Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3073

Appeal PA10-368

Ministry of Community Safety and Correctional Services

April 23, 2012

Summary: The appellant sought access to records compiled by the Ontario Provincial Police during an investigation into her daughter's death. The Ministry of Community Safety and Correctional Services granted partial access to the responsive records. The ministry's decision was partially upheld. The appellant cannot exercise the right of access on behalf of her deceased daughter by virtue of section 66(a) of the *Act*. The records contain the personal information of the appellant, her deceased daughter and other identifiable individuals. Some of the withheld information should be disclosed pursuant to the absurd result principle. The remaining withheld information qualifies for exemption under sections 21(1) and 49(b), having considered sections 21(4)(d) (compassionate circumstances), and 21(3)(b) (investigation into a possible violation of law) of the *Act*. Section 23 does not apply to the exempt information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 21(1), 21(3)(b), 21(4)(d), 23, 49(b), 66(a).

Orders Considered: P-541, P-984, MO-2237, MO-2245.

OVERVIEW:

[1] The appellant filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records held by the Ministry of Community Safety and Correctional Services (the ministry) related to the investigation conducted by the Ontario Provincial Police (the OPP) into the circumstances of her daughter's death. In

her request, the appellant specified that she sought access to a "complete copy of the full investigation and final report" regarding the death of her daughter. She provided the OPP with the occurrence number attached to the investigation.

[2] The ministry identified 88 pages of records responsive to the request and issued a decision letter granting partial access to them. The ministry withheld portions of the records citing the application of the discretionary exemption at section 49(a) (discretion to refuse a requester's personal privacy), read in conjunction with sections 14(1)(c), (l) (law enforcement), 14(2)(a) (law enforcement report) and 15(b) (relations with other governments), as well as the discretionary exemption at section 49(b) (personal privacy), read with reference to the factor at section 21(2)(f) (highly sensitive) and the presumptions at sections 21(3)(a) (medical history) and (b) (investigation into violation of law).

[3] The appellant appealed the ministry's decision.

[4] During mediation, the appellant advised that she is not seeking access to the information that the ministry identified as being not responsive to her request. She also confirmed that she is not seeking access to the information that the ministry has withheld under section 14(1)(l), the names of individuals acting in their professional capacity, and the personal information of individuals other than her daughter. Accordingly, the mediator removed this information from the scope of the appeal.

[5] As further mediation was not possible, the file was transferred to the adjudication stage for me to conduct an inquiry into this appeal.

[6] During the inquiry, I sought and received representations from the ministry and the appellant. Representations were shared in accordance with *Practice Direction 7* and section 7 of the IPC's *Code of Procedure*.

[7] Prior to submitting representations the ministry issued a supplementary decision letter and released additional information to the appellant. This information has also been removed from the scope of the appeal.

[8] In its representations, the ministry advised that it was withdrawing its reliance on the discretionary exemption at section 49(a), in conjunction with sections 14(1)(c), 14(2)(a) and 15(b). Accordingly, those exemptions are no longer at issue and I will not consider them further.

[9] In her representations, the appellant advised that although during mediation she indicated that she did not wish to pursue access to the records identified by the ministry as not responsive to her request, due to the large number of pages identified as such she would appreciate further explanation regarding records deemed to be not responsive to her request. Although it is common practice of this office not to

reintroduce an issue that has been removed from the scope of the appeal in mediation, taking into consideration the compassionate circumstances surrounding this appeal, I have decided to include a discussion on the issue of responsiveness below.

[10] In this order, I uphold the ministry's decision to withhold the information that remains at issue, in part. In the discussion that follows, I reach the following conclusions:

- the appellant cannot exercise a right of access on behalf of her deceased daughter;
- some of the information in the identified records is not responsive to the appellant's request;
- the records contain the personal information of the appellant, the appellant's deceased daughter, and other identifiable individuals;
- disclosure of some of the withheld portions of the records would amount to an unjustified invasion of individuals' personal privacy and, therefore, qualify for exemption under either section 21(1) or 49(b);
- non-disclosure of some of the withheld portions of the records would give rise to an absurd result;
- the ministry's exercise of discretion to deny access to portion of the records pursuant to section 49(b) should be upheld; and
- the section 23 public interest override does not apply to overcome the application of either of sections 21(1) or 49(b).

RECORDS:

[11] The records at issue amount to 88 pages consisting of OPP occurrence reports, OPP officer's notes, witness statements and post mortem examination records. Portions of the records have been withheld.

ISSUES:

A. Can the appellant exercise a right of access on behalf of her deceased daughter by virtue of section 66(a)?

B. Is some of the information in the identified records not responsive to the appellant's request?

C. Do the records contain "personal information" as defined in section 2(1)?

D. Do either the discretionary exemption at section 49(b) or the mandatory exemption at section 21(1) apply to the records because disclosure of the information would constitute an unjustified invasion of an individual's personal privacy?

E. Should the ministry's exercise of discretion to deny access under section 49(b) be upheld?

F. If the exemptions at sections 21(1) or 49(b) are found to apply, is there a compelling public interest in the disclosure of the information at issue that clearly outweighs the purpose of those exemptions pursuant to section 23?

DISCUSSION:

A. Can the appellant exercise a right of access of behalf of her deceased daughter by virtue of section 66(a)?

[12] 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;

[13] Under this section, the requester can exercise the deceased's right of access under the *Act* if she can demonstrate that:

- she is the personal representative of the deceased, and
- the right she wishes to exercise relates to the administration of the deceased's estate.

[14] If the requester meets the requirements of this section, then she is entitled to have the same access to the personal information of the deceased as the deceased would have had. The request for access to the personal information of the deceased will be treated as though the request came from the deceased him or herself.[1]

[1] Orders M-927 and MO-1315.

Personal representative

[15] 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.[2] The term "estate trustee" is also used to describe such an individual.[3]

[16] Generally, to establish that she is the deceased's personal representative, the requester should provide written evidence of her authority to deal with the estate of the deceased, including a certificate of appointment of estate trustee.[4]

Relates to the administration of the estate

[17] The requester must also demonstrate that the request "relates to the administration of the estate". To meet this test, the requester must demonstrate that she is seeking access to the records for the purpose of administering the estate.[5]

[18] Requests have been found to "relate to the administration of the estate" where the records are:

- relevant to determining whether the estate should receive benefits under a life insurance policy,[6]
- relevant to the deceased's financial situation and allegations of fraud or theft of the deceased's property,[7]
- required in order to defend a claim against the estate, or[8]
- required to prepare an action on behalf of the estate for damages for injuries caused to the deceased person prior to death, where the damages would be recoverable by the estate, rather than the surviving family members.[9]

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[2] *Adams v. Ontario (Information and Privacy Commissioner)* (1996), 136 D.L.R. (4th) 12 at 17-20 (Ont. Div. Ct.).
[3] Order MO-1449 and Rule 74 of the Rules of Civil Procedure under the *Courts of Justice Act*.
[4] Order MO-1449.
[5] Order MO-1315; *Adams v. Ontario (Information and Privacy Commissioner)* (1996), *supra,* 2.
[6] Order MO-1315.
[7] Order MO-1301.
[8] Order M-919.
[9] Order MO-1803.

[19] Requests have been found *not* to "relate to the administration of the estate" where the records are:

- sought to support a civil action on behalf of a deceased's estate for the wrongful death of that individual, as section 38(1) of the *Trustee Act* precludes recovery by the estate of damages for the death or loss of expectation of life by the deceased,[10]

- 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, or [11]

- sought for personal reasons, for example, where the requester "wishes to bring some closure to . . . tragic events." [12]

Representations

[20] The ministry submits that in relation to another request made under the *Act*, the appellant provided a sworn affidavit to the ministry indicating that she did not intend to apply to the Ontario Superior Court of Justice to be appointed as the estate trustee without a will for her deceased daughter. As a result, the ministry submits that section 66(a) does not apply.

[21] In her representations, the appellant submits that although at the time that she submitted her request to the ministry she had no intention of applying for appointment as estate trustee without a will for her daughter, she subsequently did so as she was required to in order for her to act on her daughter's behalf. The appellant enclosed with her representations a copy of her Certificate of Appointment as Estate Trustee without a Will endorsed by the Ontario Superior Court of Justice.

[22] Addressing the second required component for the application of section 66(a), that access relates to the administration of her daughter's estate, the appellant submits:

> There is actually no monetary estate to administer, in the contextual meaning of "estate." Unless the lifetime responsibility of care and custody of her young child could be considered as relating, in an administrative context in some abstract, but connected manner to an estate which my daughter leaves in my care.

[10] Orders M-400 and PO-1849.
[11] Order MO-1256.
[12] Order MO-1563.

Analysis and findings

[23] As previously mentioned, if section 66(a) is found to apply, the request for access to the personal information of the deceased will be treated as though the request came from the deceased herself.[13] If the section is found not to apply, the appellant may seek access to records containing the personal information of the deceased but the analysis must include a determination of whether disclosure may amount to an invasion of the deceased's personal privacy.

[24] Based on the appellant's representations and supporting documentation, I am satisfied that she is her deceased daughter's personal representative for the purpose of section 66(a) of the *Act*. However, as noted previously, for section 66(a) to apply, in addition to being the deceased's personal representative, the requester must also demonstrate that she is seeking access to records for the purpose of administering the estate.

[25] In her representations, the appellant makes it clear that she is seeking access to the requested information in the hopes that they will address the "many, remaining unanswered questions" in relation to her daughter's death. While this is certainly an understandable and sympathetic reason for seeking access to records, as noted above, previous orders have made it clear that for the purpose of the application of section 66(a), personal reasons, such as an attempt to bring closure to a tragic event, have not been found to "relate to the administration of the estate" as contemplated by that section. Moreover, the appellant concedes that there is no monetary estate to administer. Accordingly, based on the appellant's representations and my review of the records themselves, I do not accept that that the records that she seeks through this access request are required for the purposes of administering her daughter's estate.

[26] Therefore, based on the evidence before me, I find that while the appellant qualifies as the "personal representative" of her deceased daughter, the request for access in the present appeal is not "related to the administration" of the deceased's estate, as required by section 66(a). As the second requirement of section 66(a) is not met, I find that the section does not apply and the appellant is not entitled to exercise the same right of access to the information in the records as the deceased would have had.

B. Is some of the information in the identified records not responsive to the appellant's request?

[27] The ministry has identified portions of the information contained in the identified records as not responsive to the appellant's request. As noted above, although during mediation the appellant removed the issue of responsiveness from the scope of the

[13] Orders M-927 and MO-1315.

appeal, in her representations she expressed concern at the large amount of information that has been designated in this manner. She advised she would appreciate further explanation of the information designated as not responsive to her request.

[28] Generally, this office will not reintroduce issues that have been removed from the scope of appeal during mediation. However, given the compassionate circumstances of this appeal, I have decided to address the appellant's concerns.

[29] I have reviewed all of the information that the ministry has identified as not responsive to the appellant's request carefully. While I agree with the appellant's observation that significant portions of information have been withheld on this basis, I find that all of it has been appropriately identified as being not responsive to her request.

[30] The most significant portions of this information can be found in the copies of the police officer notes. Police officer notes describe in detail all tasks undertaken and the incidents responded to in the course of an officer's day. I have reviewed these records and can assure the appellant that the portions of the police officer notes that have been identified as not responsive in this appeal relate to other incidents or tasks undertaken by the respective officers on the given day or are otherwise unrelated to the investigation into the appellant's daughter's death.

[31] The ministry has also identified small portions of the occurrence reports as not responsive to the request. On my review, I find that this information consists of internal, administrative information that is also unrelated to the investigation and not responsive to the appellant's request.

[32] Accordingly, I find that all of the information identified by the ministry as not responsive to the appellant's request is in fact, not responsive to her request.

C. Do the records contain "personal information" as defined in section 2(1), and if so, to whom does it relate?

[33] Under the *Act*, different exemptions may apply depending on whether or not a record contains the personal information of the requester. Where records contain the requester's own information, access to the records is addressed under Part III of the *Act* and the discretionary exemptions at section 49 may apply. Where the records contain the personal information of individuals other than the appellant, access to the records is addressed under Part II of the *Act* and the mandatory exemption at section 21(1) may apply.

[34] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) 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 if 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 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;

[35] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[14]

[36] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a

[14] Order 11.

professional, official or business capacity will not be considered to be "about" the individual.[15]

[37] 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.[16]

[38] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[17]

[39] The ministry submits that the records at issue contain the types of personal information identified in paragraphs (a), (b), (d), (e) and (h) of the definition at section 2(1) with respect to the appellant, the appellant's daughter, and other individuals.

[40] The appellant does not dispute the fact that the records contain the types of personal information listed under paragraphs (a), (b), (d), (e) and (h) of the definition of "personal information" found in section 2(1). She agrees, given the nature of the records, that this personal information belongs to herself, her daughter and other individuals.

[41] Having reviewed the records which consist of OPP occurrence reports, witness statements and officer's notes, I accept that they contain the personal information of the appellant, the appellant's daughter, and other individuals who were interviewed as part of the police investigation or whose personal information was otherwise collected as part of the police investigation. Specifically, the personal information includes information relating to age, sex, and marital or family status (paragraph (a)), medical, psychiatric, psychological, or criminal history (paragraph (b)), addresses and telephone numbers (paragraph (d)), personal opinions or views of individuals (paragraph (e)), and the names of individuals together with other personal information about them (paragraph (h)).

[42] The records also contain a small amount of information about various individuals that qualifies as their professional information. The appellant has indicated that she does not seek access to any professional information that may not have been disclosed. Therefore, this information is not at issue in this appeal.

[43] The appellant has indicated that she is also not interested in obtaining access to the personal information of individuals other than herself and her daughter. Accordingly, in circumstances where other individuals' personal information appears on

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[15] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[16] Orders P-1409, R-980015, PO-2225 and MO-2344.
[17] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe* [2002] O.J. No. 4300 (C.A.).

its own, I will not consider it to be at issue and will not address it further in this order. However, much of the severed information consists of the appellant's daughter's information, where it is mixed with the personal information of other individuals, including that of the appellant. Given that she seeks access to any information about her daughter that might help to elucidate the circumstances surrounding her death, I will also determine the disclosure of the appellant's daughter's personal information where it is mixed with that of other identifiable individuals.

[44] As described above, in circumstances where the appellant's daughter's personal information is mixed with that of the appellant Part III of the *Act* applies and I will consider whether the information is exempt from disclosure under the discretionary exemption at section 49(b). In circumstances where the deceased's personal information appears on its own, or where it is mixed with that of individuals other than the appellant, Part II of the *Act* applies and I will consider whether the information is exempt from disclosure under the mandatory exemption at section 21(1) of the *Act*.

D. Does the discretionary exemption at section 49(b) or the mandatory exemption at section 21(1) apply to the records because disclosure of the information would constitute an unjustified invasion of an individual's personal privacy?

[45] The personal privacy exemptions under the *Act* are *mandatory* under section 14(1) under Part II and *discretionary* under Part III. Put another way, where a record contains the personal information of both the appellant and another individual (her daughter for example), section 49(b) in Part III permits an institution to disclose information that it could not disclose if the exemption at section 21(1) in Part II was applied.[18]

[46] The mandatory personal privacy exemption at section 21(1) of the *Act* provides, in part:

> 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.

[47] Where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure *would not* constitute an "unjustified invasion of personal privacy."

[18] Order MO-1757.

[48] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right, including section 49(b). That section reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where the disclosure would constitute and unjustified invasion of another individual's personal privacy.

[49] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[50] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[51] For section 49(b) to apply, on appeal I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy.

[52] In determining whether the exemptions in sections 21(1) or 49(b) apply, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 21(2) provides some criteria for the police to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under sections 21(1) or 49(b).

Section 21(4)(d)

[53] The ministry states that it found that section 21(4)(d) warranted consideration in the circumstances of this appeal and disclosed portions of the records to the appellant based on this section. However, it found that section 21(4)(d) did not apply to the portions of the records that it withheld. Section 21(4)(d) states:

> Despite subsection 3, a disclosure of personal information does not constitute an unjustified invasion of personal privacy if it,
>
> > discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[54] The term "close relative" is defined in section 2(1) of the *Act* and includes a parent.

[55] Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the "circumstances" to be considered would include the fact that the personal information of the deceased is intertwined with the personal information of another individual or individuals. The facts and circumstances referred to in section 21(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 21(4)(d).[19]

[56] After the death of an individual, it is that person's spouse or close relatives who are best able to act in their "best interests" with regard to whether or not particular kinds of personal information would assist them in the grieving process.[20] The task of the institution is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons."[21]

[57] The application of section 21(4)(d) requires a consideration of the following questions all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?

2. Is the requester a spouse of "close relative" of the deceased individual?

3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?[22]

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[19] Orders MO-2237, MO-2270, MO-2290, MO-2306, MO-2387 and MO-2615.
[20] Order MO-2245.
[21] *Ibid.*
[22] Orders MO-2237 and MO-2245.

[58] The ministry submits that given that the records contain information which relates to the appellant's deceased daughter, it is satisfied that disclosure of sensitive personal information relating to the appellant's daughter is desirable for compassionate reasons. It submits that it "has relied upon section 21(4)(d) for the disclosure of a substantial number of records to the appellant." It further states that "these records provide the appellant with a copious amount of information that may assist her to 'retrace the last years of [her daughter's] life to gain understanding and knowledge of what happened to her." The ministry goes on to submit that disclosure of the withheld portions is not desirable for compassionate reasons, in its view.

[59] In her representations, the appellant queries how the ministry can find that section 21(4)(d) has been met and only provided partial disclosure of the records. She states that she seeks access to the withheld portions of the records to understand the circumstances of her daughter's death and the events leading up to it, in the days and weeks prior.

[60] The ministry has applied section 21(4)(d) to the records at issue and has disclosed a significant amount of the responsive information on the basis of compassionate grounds. Specifically, the ministry has disclosed all of the appellant's own personal information to her, including any of her own personal information where it is mixed with her daughter's. The ministry has also disclosed, pursuant to this section, her daughter's personal information where it is not intertwined with that of other individuals.

[61] Having reviewed the remaining information closely, I agree with the ministry that although the records contain the personal information of the appellant's daughter and the appellant is a "close relative" as is required by the section, the disclosure of the remaining personal information is not desirable for compassionate reasons, in the circumstances of this request. I therefore find that the information that remains at issue in the responsive records is not subject to section 21(4)(d).

[62] While all of the withheld information consists of the personal information of the appellant's daughter, given that it relates to the investigation into her death, much of it is inextricably intertwined with the personal information of other individuals. I appreciate the appellant's hope that the severed portions of these records would provide her with additional information that might help her to understand the circumstances of her daughter's death and the events leading up to it "in the days and weeks prior." However, given the nature of the withheld information, I accept the ministry's position that its disclosure will not better inform the appellant about those circumstances and, even if portions of it might provide a small amount of additional information, in the context of the records its disclosure does not outweigh the privacy rights of the other individuals whose personal information appears in the records.

[63] As section 21(4)(d) does not apply to the information remaining at issue, I will now consider whether the presumption at section 21(3)(b) applies to that information.

Section 21(3)(b)

[64] The ministry has raised the application of section 21(3)(b) of the *Act* to the information remaining at issue. That section reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

[65] The ministry submits that the information at issue consists of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law and, therefore, its disclosure would constitute a presumed unjustified invasion of privacy within the meaning of the presumption at section 21(3)(b). [23]

[66] In her representations, the appellant questions how the ministry can rely on this presumption as she was given information by the OPP that there would be no criminal investigation or charges laid with respect to her daughter's death. She states that she is the only party who is interested and motivated to complete an investigation into her daughter's death. She also states that the ministry has not identified the possible violation of law that this section requires for its application.

[67] I agree with the ministry that section 21(3)(b) applies to the information at issue in the records as it was compiled and is identifiable as part of an investigation into a possible violation of law, in particular, a violation of law under the *Criminal Code of Canada.* Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[24]

[68] Therefore, I conclude that the remaining undisclosed information is subject to the presumption at section 21(3)(b). Accordingly, I find that section 21(1) of the *Act* applies to the information that is subject to analysis pursuant to Part II of the *Act*, specifically, the deceased's personal information where it is mixed with that of identifiable individuals other than the appellant, and section 49(b) of the *Act* applies to

[23] Orders P-223, P-237 and P-1225.
[24] Orders P-242 and MO-2235.

the information that is subject to analysis pursuant to Part II of the *Act*, specifically, the deceased's personal information where it is mixed with that of the appellant.

Absurd result

[69] Despite my findings above with respect to the application of sections 21(1) and 49(b), my review of the information at issue reveals that the absurd result principle might apply to at least some of the remaining personal information. This principle states that where the requester originally supplied the information or the requester is otherwise aware of it the information may be found not to be exempt because to find otherwise would be absurd and inconsistent with the purpose of the exemption. [25]

[70] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement;[26]
- the requester was present when the information was provided to the institution;[27]
- the information is clearly within the requester's knowledge.[28]

[71] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[29]

[72] In previous orders, this office has emphasized that the absurd result principle ought not to be applied beyond the clearest of cases. In my view, with respect to some of the information that that has been at issue, it is clear that the absurd result principle should be applied. Specifically, in keeping with the orders identified above, I find that the absurd result principle applies to the following information:

- On page 6, under the heading "Family Medical History", the ministry has severed information that relates to the appellant's sister and father, both of whom are deceased. This information is clearly within the appellant's knowledge and should be disclosed to her.
- Pages 14, 15, 16 consist of typed statements provided to the police by the appellant. The ministry has withheld portions of this statement. With the

[25] Orders M-444, MO-1323.
[26] Orders M-444, M-451.
[27] Orders M-444, P-1414.
[28] Orders MO-1196, PO-1679, MO-1755.
[29] Orders M-757, MO-1323, MO-1378.

exception of three sentences on page 15 which amounts to an editorial comment by the drafting officer and contains the personal information of an identifiable individual that may not be within the appellant's knowledge, I find that the appellant should be provided access to the content of her own witness statement. The appellant was clearly present when the information was being provided to the ministry and it is clearly within her knowledge.

- Page 20 refers to a typed letter written by the appellant. Severances have been made to the second complete paragraph of that page which summarizes the content of the appellant's letter. This information is within the appellant's knowledge and should be disclosed to her.

- Pages 76 and 77, as well as the top of page 85 consists of statements given to police by the appellant, recorded by hand in a police officer's notebook. The ministry has severed portions of these statements. Similarly to the typewritten statements identified above, these are statements that were provided to the police by the appellant, she was present when the information was provided to them and the information that they contain is clearly within her knowledge. It would be absurd to withhold this information from her.

- Additionally, on pages 41, 76 and 77 which consist of police notes, the ministry has severed the identity of individuals who accompanied the appellant to the OPP detachment on various days. This information is clearly within the appellant's knowledge and should be disclosed to her.

[73] Accordingly, I find that the absurd result principle applies to the above-mentioned information and I will order it disclosed to the appellant. For the sake of clarity, I will provide a highlighted copy of these pages to the ministry with the portions that should be disclosed to her.

Conclusion

[74] Following the application of the absurd result principle there remains some information that is exempt pursuant to the mandatory section 21(1) as it contains only the personal information of the appellant's daughter mixed with that of other identifiable individuals. This information does not contain the personal information of the appellant.

[75] There also remains a very small amount of personal information that remains exempt pursuant to section 49(b) as it contains the personal information of the appellant, mixed with that of her daughter, as well as that of other identifiable individuals. As section 49(b) is a discretionary exemption, its application is subject to

whether the ministry's exercise of discretion was reasonable. I will discuss the ministry's exercise of discretion below.

[76] Additionally, in her representations, the appellant has raised the possible application of the public interest override at section 23 of the *Act*. I will address its possible application with respect to the information that has been withheld pursuant to both sections 21(1) and 49(b) below.

E. Should the ministry's exercise of discretion to deny access under section 49(b) be upheld?

[77] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[78] In this order, I have found that some records and parts of records qualify for exemption under the discretionary exemption at section 49(b). Consequently, I will assess whether the ministry exercised its discretion properly in applying this exemption to the portions of records that have been withheld.

[79] This office may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose,
- it takes into account irrelevant considerations, or
- it fails to take into account relevant considerations.

[80] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[30] This office may not, however, substitute its own discretion for that of the institution.[31]

[81] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:

- the purposes of the *Act*, including the principles that,
    - information should be available to the public,

[30] Order MO-1573.
[31] Section 43(2) of the *Act.*

  - individuals should have a right of access to their own personal information,
  - exemptions from the right of access should be limited and specific,
  - the privacy of individuals should be protected;
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking his or her own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.[32]

Representations

[82] The ministry submits that it has exercised its discretion appropriately in the particular circumstances of this appeal. It submits that it considers each request on a case-by-case basis and for this particular request it decided to exercise its discretion to release a "substantial portion of the requested information to the appellant." It submits:

> The ministry has considered the appellant's request, as a grieving parent, in accordance with the compassionate disclosure provisions in section 21(4)(d) and disclosed a large number of sensitive police records to assist the appellant. In its exercise of discretion, the ministry carefully

[32] Orders P-344 and MO-1573.

> considered the potential benefits to the appellant should additional information be disclosed.
>
> …
>
> Given the highly sensitive nature of this matter, the ministry was satisfied that release of additional information from the records remaining at issue would case personal distress to identifiable individuals. The ministry was also satisfied that the information remaining at issue was compiled and is identifiable as part of an investigation into a possible violation of law.
>
> The ministry carefully considered whether it whether it would be possible to sever any non-exempt information from the records at issue. However, the ministry concluded that severing was not feasible in this instance.

[83] The appellant submits that she "does not believe that the ministry has exercised its full discretion under section 49(b) regarding all relevant considerations surrounding [her] request." She submits that they were not supplied with enough factors to aid in their considerations. More specifically, she states:

> I submit that the ministry failed to take into *full* account all *relevant* considerations in their decision to deny access to my information request as in:
>
> - failing to fully consider the potential benefit this grieving parent could realize from the full disclosure of the records they hold pertaining to the circumstances surrounding her child's death;
>
> - the imbalance of consideration given in the weighing of my rights of access to my daughter's personal information against the right to privacy protection of other individuals, namely my daughter and affected parties, where the information may be intertwined; and
>
> - failure to give section 21(4)(d) the full extent of its purpose in the context it is written.

Analysis and findings

[84] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which they exercised their discretion. Based on this information, as well as my review of the records that have been severed, I accept that

the ministry's exercise of discretion not to disclose the information was proper and made in good faith.

[85] As previously mentioned, the ministry applied section 21(4)(d) to disclose a significant amount of information to the appellant to assist her in understanding the circumstances of her daughter's death. The only information that was withheld pursuant to section 49(b) is the appellant's personal information where it appears intertwined with her daughter's information as well as the personal information of other identifiable individuals. In considering the nature of the information, as well as the privacy rights of the other identifiable individuals, the ministry exercised its discretion to withhold the information. I am satisfied that its exercise of discretion was appropriate.

[86] Accordingly, I find the withheld portions of the records qualify for exemption under section 49(b).

F. Is there a compelling public interest in the disclosure of the information at issue that clearly outweighs the purpose of the exemption at sections 21(1) and 49(b)?

[87] In her representations, the appellant submits that pursuant to section 23 of the *Act* there exists a public interest in the disclosure of the records that operates to "override" the operation of the exemption at section 21(1). Section 23 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.

[88] The discretionary exemption at section 49(b) of the *Act* is not listed as one of the exemptions that can be overridden by section 23. This matter has been previously considered in Order P-541, where Inquiry Officer Anita Fineberg made the following finding with respect to whether the public interest override in section 23 of the *Act* applied to section 49(b):

> In my view, where an institution has properly exercised its discretion under section 49(b) of the *Act*, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal is considered under section 21. Were this not to be the case, an individual could theoretically have a lesser right of access to his or her own personal information than would the "stranger." This would result if section 23 could b used to override the exemption in section 21 of the *Act*, but not if the institution denied access to the information pursuant to section 49(b)

> as it contained the appellant's own personal information, as well as that of other individuals.

[89] I agree with this finding. Therefore, I will consider the possible application of section 23 to those portions of the records that I have found qualify for exemption under section 49(b) of the *Act* as well as to those portions of the records that I have found to qualify for exemption under section 21(1) of the *Act*.

[90] For section 23 to apply, two requirements must be met. First there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

Compelling public interest

[91] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the records and the *Act's* central purpose of shedding light on the operations of government.[33] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the records must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[34]

[92] A public interest does not exist where the interests being advance are essentially private in nature.[35] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[36]

[93] The words "compelling" has been defined in previous orders as "rousing strong interest or attention."[37]

Purpose of the exemption

[94] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[95] An important consideration in balancing a compelling public interest in disclosure again the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[38]

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[33] Orders P984, PO-2607.
[34] Orders P-984 and PO-2556.
[35] Orders P-12, P-347 and P-1439.
[36] Order MO-1564.
[37] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.); Order P-984.

Representations

[96] The appellant submits that the public interest override provision at section 23 applies for two reasons.

[97] First, she submits that a "complete set of health information available regarding [her deceased daughter] and surrounding her circumstances is paramount for the appropriate administration of future health decision made for and by" other family members, including her granddaughter, the deceased's child.

[98] Second, the appellant submits that she does not have confidence in the Coroner's stated cause of death and believes that findings of narcotic use in her daughter's room created a bias. She submits:

> There is a compelling need for this family to be totally aware of the observations reported by witnesses and their description of symptoms experienced by [her daughter] in the days and weeks prior to her death to help us arrive at an accurate and acceptable cause of death.

[99] She also submits there is a strong and compelling public interest for communities to be made aware of "the mortal effects of CA-MRSA (Community Acquired – Methicillin Resistent Staphyloccocus Aureus) infection." She submits that this bacterial infection from which her daughter suffered poses a high danger and risk for the community at large and is easily spread through personal contact. She further submits:

> If my daughter's death were indeed found to be caused by the most life-threatening findings of Infectious Endocarditis and Systemic Sepsis, as opposed to narcotic overdose, it is vitally important for these findings to becomes knowledge of the Public Health Agency of Canada in order for that Agency to compile statistics and enable legislation for the safeguarding of public health amongst our communities against this antibiotic resistant bacteria, which is reported to have surpassed the mortality rates of HIV infection.

Analysis and findings

[100] As noted above, the word "compelling" has been defined in previous orders as "rousing strong interest or attention."[39] In Order P-984, Adjudicator Holly Big Canoe discussed this requirement:

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[38] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*(1999), 118 O.A.C. 108 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Orders PO-1927-I, PO-2569, PO-2647, and PO-2666.

[39] *Supra,* 26.

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

[101] In the present case, the appellant's position that the compelling public interest applies is two pronged. First, she submits that the family requires complete access to the reported symptoms experienced by her daughter for medical reasons, specifically, to assist them in the future with respect to potential decisions they will have to make with respect to their own health. Second, she questions the coroner's stated cause of death and expresses her belief that her daughter's death was impacted by a bacterial infection or other condition and, if that is the case, the public should be made aware.

[102] While I understand the appellant's need to obtain access to as much information about her daughter's death, in my view, this evidence is not sufficient to establish that there exists the requisite "compelling public interest" in the disclosure of the information that remains undisclosed in this appeal. The appellant's evidence with respect to her family's need to access medical information for their own health care decisions clearly addresses a very private interest, which as noted above, does not amount to a public interest warranting the application of the override provision. Her position that the public needs to know about the possibility of a bacterial infection being a contributor to her daughter's death is general in nature and not supported by evidence to demonstrate that there is an existing compelling interest held by the general public in this regard and therefore, is also best characterized as a private interest. Moreover, having considered the specific information that remains at issue, its disclosure would not accomplish either of the appellant's reasons for requesting that it be disclosed under section 23 of the *Act.*

[103] Accordingly, as sympathetic as the appellant's private interest may be, I find that her evidence does not substantiate a publicly held concern, "rousing strong interest or attention" as required by the "compelling public interest" component of the section 23 override. As no compelling public interest has been established, it is not necessary for me to determine whether the appellant's interest outweighs the purpose of the section 49(b) exemption claim. I find, therefore, that section 23 does not apply.

ORDER:

1. I order the ministry to disclose to the appellant by **May 23, 2012**, the information that I have found to be subject to the absurd result principle. For the

sake of clarity, I have provided the ministry a copy of those pages which have been highlighted to identify those portions that should be disclosed.

2. I uphold the ministry's decision to withhold the remaining information in the records.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant pursuant to order provision 1.

Original Signed by: April 23, 2012
Catherine Corban
Adjudicator