

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3129

Appeals PA11-326 and PA11-478

Ministry of Community Safety and Correctional Services

November 5, 2012

Summary: The ministry received a request for information regarding the investigation into the death of the requester's son. The requester specifically sought access to the full OPP investigation report submitted by a named detective and his partner, as well as any and all statements taken during the investigation. Following third party notifications, the ministry issued a decision, granting partial access to the requested records. The deceased's spouse appealed the ministry's decision, claiming that section 21(1) of the *Act* applied to all the records at issue, as their disclosure would constitute an unjustified invasion of personal privacy. The requester also filed an appeal, claiming the application of 21(4)(d) of the *Act* to all of the records, which provides for disclosure of personal information to the spouse or close relative of deceased individuals where disclosure is desirable for compassionate reasons. This order upholds the ministry's decision to grant access to portions of the records for "compassionate reasons" as defined by section 21(4)(d) of the *Act*, but to deny access to other portions of the records which are exempt under sections 21(1) and 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 21(1), 21(1)(f), 21(2)(f), 21(3)(a), 21(3)(b), 21(3)(d), 21(3)(f), 21(3)(g), 21(4)(d) and 49(b).

Orders and Investigation Reports Considered: MO-2237.

OVERVIEW:

[1] 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*) for access to information regarding the investigation into the death of the requester's son. The requester specifically sought access to the full investigation report submitted by a named Ontario Provincial Police (OPP) detective and his partner, as well as any and all statements taken during the investigation.

[2] The ministry notified a number of affected persons whose interests may be affected by this request, including the spouse of the deceased individual (the affected person).

[3] Following third party notifications, the ministry issued a decision to the affected person advising that it had decided to grant the requester partial access to the records. The ministry explained that access was being granted pursuant to section 21(4)(d) of the *Act* which provides for the disclosure of personal information to the spouse or close relative of deceased individuals where disclosure is desirable for compassionate reasons.

[4] The ministry also advised the affected person that access to the OPP records relating exclusively to her, her marriage, or her children, would be denied in accordance with the privacy exemptions contained in sections 21(1) and 49(b) of the *Act*.

[5] Subsequently, the ministry issued a decision to the requester, advising that access to portions of the responsive records was denied pursuant to sections 21(1) and 49(b), taking into account the presumptions at section 21(3)(b), (d) and (f) and the factor weighting against disclosure at section 21(2)(f). As well, the ministry claimed that the discretionary law enforcement exemptions under 14(1)(c), (g), (h), (l) and 14(2)(a), and section 15(b) (relations with other governments) and 49(a) of the *Act* applied to withhold portions of the records at issue.

[6] The affected person appealed the ministry's decision to disclose portions of the records to the requester (PA11-326).

[7] The requester (now the appellant) also appealed the ministry's decision to deny access to portions of the records (PA11-478).

[8] During mediation, the mediator discussed the issues in the appeals with the affected person and the appellant. The affected person strongly objected to the release of any information about herself, her children and the deceased. The appellant advised this office that he no longer wishes to pursue access to any information relating to the affected person or her children, including any statements that she may have made about the deceased individual. Accordingly, any information that relates exclusively to

the affected person or her children, or any statements made by her about the deceased individual have been removed from the scope of these appeals.

[9] The appellant also advised that he did not wish to pursue access to any police codes contained in the records or any information in the records that has been identified as non-responsive to the request.

[10] However, the appellant advised that he wishes to pursue access to all other information about the deceased individual. The affected person advised that she continues to object to the release of any information about the deceased individual.

[11] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeals process, where a written inquiry is conducted by an adjudicator.

[12] During my inquiry into this appeal, I sought and received representations from the affected person, the ministry and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*.

[13] In its representations, the ministry advised that it was no longer relying on the exemptions in sections 14(2)(a) and 15(b) of the *Act*. Further, the ministry advised that it would no longer rely upon the exemption in section 14(1)(l) of the *Act* on the understanding that the appellant is no longer requesting police codes. As such, the exemptions in sections 14(1)(l), 14(2)(a) and 15(b) of the *Act* are no longer at issue in this appeal.

[14] In the discussion that follows, I find that sections 21(1) and 49(b) apply to the entire record. However, I uphold the ministry's decision to grant the appellant access to portions of the records for "compassionate reasons" as contemplated by section 21(4)(d) of the *Act*.

RECORDS:

[15] The records at issue in this appeal consist, in whole or in part, of OPP reports, officers' notes, statements and photos. Other information in the records, consisting of police codes, information in the records identified as non-responsive to the request, information that relates exclusively to the affected person or her children and statements made by the affected person about the deceased individual is not at issue.

ISSUES:

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

- B. Does the mandatory exemption at section 21(1) or the discretionary exemption in section 49(b) apply to the records?
- C. Does the discretionary exemption at section 49(a), in conjunction with sections 14(1)(c), 14(1)(g) and 14(1)(h), apply to the records?
- D. Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[16] The ministry relies on the mandatory exemption in section 21(1) and the discretionary exemption on section 49(b) in conjunction with section 21(1), to the severances made to the responsive records. Before I can determine which sections of the *Act* may apply to the records, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

[17] The term "personal information" is defined in section 2(1) of the *Act* 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 view 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;

[18] 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.¹

[19] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or other capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[20] 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 professional, official or business capacity will not be considered to be "about" the individual.²

[21] Even if information relate 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.³

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1612, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

[22] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[23] The affected person submits that the records contain almost exclusively personal information about the deceased, herself, her children and other individuals with whom the deceased had contact in his last days and hours.

[24] I have carefully reviewed the records and find that all of them contain the deceased's personal information, including his date of birth [paragraph (a)], information relating to his medical and employment history and financial transactions [paragraph (b)], the opinions or view of individuals as they relate to him (paragraph g), his name along with other personal information about him [paragraph (h)], information about his activities and relationship with the affected person, as well as other individuals [paragraph (h)], and information relating to the circumstances of his death [paragraph (h)].

[25] In addition, I find that portions of the records contain the affected person's personal information, including her date of birth [paragraph (a)], her name along with other personal information about her [paragraph (h)], information relating to her activities and relationship with the deceased and other individuals [paragraph (h)] and her personal opinions or views [paragraph (e)].

[26] I note that the affected person submits that her personal information and that of her children is inextricably intertwined with the deceased's personal information. Accordingly she argues that it cannot be severed from that of her deceased husband. However, I have carefully reviewed the record and find that information that can be considered to be solely about the affected person exists in discrete portions of the record. Furthermore, I have carefully reviewed the records and find that they do not contain the children's personal information, as defined in section 2(1) of the *Act*. In addition, while there are portions of the records in which the affected person's personal information is inextricably intertwined with that of the deceased, there remains large portions of the records that concern only the deceased, such as the circumstances of his death. The information that concerns only the deceased can be severed without revealing personal information relating to the affected person.

[27] I also note that the appellant does not seek access to personal information about the affected person or her children. As such, any such personal information is outside the scope of the appeal.

[28] In addition to the personal information of the affected person, I also find that the records contain the personal information of a number of other identifiable individuals, including their dates of birth [paragraph (a)], and their names along with other

⁴ Order PO-1880, upheld.

personal information about them and their relationships with the deceased [paragraph (h)]. These individuals include witnesses and other individuals interviewed by the police in relation to the death of the deceased. I note that there are portions of the record in which the personal information of these parties, such as their names along with other personal information about them and their relationships with the deceased, is inextricably intertwined with that of the deceased. In addition, I note that, during the ministry's third party notification process, a number of these individuals consented to the disclosure of their personal information to the appellant.

[29] With regard to the appellant's personal information, previous orders have established that where a record contains both the personal information of the requester and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b).⁵ Some exemptions, including the invasion of personal privacy exemption at section 21(1), are mandatory under Part I but discretionary under Part II, and thus in the latter case an institution may disclose information that it would not disclose if Part I is applied.⁶

[30] The correct approach is to review the entire record, not only those portions remaining at issue, to determine whether it contains the requester's personal information. This record-by-record analysis is significant because it determines whether the record as a whole (rather than only certain portions of it) must be reviewed under Part I or Part II of the *Act*.⁷

[31] Applying this record by record approach, I find that three records contain the appellant's personal information, including his date of birth [paragraph (a)] and his name along with other personal information about him and his relationship with the deceased [paragraph (h)]. These records are the Homicide/Sudden death report (page 4), a Supplementary Occurrence Report (pages 12 to 19) and the notes prepared by a named officer during the investigation into the deceased's death (pages 92 to 136). Accordingly, for the severed portions of these three records, which I have found to contain the personal information of the deceased and/or other individuals, as well as that of the appellant, I will consider whether they qualify for the personal privacy exemption under the discretionary exemption at section 49(b) or the discretionary exemption at section 49(a), found in Part II of the *Act*.

[32] As the remainder of the records contain only the personal information of identifiable individuals other than the appellant, I will review the application of the mandatory personal privacy exemption in section 21(1) and the discretionary law enforcement exemption in section 14(1) of the *Act* to these records.

⁵ Order M-352.

⁶ Orders MO-1757-I and MO-2237.

⁷ Order M-352.

B. Does the mandatory exemption at section 21(1) or the discretionary exemption in section 49(b) apply to the records?

[33] Section 47(1) of the *Act* gives individuals a general right of access to their personal information held by an institution. Section 49 provides a number of exemptions from this right.

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

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual’s personal privacy.

[35] 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.

[36] Under section 21, where a record contains the personal information 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”. Section 21(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[37] In both section 49(b) and section 21 situations, 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 individual’s personal privacy. I note that, during the ministry’s third party notification process, a number of the individuals whose personal information is contained in the records consented to the disclosure of their personal information to the appellant. As such, their personal information is no longer at issue in this appeal, as per section 21(1)(a) of the *Act*. However, I note that where their personal information is inextricably intertwined with that of the deceased, I will

consider whether those portions should otherwise be exempt under the personal privacy exemption.

[38] Section 21(2) provides some criteria for the ministry 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 of (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 49(b).

[39] In its decision letter, the ministry claimed that disclosure of the withheld portions of the record would constitute an unjustified invasion of personal privacy under sections 21(1) and 49(b), taking into account the presumptions at section 21(3)(b), (d) and (f) and the factor weighing against disclosure at section 21(2)(f).

[40] In her representations, the affected person claims that section 21(1) applies to all of the records and relies on the presumptions at sections 21(3) (a), (d), (f) and (g) and the factor weighing against disclosure at section 21(2)(f) to support her submissions.

[41] Although the appellant did not make submissions with regard to the personal privacy exemption under section 21(1) of the *Act*, he refers to section 18(4) of the *Coroner's Act*,⁸ which states:

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 coroner's findings of facts to determine the answers to the questions set out in subsection 31(1), and such findings, including the relevant findings of the *post mortem* examination and of any other examinations or analyses of the body carried out, shall be available to the spouse, parents, children, brothers and sisters of the deceased and to his or her personal representative, upon request.

[42] The appellant submits that this wording in the *Coroner's Act* entitles him to have full access to the information relating to the deceased and, therefore, asks that he be granted access to the records requested.

[43] While I appreciate the appellant's desire for access to the records, the *Coroner's Act* only applies to the coroner's findings of facts, and the coroner's findings are not at issue in this appeal. In fact, the appellant indicates in his representations that he has

⁸ R.S.O. 1990, c. C.37.

already obtained access to the coroner's report. Therefore, I will not consider the application of the *Coroner's Act* to the records at issue in this appeal.

Section 21(3)

[44] The affected person submits that the records, as described to her by the police, contain information relating to toxicology results and various interview responses pertaining to the deceased's psychological status prior to his death. As such, the appellant submits that the release of the deceased's medical and psychological information would give rise to a presumed unjustified invasion of privacy under section 21(3)(a). In addition, the affected person describes how sections 21(3)(d), (f) and (g) of the *Act* also apply to the records in the confidential portions of her representations.

[45] The relevant paragraphs of section 21(3) read as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- ...
- (d) relates to employment or educational history;
- ...
- (f) describes an individual's finances, income, assets, liability, net worth bank balances, financial history or activities or creditworthiness;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; ...

[46] With regard to section 21(3)(b) of the *Act*, 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.⁹ The

⁹ Orders P-242 and MO-2235.

presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁰

[47] The records at issue in this appeal consist, in whole or in part, of OPP occurrence reports, officers' notes, statements and photos relating to the circumstances of the deceased's death. I have carefully reviewed the records at issue and find that the presumption at section 21(3)(b) applies to all of the records. I am satisfied that the personal information contained in the records was compiled by the police during their response to an investigation of the death of the deceased. Accordingly, I find that the personal information was compiled and is identifiable as part of the investigation by the police into a possible violation of law and that the presumption in section 21(3)(b) applies.

[48] Further, I find that the presumption at section 21(3)(a) also applies to portions of the records at issue. As the affected person submits, certain portions of the records contain the deceased's personal information as it relates to his medical condition at the time of his death, as well as the diagnosis of the cause of his death. Accordingly, I find that the personal information in the records relates to a medical, psychiatric, or psychological history, diagnosis, condition, treatment or evaluation, as contemplated by the presumption in section 21(3)(a).

[49] In addition, I find that the presumptions at sections 21(3)(d) and (f) apply to portions of the records at issue. Certain portions of the records contain personal information relating to the deceased's employment history. As well, the records contain information relating to the deceased's finances, financial history and financial activities, as described in section 21(3)(f).

[50] However, I find that the presumption found in section 21(3)(g) does not apply to the records at issue. The terms "personal evaluations" or "personnel evaluations", in section 21(3)(g) refer to assessments made according to measurable standards.¹¹ While I find that the record contains individuals' personal views or opinions about the deceased, I find that these opinions or views cannot be considered to be assessments made according to measurable standards. As such, I find that the presumption at section 21(3)(g) does not apply to the records at issue.

[51] Therefore, I find that the presumption at section 21(3)(b) applies to all of the records at issue and sections 21(3)(a), (d) and (f) also apply to certain portions. I will now consider the application of the considerations listed in section 21(2) and whether there are any factors weighing for or against disclosure.

¹⁰ Orders M-2213, PO-1849 and PO-2608.

¹¹ Orders PO-1756 and PO-2176.

Section 21(2)

[52] Section 21(2) reads as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote health and public safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[53] In addition to the presumptions in section 21(3), the ministry claims that the factor weighing against disclosure at section 21(2)(f) applies to certain portions of the record. The ministry further submits that, in making its decision, it considered the concerns raised by the affected person about the harmful effect disclosure might have on the children's psychological well-being. The ministry submits that it is particularly mindful of the advice of a psychologist, who had been treating the children for a significant period of time. As it found that the disclosure of the withheld portions of the

record would not be in the best interests of the children, the ministry submits that certain portions of the records should be withheld from disclosure to the appellant.

[54] In her representations, the affected person argues that all of the information in the records is "highly sensitive", as described in section 21(2)(f), and therefore the disclosure of the records would constitute an unjustified invasion of personal privacy.

[55] This office has established that, for information to be considered highly sensitive under section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.¹²

[56] In my view, all of the records can be considered to be highly sensitive since the records contain information detailing the particulars of the deceased's death, the circumstances surrounding it and the nature of his personal relationships. The information that has been withheld is, by its very nature, highly sensitive and deeply private. Further, with regard to the severed portions of the record, I am satisfied that there is a reasonable expectation that the affected person and her children would experience significant personal distress¹³ if these particular portions were disclosed to the appellant. Therefore, I find that section 21(2)(f) weighs heavily in favour of a finding that the disclosure of the withheld portions of the records would constitute an unjustified invasion of personal privacy.

[57] Similarly, the consideration listed in section 21(2)(i) (unfair damage to reputation) is also applicable. I find that the disclosure of some portions of the information in the records may unfairly damage the reputation of the deceased.¹⁴ As such, I give this factor moderate weight when balancing the factors favouring privacy protection against those favouring disclosure.

[58] With regard to the other factors weighing against disclosure, I find that none apply.

[59] Taking into account the application of the presumptions in sections 21(3)(a), (b), (c), (d) and (f), and the factor favouring privacy protection in section 21(2)(f), I find that the disclosure of the withheld portions of the records would constitute an unjustified invasion of personal privacy, and that the records which do not contain the personal information of the appellant are exempt under section 21(1).

[60] With respect to the application of section 49(b) to the records, I previously found that three records contain the appellant's personal information, consisting of his date of birth [paragraph (a)] and his name along with other personal information about him and his relationship with the deceased [paragraph (h)]. This personal information is

¹² Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹³ Order PO-3093.

¹⁴ Order PO-2196.

contained in the Homicide/Sudden death report (page 4 of the records), a Supplementary Occurrence Report (pages 12 to 19) and the notes prepared by a named officer during the investigation into the deceased's death (pages 92 to 136).

[61] Upon careful review of these records, I find that the appellant's personal information consists of only discrete portions of these records, while the overwhelming majority of them is highly sensitive personal information of the deceased, the affected person and other individuals. In addition, the presumptions in sections 21(3)(a) and (b) apply to this personal information. I also find that there are no other factors under section 21(2) favouring the disclosure of this information to the appellant. Accordingly, I find that the three records found at page 4, 12 to 19 and 92 to 136 qualify for exemption as their disclosure is presumed to constitute an unjustified invasion of personal privacy under section 49(b).

[62] Having found that sections 21(1) and 49(b) of the *Act* apply to certain portions of the records, I will now consider whether the exception to these exemptions provided by section 21(4)(d) applies to entitle the appellant to disclosure of the records, or portions of them.

Section 21(4)(d)

[63] The principle issue in relation to the disclosure of the records at issue is whether the exception to the exemption in section 21(4)(d) of the *Act* permits the further disclosure of the deceased's personal information (some of which is co-mingled with the information of other individuals, including the affected person.)

[64] Section 21(4)(d) states, in part:

... a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses the 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.

[65] The terms "close relative" and "spouse" are defined in section 2(1) of the *Act* as follows:

"close relative" means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; ("proche parent"); and

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons who live together in a conjugal relationship outside marriage. ("conjoints")

[66] Personal information about a deceased individual can include information that also qualifies as that of another individual, such as the affected person. Where this is the case, the "circumstances" to be considered would include the fact that personal information of the deceased is also the personal information of another individual or individuals and the factors and circumstances referred to in section 21(2) may be relevant. In any event, the overall circumstances must be considered and weighed in any application of section 21(4)(d).¹⁵ This approach was first articulated in Order MO-2237, and is applicable in the case before me. Therefore, I will adopt it for the purposes of this appeal.

[67] In Order MO-2237, I set forth the following three-part test to be applied when evaluating whether the exception in section 14(4)(c) [the municipal equivalent to section 21(4)(d)] applies:

In my opinion, the application of section 14(4)(c) 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 or "close relative" of the deceased individual?
3. Is disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the appeal?

Step 1 – Personal Information of the Deceased

[68] I have found above that the records as a whole contain the personal information of the deceased. In addition, the records contain the personal information of a number of other individuals, including the appellant and the affected person.

¹⁵ Orders MO-2237, MO-2270, MO-2290, MO-2306, MO-2387 and MO-2615.

[69] I have noted that some of the personal information of these individuals is inextricably intertwined with that of the deceased. Accordingly, for these portions, severing this information, other than names and birth dates, to avoid disclosure of other individuals' personal information is not practicable.

[70] I am therefore satisfied that the first requirement for the application of section 21(4)(d) is satisfied.

Step 2 – Spouse or "Close Relative"

[71] As the parent of the deceased individual whose personal information is contained in the records at issue, the appellant is considered to be a "close relative" under the *Act* and, as a result the second requirement of section 21(4)(d) is satisfied.

Step 3 – Desirable for Compassionate Reasons

[72] Because section 21(4)(d) can override the presumed unjustified invasion of privacy as set out in section 21(3) and the factors weighing against disclosure in section 21(2), it calls for the interpretation of the words "desirable for compassionate reasons".

[73] In Order MO-2237, I considered the definition of the word "compassionate" and the intent of the Legislature as follows:

The *Concise Oxford Dictionary, Eighth Edition*, defines "compassionate" as follows: "*adj.* sympathetic, pitying." Compassion is defined in the *Concise Oxford Dictionary, Eighth Edition*, as follows: "*n.* pity inclining one to help or be merciful."

I accept these definitions as evidence of the plain and ordinary meaning of the word "compassionate" and adopt it for the purposes of this appeal.

As discussed above, I have concluded that by using the words "in the circumstances" the Legislature intended that a broad and all-encompassing approach be taken to the consideration by this office of whether or not disclosure is "desirable for compassionate reasons." In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. It is recognition that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.

[74] I adopt this approach for the purposes of this appeal.

[75] In its representations, the ministry submits that the affected person advised that she is the personal representative of the deceased within the meaning of the *Act* and that she provided the ministry with a statutory declaration to that effect as supporting evidence. As the personal representative of the deceased, the ministry indicates that the affected person requested that the responsive records not be disclosed to the appellant, in part to protect her and the deceased's children. The ministry notes that the affected person provided a letter from the children's psychologist supporting this decision.

[76] The ministry submits that, in its review of the records and the application of section 21(4)(d) in conjunction with the correspondence from the affected person, it was not satisfied, in the circumstances of this appeal, that disclosure of most of the records would be desirable for compassionate reasons.

[77] The ministry further submits that, in making its decision, it considered the concerns raised by the affected person and the psychologist about the harmful effect disclosure might have on the children's psychological well-being. The ministry submits that it is particularly mindful of the advice of the psychologist, who had been treating the children for a significant period of time.

[78] In addition, the ministry claims that it acted in the best interests of the children when it decided to withhold portions of the information in the records from disclosure.

[79] However, as the father of the deceased, the ministry submits that based on the interpretation of section 21(4)(d) in previous orders of the IPC, the appellant would ordinarily be entitled to receive at least some of the records.

[80] The appellant submits that, as a grieving father, he is entitled to receive all the records requested and hopes that the information will provide him with some closure with regard to the deceased's death.

[81] In her representations, the affected person notes that the IPC has previously held that greater knowledge of the circumstances of the death is by its very nature compassionate. However, she submits that this general principle does not apply in the circumstances of this appeal and that the consideration of whether disclosure is desirable for "compassionate reasons" under the *Act* does not limit the analysis to an examination of the compassionate reasons favouring disclosure to the requester/appellant. The affected person further submits that:

Section 21(4)(d) does not set out an automatic entitlement to disclosure where there are "compassionate reasons", but rather sets the standard higher that the compassionate reasons make disclosure desirable. This situation is very unusual and far from the normal case in which disclosure would be desirable weighing the compassionate reasons for and against

disclosure. In this situation, for compassionate reasons, disclosure is not desirable. [Emphasis in original]

[82] I have carefully considered all the circumstances surrounding this request and appeal, particularly the privacy interests of the affected person and her children. I am particularly mindful of the fact that a psychologist raised concerns with the ministry with regard to the effect that the disclosure of the records may have on the well-being of the affected person's children. As I found above, the factors in section 21(2)(f) and 21(2)(i) weigh strongly against the disclosure of the information contained in the records.

[83] Furthermore, I agree with the affected person that the *Act* does not restrict the analysis of section 21(4)(d) to the consideration of compassion to the requester alone. Section 21(4)(d) requires that the disclosure be desirable for compassionate reasons in relation to all the circumstances relating to the request. After considering all the circumstances surrounding the request and appeal, I find that the privacy interests of other individuals, including the affected person and her children, should not automatically yield to the compassionate reasons that may call for full disclosure to the appellant.

[84] However, as the grieving father of the deceased, I do find that the appellant is entitled to disclosure of at least some portions of the records for compassionate reasons. I have carefully reviewed the records in light of the representations submitted by all parties and find that the ministry carefully balanced all of the competing interests, including the compassionate reasons for and against disclosure. The ministry thoroughly considered all the circumstances of the request and the appeal and withheld portions that, if disclosed, could cause serious emotional distress to the affected person and her children. As such, I find that the ministry properly applied the exception to the personal privacy exemption in section 21(4)(d) and uphold its decision.

C. Does the discretionary exemption at section 49(a), in conjunction with sections 14(1)(c), 14(1)(g) and 14(1)(h) apply to the records?

[85] The ministry also decided to deny access to a number of records and parts of records under section 49(a), read in conjunction with the law enforcement exemptions in sections 14(1)(c), 14(1)(g) and 14(1)(h).

[86] I have already found that the information withheld under these exemptions was properly withheld under section 49(b) or section 21(1). Consequently, I find that it is not necessary to determine whether the withheld information on pages 18, 108, 109, 112, 126, 127 and 128 is also exempt from disclosure under section 49(a), in conjunction with sections 14(1)(c), 14(1)(g) and 14(1)(h).

D. Did the institution exercise its discretion under sections 49(a) and 49(b)? If so, should this office uphold the exercise of discretion?

[87] The sections 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution has failed to do so.

[88] In addition, the Commissioner 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
- it fails to take into account relevant considerations.

[89] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ This office may not, however, substitute its own discretion for that of the institution.¹⁷

[90] As I have found that it was not necessary to consider whether section 49(a) applied to the records at issue, I will only consider the ministry's exercise of discretion in relation to its application of section 49(b) to the three records that contain the appellant's personal information.

[91] In support of its position that it properly exercised its discretion to withhold portions of the records that contain the appellant's personal information under section 49(b) of the *Act*, the ministry states that it considered the following:

- (a) The concerns raised by the affected person and by the psychologist about the harmful effect disclosure might have on the children's psychological well-being. In particular, the ministry submitted that it was mindful of the psychologist's advice, as she had been treating the children for a significant amount of time.
- (b) The fact that the affected person is the personal representative of the deceased and is the mother of the children. The ministry states that it wants to act in the best interest of the children.

¹⁶ Order MO-1573.

¹⁷ Section 54(2) of the *Act*.

- (c) Despite the foregoing, the appellant is a "close relative" of the deceased within the meaning of section 21(4)(d) of the *Act* and should therefore be entitled to access to at least some of the records.

[92] In her representations, the affected person submits that the ministry failed to adequately consider whether there are compassionate reasons favouring a decision not to disclose the records to the appellant in the unusual circumstances of this case. She also submits that the ministry failed to consider the compassionate reasons related to her, the children and the deceased's wish for confidentiality. Further, the affected person submits that the ministry failed to properly consider whether the information contained in the records could be severed from that of her and her children. In this regard, the affected person submits that her personal information and that of her children is inextricably intertwined with that of the deceased and cannot be severed from the record.

[93] Finally, the affected person submits that the ministry failed to consider the overarching principle in the *Act* of balancing the interests of disclosure against the interests of personal privacy by granting automatic disclosure to an individual who is grieving.

[94] The appellant did not make representations with regard to the ministry's exercise of discretion.

[95] With respect to the affected person's contention that the ministry failed to properly balance the interests of disclosure against the interests of personal privacy, I find, upon careful review of the ministry's proposed severances in conjunction with its representations, that the ministry did consider the interests of the affected person and her children before making its decision to disclose portions of the records.

[96] Based on my review of the representations, the records at issue, and the manner in which the ministry severed the records and its representations, I find that the ministry's exercise of discretion was proper. The ministry properly considered the appellant's right to the records under section 21(4)(d), the privacy interests of other individuals, the impact that the disclosure could have on the affected person and her children and the purpose of the section 49(b) exemptions. As a result, I uphold the ministry's exercise of discretion.

ORDER:

1. I uphold the ministry's decision to withhold access to portions of the records under sections 21(2)(f) and 49(b) of the *Act*.
2. I order the ministry to disclose to the appellant the remaining information in the records by **December 11, 2012** but not before **December 6, 2012**.

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 records disclosed pursuant to order provision 2.

Original signed by: _____
Brian Beamish
Assistant Commissioner

_____ November 5, 2012