Based on the information provided by the Ministry and its CIS Manager, including the identities of those individuals who assisted her, I am satisfied that the Ministry did so. I also note that based on the evidence before me, it appears that the Ministry conducted at least three separate searches.

Accordingly, based on the information provided by the Ministry and the circumstances of this appeal, I find that the Ministry's search for records responsive to the request was reasonable for the purposes of section 24 of the *Act*. Accordingly, I dismiss this part of the appeal.

ORDER:

1. I uphold the Ministry's decision to deny access to the severed portions of Records 2 and 5 that are marked by orange highlighter on the copy of the records provided with this order. This information should **not** be disclosed to the appellant.

2. I order the Ministry to disclose to the appellant by **March 2, 2009**, but not earlier than **February 23, 2009**, the following:

    a. the severed portions of Record 4; and
    b. the portions of Record 5 that are marked by green highlighter on the copy of the records provided to the Ministry with this order.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

4. I uphold the Ministry's search for responsive records and dismiss this part of the appeal.

January 27, 2009

Daphne Loukidelis
Adjudicator