Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3279

Appeal PA12-38

Ministry of Community Safety and Correctional Services

November 25, 2013

Summary: The appellant requested access to information pertaining to a house fire that resulted in the tragic death of an individual. The ministry relied on sections 14(1)(a) (law enforcement) and 21(1) (invasion of privacy) of the *Act* to deny access to the requested information. The appellant appealed the ministry's decision and asserted that it was in the public interest that the requested information be disclosed. A number of issues were resolved at mediation resulting in the appellant no longer seeking any information that the ministry determined to be non-responsive to the request or subject to any law enforcement exemptions. The adjudicator partially upholds the ministry's decision and orders that it disclose identified non-exempt responsive information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of personal information), 2(3), 2(4), 10(2), 21(1)(a), 21(1)(f), 21(2)(a), 21(2)(f), 21(3)(a), 21(3)(b), 21(3)(d), 21(3)(f), 21(4)(d), 23; *Fire Protection and Prevention Act*, 1997 S.O. 1997, c. 4, sections 9(1)(e), 9(2)(e) and 9(3); *Public Inquiries Act, 2009*, SO. 2009, c. 33, Sched. 6, sections 3, 33(14).

Orders and Investigation Reports Considered: Privacy Complaint Report MI09-1, Orders M-582, PO-1833, PO-2518, PO-3088, PO-3133.

BACKGROUND

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to "all documents and reports" related to the Ontario Fire Marshall's [OFM] investigation of a fire at a specified address[1]. The ministry states that the fire resulted in the tragic death of an individual and generated "significant local media coverage".

[2] The ministry identified records responsive to the request and, relying on sections 14(1)(a) (interfere with a law enforcement matter) and 21(1) (invasion of privacy) of the *Act*, denied access to them, in full.

[3] The requester (now the appellant) appealed the decision.

[4] During mediation, the mediator obtained the consent of a witness to the disclosure of any of their personal information that may be contained in the responsive records. Notwithstanding the consent, the ministry did not disclose any information in the responsive records. Also during mediation, the appellant advised that he was no longer seeking access to any information withheld under any section 14(1) law enforcement exemption as well as any information that the ministry determined to be non-responsive to the request. Accordingly, any information that the ministry withheld under section 14(1) or that it identified as non-responsive is no longer at issue in the appeal. The appellant further asserted, however, that it was in the public interest that the balance of the information be disclosed. Accordingly, the application of the public interest override at section 23 of the *Act* was added as an issue in the appeal.

[5] Mediation did not resolve the matter and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] I sought representations from the ministry and the appellant. I received their representations and shared them in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. After the exchange of submissions, the appellant requested and received a copy of the ministry's reply representations.

[7] In this order I partially uphold the ministry's decision.

[1] This included "all reports, studies, correspondence, emails, memos, recommendations and findings of origin, cause, circumstances and contributing factors".

RECORDS:

[8] The records at issue include a Fire Investigation Services Report and associated notes, Case Submission Form, Centre of Forensic Sciences Report, Incident Report, Witness Statements, Occurrence and Person Details and officers' notes.

ISSUES:

A. Do the records contain personal information?

B. Would disclosing the personal information in the records constitute an unjustified invasion of personal privacy pursuant to section 21(1) of the *Act*?

C. Is there a compelling public interest in the disclosure of information found to be exempt that outweighs the application of section 21(1) of the *Act*?

D. Can the records be reasonably severed without revealing exempt information?

DISCUSSION:

A. Do the records contain personal information?

[9] In his representations, the appellant states that he does not seek any personal information in the records. That said, his submissions as to what would constitute personal information are somewhat inconsistent with this position. For the sake of completeness, I have decided to not only determine whether the records contain personal information, but will also decide whether the information is subject to exemption under section 21(1) of the *Act*. I will also consider whether, if the information is exempt, it should otherwise be disclosed through the application of the public interest override at section 23 of the *Act*.

[10] Accordingly, it is necessary to determine whether the records contain "personal information". 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 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;

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

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

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[2] Order 11.

[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

> 2(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 official capacity.
>
> 2(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.

[14] In addition, previous IPC orders have found that 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.[4]

[15] However, previous orders have also found that 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.[5]

[16] The ministry submits that the records contain information that falls within the scope of the definition of personal information in section 2(1) of the *Act* and furthermore, that it would be reasonable to expect that individuals would be identified if the information is disclosed:

> The ministry submits that the personal information in the records belongs primarily to a deceased individual. There is also personal information about a third party witness, who as noted, has consented to the disclosure of his personal information. Finally, there is personal information about several other individuals, including a close relative of the deceased individual and a couple of witnesses … . These latter individuals have not consented to the disclosure of their personal information, and the ministry submits they may not be aware of this appeal.
>
> The ministry submits that the personal information includes information that is likely to identify the deceased individual including his name, address, date of birth, details about the fire that killed him at his home, his post-mortem examination by a coroner and [records] that reference him and that predate his death. There are also opinions of affected third party individuals about the deceased individual.

[4] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.

> The ministry submits that the personal information belonging to affected third parties includes their names, addresses and statement information. The ministry submits that the release of their personal information, particularly their names, will identify them.

[17] Relying on Privacy Complaint Report Number MI09-1, the ministry submits that because this appeal relates to records pertaining to a fire at a specified address, disclosing "information about the fire would reveal inherently personal details about the individual and his death as a result of the fire."

[18] The ministry further submits that the records contain a number of names and addresses of individuals acting in a business or professional capacity, such as firefighters and police officers. The ministry submits that:

> … these records have been withheld because they would identify details about the fire and the death of the deceased individual, which as noted above, the ministry contends contains personal information belonging to the deceased individual.

[19] The appellant takes the position that the records do not contain any "personal information" and that previous orders of this office "show a consistency in requiring OFM investigation documents to be released to the public". The appellant submits that in Order M-592, this office did not uphold the City of Toronto's decision to sever from a report the names of the tenants who occupied a unit in a property where a fire had started.

[20] The appellant further submits that:

> We are not requesting any personal information. We do not want any personal information. The IPC and OFM have historically released much more information than we are requesting in this matter. We suggest that both organizations follow the standard previously set.

[21] Referring to the decision of former Senior Adjudicator David Goodis in Order PO-1833, the appellant submits that "[m]uch of the information in the records is non-personal in nature and should be released".

[22] The ministry states in reply that in Order M-592, this office ordered disclosure of the names of tenants who occupied a residential unit where a fire occurred, however, the ministry submits that:

> In this instance, the appellant already knows the name of the individuals involved in the fire. Instead, the appellant is seeking much more extensive personal information than that which is at issue in Order M-592.

Analysis and finding

[23] I must first consider whether all the records relating to the fire are the personal information of the deceased. In Order PO-3088[6] Adjudicator Stephanie Haly considered whether disclosing the results of environmental tests at a homeowner's address would reveal personal information about the homeowner. She framed the issue in that appeal in the following way:

> The first issue to be determined is whether the addresses with the test results (category 1 records) and location information with test results (category 2 records) constitutes personal information for the purposes of section 21(1) of the *Act*. In order to determine whether there is a privacy interest at stake, it is necessary to decide whether the records contain "personal information", and if so, to whom it relates.

[24] As set out in Order PO-3088, an affected person who provided representations in that appeal submitted that the test result, with the address information, was his personal information because of the harm that he would suffer if it is disclosed. The affected person in that appeal further argued that someone using a reverse look-up on the internet could use the property address to identify him and his family and thus disclosure could result in harm.

[25] The affected person's arguments about the potential harm and the possibility of being identified were also made by the appellant in that appeal who submitted that paragraph (d) of the definition of "personal information" in section 2(1) is applicable, and that the records contained the location and results of trichloroethylene (TCE) tests that, if disclosed, would constitute the personal information of each of the individual homeowners whose homes were tested. In particular, the appellant in that appeal stated that:

> … if the location of a person's home is considered private and therefore personal information under the *Act*, it follows that the location and results of tests taken within the privacy of a person's home should be considered private and personal information under the *Act*.

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[6] In Order PO-2763 Adjudicator Stephanie Haly had upheld the ministry's decision to grant partial access to the requested information at issue in that appeal to the requester. The appellant applied for judicial review of Order PO-2763 and her decision was quashed. The court remitted the appeal back to this office so that she could give notice to individuals whose interests may be affected by the outcome of the appeal before her, specifically, a group of individuals referred to by the appellant as "the homeowners" (the affected persons). Adjudicator Haly's Order PO-3088 followed notification of the homeowners.

…

> [The appellant in that appeal submitted] that where the disclosure of information could result in negative financial consequences to an identifiable individual, that information should be considered information about the individual and not about the property. The Records contain information that if disclosed may result in financial consequences to individual home owners and thus, should be considered information about an individual and not property.
>
> Orders that have found that test results relate to properties and not individuals, such as IPC Orders PO-2322 and MO-2053 are distinguishable as they did not involve information gathered in the privacy of an individual's home with the understanding that the information would remain confidential and there was no risk that disclosure of such information would result in financial consequences to the individual property owners and therefore are not relevant to the present appeal.

[26] The appellant in that appeal further argued that the individual homeowners would be identifiable as the addresses can be inputted in publicly available references and their identities and phone numbers could be located.

[27] In finding that the records at issue in that appeal did not contain personal information for the purposes of the *Act*, Adjudicator Haly wrote:

> The appellant's argument is two-fold. The appellant argues that disclosure of the records would reveal recorded information about an "individual" because the information was obtained inside the homeowners' property. Further, the appellant argues that disclosure of this information would result in negative financial consequences to the homeowners. The appellant's second argument is that these individuals are "identifiable".
>
> I disagree with the appellant's first argument. The recorded information is not about an "individual" within the meaning of the term "personal information". The appellant seeks to distinguish Orders MO-2053 and PO-2322 on the basis that in those cases the information at issue was not gathered in the privacy of the homeowner's home. I find that the location where the information was obtained is not relevant to the issue of whether the information relates to the property or to the individual. What is relevant is the distinction addressed by former Commissioner Sidney B. Linden in Order 23 which has been applied in a number of subsequent orders of this office, including Orders MO-2053 and PO-2322. In Order 23, the Commissioner made the following findings regarding the

distinction to be made between information that qualifies as "personal information" and information about residential properties:

> In considering whether or not particular information qualifies as "personal information" I must also consider the introductory wording of subsection 2(1) of the *Act*, which defines "personal information" as "...any recorded information about an identifiable individual..." In my view, the operative word in this definition is "about". The Concise Oxford Dictionary defines "about" as "in connection with or on the subject of". Is the information in question, i.e. the municipal location of a property and its estimated market value, about an identifiable individual? In my view, the answer is "no"; the information is about a property and not about an identifiable individual.
>
> The institution's argument that the requested information becomes personal information about an identifiable individual with the addition of the names of the owners of the property would appear to raise the potential application of subparagraph (h) of the definition of "personal information".
>
> Subparagraph (h) provides that an individual's name becomes "personal information" where it "...appears with other personal information relating to the individual or where the disclosure of the name would reveal other information about the individual" (emphasis added). In the circumstances of these appeals, it should be emphasized that the appellants did not ask for the names of property owners, and the release of these names was never at issue. However, even if the names were otherwise determined and added to the requested information, in my view, the individual's name could not be said to "appear with other personal information relating to the individual" or "reveal other personal information about the individual", and therefore subparagraph (h) would not apply in the circumstances of these appeals. [Emphasis in original]

Senior Adjudicator John Higgins, in Order MO-2053, reviewed the jurisprudence following Order 23 which clearly sets out this distinction between information about property and "personal information". He states:

> Subsequent orders have further examined the distinction between information about residential properties and "personal information". Several orders have found that the name and address of an individual property owner together with either the appraised value or the purchase price paid for the property are personal information (Orders MO-1392 and PO-1786-I). Similarly, the names and addresses of individuals whose property taxes are in arrears were found to be personal information in Order M-800. The names and home addresses of individual property owners applying for building permits were also found to be personal information in Order M-138. In addition, Order M-176 and Investigation Report I94-079-M found that information about individuals alleged to have committed infractions against property standards by-laws was personal information. *In my view, the common thread in all these orders is that the information reveals something of a personal nature about an individual or individuals.*
>
> The information at issue in this case bears a much closer resemblance to information which past orders have found to be about a property and not about an identifiable individual. For example, in Order M-138, the names and home addresses of individual property owners who had applied for building permits were found to be personal information, but the institution in that case did not claim that the property addresses themselves were personal information, and the addresses were disclosed. In Order M-188, the fact that certain properties owned by individuals were under consideration as possible landfill sites were found not to be personal information. Similarly, in Order PO-2322, former Assistant Commissioner Tom Mitchinson found that water analysis and test results concerning an identified property were information about the property, not personal information.
>
> [Emphasis in original]

In Order MO-2053, Senior Adjudicator Higgins went on to find that two fields of information titled "street no" and "street name" for locations of septic systems were information about the property and not "about" an identifiable individual.

[28] Adjudicator Haly then concluded:

> … I find that the test results combined with the addresses are "about" the property in question and not "about" the individual homeowners. As such, the records relating to the various addresses fall outside the scope of the definition of "personal information" in section 2(1) of the *Act*. Similarly, I include in my finding those records which do not include an address, but instead identify GPS coordinates, maps, bore hole locations, well locations and test results. These types of records that contain "location" information combined with test results also fall outside the scope of the definition of "personal information" in section 2(1) and, as such, constitute only information about the property.
>
> The appellant asks that I also consider the fact that the homeowners will experience financial loss should the information be disclosed. The consequences of disclosure are more properly considered under the application of the exemptions of the *Act*. The determination of whether information is "personal information" for the purposes of the *Act* is not made based on the possible consequences of its disclosure.

[29] With respect to the argument that individual homeowner's would be identifiable through use of publicly available resources, Adjudicator Haly wrote:

> … The fact that the names of individual owners could be determined by a search in the registry office or elsewhere does not convert the municipal address from information about a property to personal information. In Order PO-1847, former Adjudicator Katherine Laird noted that, in the context of a discussion about correspondence concerning possible land use, "…where records are **about a property**, and not **about an identifiable individual**, the records may be disclosed, with appropriate severances, notwithstanding the possibility that the owners of the property may be identifiable through searches in land registration records and/or municipal assessment rolls." [Footnote omitted] (Emphasis in original)

[30] I agree with the analysis set out in Order PO-3088 and the authorities cited by Adjudicator Haly in her decision. In my view, the fact that the information in the records at issue in this appeal is associated with a fire at a specific address does not automatically result in all the information in the records being personal information. In that regard, I find that some of the information at issue, even though associated with a fire at a specified address, is about the property rather than about the deceased, and disclosing it would not reveal something of a personal nature about an individual or individuals. In this regard, I find that the consequences of the fire to the house and its path, is about the property, rather than the deceased. On the other hand, for example,

information about certain of the personal possessions of the deceased that were affected by the fire, and, in the circumstances of this appeal, the cause of the fire, qualify as the deceased's personal information.

[31] The records do contain recorded personal information about various individuals (including the deceased) in their personal capacity, including information relating to age and sex (paragraph (a)), medical history (paragraph (b)), address and telephone number (paragraph (d)), the views or opinions of other individuals about the deceased (paragraph (g)), as well as other personal information relating to the identifiable individuals, including the deceased. All of this information falls within the scope of the definition of personal information at section 2(1) of the *Act*

[32] The records also identify the individuals who responded to the fire (from the Hamilton Fire Department) and those who conducted an investigation into the circumstances and consequences of the fire, including the coroner's office, the Hamilton Police Services Board (the police) and the OFM. It has been established in a number of previous orders that information provided by, or relating to an individual in a professional capacity or in the execution of employment responsibilities is not "personal information".[7] In my view, therefore, except for some information in the records pertaining to these individuals which would reveal something of a personal nature about them, such as their personal residence addresses or personal residence telephone numbers, I find that disclosure of the information relating to those individuals who were acting in a professional or business capacity would not reveal anything of a personal nature about those individuals, and therefore does not qualify as personal information.

[33] As set out above, I will now consider whether the information that I have found to be personal information, qualifies for exemption under section 21(1), and if exempt, should otherwise be disclosed through the application of the public interest override at section 23 of the *Act*.

B. Would disclosing the personal information in the records constitute an unjustified invasion of personal privacy pursuant to section 21(1) of the *Act*?

[34] Where an appellant seeks the personal information of another individual, section 21(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. In this appeal, the exceptions at 21(1)(a) and 21(1)(f), appear to apply. Those exceptions read:

[7] Orders M-262, P-257, P-427, P-1412 and P-1621.

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(a): Consent

[35] As set out above, an individual whose personal information appears in the records consented to the ministry releasing his personal information to the appellant. To the extent that this individual's person information can be separated from the personal information of other identifiable individuals, including the deceased, the requirements of section 21(1)(a) are met, and this information is not exempt under section 21(1). Accordingly, the personal information relating to this individual alone should be disclosed to the appellant. I have highlighted this information in green on a copy of the pages of the records containing that information that I have included with the ministry's copy of this order.

Section 21(1)(f): Disclosure not an unjustified invasion of personal privacy

[36] Sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out at section 21(2) of the *Act*.[8]

[37] The ministry provides representations on sections 21(2)(f) and 21(3)(a). In addition, the ministry refers to section 21(4)(d) in support of its arguments on the application of section 21(2)(f). The appellant provides representations pertaining to section 21(2)(a) of the *Act*. As well, my review of the records indicates that sections 21(3)(b), 21(3)(d) and 21(3)(f) may also be applicable, in the circumstances of this appeal.

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[8] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

[38] Those sections read:

> 21(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (4) Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> (d) discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

The ministry's representations

[39] With respect to the presumption in section 21(3)(a), the ministry submits that:

> The ministry has claimed the mandatory presumption in section 21(3)(a) because the records were created in a large part to determine the cause

of the deceased individual's death, which has a medical component to it. The ministry notes that the post-mortem examination contains especially intrusive details about the deceased individual's medical and physical state, and that this exam was conducted by a Coroner, who is a medical practitioner.

[40] The ministry further submits that the withheld personal information is "highly sensitive", thereby falling within the scope of section 21(2)(f) of the *Act*. The ministry's submissions in this regard focus mostly on the wishes of, and the effects on, the surviving family members of the deceased. The ministry submits:

- a close family member of the deceased wrote to the ministry requesting that the responsive records not be disclosed.

- this is "apparently consistent" with the position taken by other surviving family members of the deceased.

- the ministry's position has been informed by this office's interpretation of section 21(4)(d), "where it has essentially ruled that family members ought to be given deference in deciding what is compassionate when it comes to receiving access to their loved one's personal information. In this instance, the ministry submits 'compassionate' in the context of this appeal means granting family members the privacy they desire."

- the fact that the appellant is a media requester magnifies the ministry's concerns and the fact that the deceased's surname is uncommon means that surviving family members may receive unwanted scrutiny if disclosed information were to be published.

- the records include information about [a pre-existing matter involving the deceased] as well as the results of the deceased's post-mortem examination.

- third parties whose personal information appears in the records have not consented to the disclosure of their personal information.

- the affected third parties have an expectation that their personal information would not be disclosed. The ministry submits that "when individuals provide statements to, and otherwise cooperate with fire or police investigators, they do not expect that the personal information they provide will subsequently be disclosed in the manner contemplated by this appeal".

[41] The ministry further submits that if the personal information at issue in this appeal is disclosed, the families of deceased individuals who wish to safeguard their own privacy and that of their loved ones will cease to cooperate with the police, fire investigators and coroners. The ministry submits that this "would have a devastating impact on these ministry operations".

The appellant's representations

[42] Relying on section 21(2)(a) of the *Act*, the appellant submits that disclosure of the withheld information is desirable for the purpose of subjecting the activities of government agencies to public scrutiny. The appellant submits:

- the OFM has set a precedent of releasing personal information from previous investigations.

- the OFM has previously issued press releases that are posted in perpetuity on its website in order to meet its mandate of informing and educating the public and should do the same with respect to the information at issue in this appeal.

- section 33(14) of the *Public Inquiries Act*, 2009 (*PIA*)[9], which the appellant asserts applies to all OFM investigations and inquiries[10], requires the release of any documents produced in any investigation or review upon the request of any individual.

[43] The appellant further submits that:

> These facts taken together put the ministry's position in an interesting light. Why are they taking this unprecedented position of withholding fire safety information from the public? What are they hiding - a botched investigation? Illegal activity? Misconduct? Withholding the report puts the investigation, the OFM and the ministry into disrepute.

[9] SO. 2009, c. 33, Sched. 6. Section 33(14) reads: Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to the person by the person or body conducting the inquiry within a reasonable time.

[10] The appellant refers in this regard to section 9(3) of the *Fire Protection and Prevention Act*, 1997 S.O. 1997, c. 4. Section 9(3) reads: Section 33 of the *Public Inquiries Act, 2009* applies to any inquiry or investigation by the Fire Marshal under [*Fire Protection and Prevention Act, 1997*].

[44] The appellant refers specifically to a number of ministry news releases[11] and submits:

> We can only suggest the government and its agency is hiding this public report in order to cover up inadequacies - accidental or intentional - in the investigation. By doing so, they are failing to protect residents from potential fires and fire deaths. We wonder how many more residents will have to die in the same way this man died before the OFM decides to fulfill its mandate to educate and inform the public.

[45] The appellant submits that:

> The OFM, an agency of the Ontario government, conducted a secret and private investigation under the auspices of a public operation. This government investigation was conducted privately - according to the ministry's own submission - for the service of a few family members of the deceased.
>
> This is not what OFM is mandated to do. They are required, under provincial legislation, to conduct investigations for the service of the community and use their findings to educate and promote public safety - not the interests of the few over the interests of the many.
>
> Government resources, in this case, have been used to provide a fire investigation and report for a few family members. We submit this is improper and potentially illegal.
>
> The greater good is served by releasing the documents and exposing the apparent questionable activity conducted by the OFM and the ministry under the guise of a public investigation. These records and documents are not, as the ministry argues, the personal and private property of the deceased's family member. They are in fact the property of the Ontario taxpayer, created to inform and educate the community and encourage community safety.

[46] With respect to section 21(2)(f), the appellant submits that:

> … the potential for distress is minimal, and insignificant in comparison to the need to learn the cause, origin and circumstances of this fatal fire - exactly like the above cases where the OFM correctly and responsibly released details to the public.

[11] Which, along with the previously cited news release, were also included with the appellant's representations.

…

Affected third party individuals do not have an expectation of privacy, or protection from embarrassment. Their personal information is part of the public record and available to release to the public under the provincial legislation the OFM is required to follow as detailed elsewhere in our submission.

[47] The appellant further submits:

The ministry submission focusses on the personal interests of a few family members in protecting themselves from potential embarrassment. We feel they have not made a strong case here, and have failed to meet the test of the *Act*.

There is indeed a third - more significant - perspective beyond the interests of the deceased and the deceased's family members. That third perspective is represented in greater numbers and with a greater interest in the information - that of our newspaper's readers the community's residents, and the general public.

Consider the interest of that third perspective - the local homeowner and taxpayer who expects to learn the details of the tragic fire that cost the life of their neighbour - not out of some prurient interest or entertainment value, but instead a need to know in order to be educated and properly protect themselves, their family members and their community from further tragic fires and fire deaths. The OFM holds this information but is hiding it from public scrutiny, contrary to its mandate to inform, educate and protect. Release of this information could prevent future tragedy - a greater good that outweighs personal privacy or the protection of government from public embarrassment.

… release would provide valuable public safety education that could prevent further deaths - and mean that the death of this individual would serve some valuable purpose. Any invasion of privacy - which we submit is minimal, unlikely and inconsequential - would be justified in two significant ways: by preventing future deaths and also holding the government agency for investigating fires, fire deaths and protecting the public up to public scrutiny.

[48] Responding to the ministry's position on section 21(3)(a), the appellant submits that:

> It is clear the medical exemption does not apply in this case, as all fire investigation reports - which are regularly released to the public … contain the same medical information when deaths occur in fires.

[49] The appellant submits that the OFM has released medical information pertaining to fire deaths in their news releases and that he is only:

> … requesting the same information release under the same circumstances as the [specific date] release summarizing the fire investigation report into the blaze at [another specified municipal address] on [another specified date].[12]

The ministry's reply submissions

[50] In reply, the ministry refers to Order PO-3133 and this office's approach to section 21(4)(d) and submits that in the circumstances of this appeal, "taking a 'broad and all encompassing approach' towards disclosure can only lead to the conclusion that it would not be 'desirable for compassionate purposes'".

[51] With respect to the impact of the *PIA*, the ministry submits that the appellant has failed to meet the requirements of section 33(14) of that legislation:

> First, the appellant has not produced the records that are at issue in this appeal. Second, the appellant has not demonstrated any legal entitlement to the records under the [*PIA*] or under the [*FIPPA*]. Therefore, the ministry submits that subsection 33(14) of the [*PIA*] does not give the appellant a right to the records in this instance.

[52] With respect to the appellant's submissions regarding press releases, the ministry submits in reply that:

> The appellant suggests the OFM is being inconsistent by posting press releases relating to certain fire incidents on its website. The OFM acknowledges selectively posting press releases about fires at its discretion, and where it believes that there is a particular fire safety message that needs to be brought to the attention of the public. The ministry notes that Hamilton Emergency Service has posted its own press release on its website which [the ministry included with its representations]. The Hamilton press release provides much of the same

[12] The appellant included a copy of the news release with his representations.

information that the OFM would have published had it issued its own press release.

Analysis and Findings

The Impact of the PIA

[53] I agree with the ministry's position that the provisions of the *PIA* do not apply with respect to the matter before me. I am not a commission conducting a public inquiry into a matter that the Lieutenant Governor in Council considers to be in the public interest under section 3 of the *PIA*[13], nor is there any provision in *FIPPA* that incorporates by reference section 33(14) of that statute. Furthermore, the appellant did not produce the records at issue in this appeal. Finally, the appellant's entitlement to access is established under *FIPPA*, not the *PIA*.

[54] I will now consider whether the personal information in the records qualifies for exemption under section 21(1) of the *Act*.

The presumptions in section 21(3)

Section 21(3)(a)

[55] Based on my review of the records, I find that pages 68 to 72 of the records, being a post-mortem examination of the deceased, contain information that falls within the section 21(3)(a) presumption as it relates to the deceased's medical condition.[14] Other information that falls within the scope of section 21(3)(a) also appears in varying amounts on other pages of the records at issue.

Section 21(3)(b)

[56] Although no specific representations were made on this presumption, in order for section 21(3)(b) to apply, the "personal information" must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

[57] On their face, all the records clearly relate to an investigation by the OFM into a fire. Previous orders of this office have found that in conducting an investigation into the cause of a fire, the OFM is not performing a law enforcement function. As a result, section 21(3)(b) cannot apply to the "personal information" in records forming part of such an OFM investigation, unless the evidence indicates that the information was compiled and is identifiable as part of an investigation into a possible violation of law by

[13] Section 3 reads: The Lieutenant Governor in Council may by order establish a commission to conduct a public inquiry into a matter that the Lieutenant Governor in Council considers to be in the public interest.
[14] See in this regard Order P-362.

an agency performing a law enforcement function.[15] Based on my review of the records, in my view only pages 131 to 133 and 136 to 151 fall within the scope of 21 (3)(b) of the *Act*, as they pertain to an investigation into a possible violation of law conducted by the police.

[58] It is not clear from the materials before me, however, if the OFM provided any of the other records to the police or whether they would otherwise fall within the scope of 21(3)(b). In my view, without more, I do not have sufficient evidence to establish that the personal information in these other records was compiled and is identifiable as part of an investigation into a possible violation of law under section 21(3)(b)[16].

Sections 21(3)(d) and 21(3)(f)

[59] Although no specific submissions were made on the application of these presumptions, I find that a small portion of the records at issue fall within the scope of sections 21(3)(d) and 21(3)(f) because they relate to the deceased's, and other identifiable individuals', employment history and describe the deceased's assets.

The factors and circumstances in section 21(2)

Section 21(2)(a)

[60] The objective of section 21(2)(a) of the *Act* is to ensure an appropriate degree of scrutiny of government and its agencies by the public. After reviewing the submissions and the records, in my view disclosing the subject matter of the personal information in the records would not result in greater scrutiny of the OFM or any other agency of the Government of Ontario. In a nutshell, the appellant's position is that because the OFM released information on previous investigations, but not this one, the OFM has something to hide. One does not flow from the other. More sufficiently clear and cogent evidence is required is needed to establish the appellant's assertions of ulterior motives on the ministry's part or a "cover up". Additionally, in my view, the subject matter of the records sought does not suggest a public scrutiny interest.[17]

[61] Accordingly, in the circumstances, I find that the factor at section 21(2)(a) is not a relevant consideration.

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[15] Orders PO-2066, PO-2271 and PO-2339.
[16] See Orders PO-2066, PO-2271 and PO-2339.
[17] See Order PO-2905 where Assistant Commissioner Brian Beamish found that the subject matter of a record need not have been publicly called into question as a condition precedent for the factor in section 21(2)(a) of *FIPPA* to apply, but rather that this fact would be one of several considerations leading to its application.

Section 21(2)(f)

[62] In order for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause the subject individual personal distress.

[63] Previously, the test was whether disclosure would cause "excessive" personal distress to the subject individual.[18] In Order PO-2518 and orders that followed, the reasonable expectation of "significant" personal distress has been determined to be the more appropriate threshold in assessing whether information qualifies as "highly sensitive".[19] However, as acknowledged by the ministry in its representations, the point of reference is always the "subject individual".

[64] I accept that the disclosure of certain personal information of identifiable individuals in the records would, in the circumstances of this appeal, cause those individuals significant personal distress. In my view, this is a factor weighing heavily in favour of non-disclosure.

Other factors/relevant circumstances

[65] The ministry submits that it is concerned that if personal information responsive to the request is disclosed:

> the families of deceased individuals who wish to safeguard their own privacy and that of their loved ones will cease to cooperate with the police, fire investigators and coroners. The ministry submits that this outcome would have a devastating impact on these ministry operations.

[66] In my view, however, the ministry has failed to provide sufficiently detailed and convincing evidence to support this bald assertion.

[67] There are perhaps other unlisted factors worthy of consideration in this appeal. However, the appellant has not satisfied me that there are factors or circumstances favouring disclosure of the personal information in the records, including that of the deceased. Conversely, the ministry has satisfied me that the factor at section 21(2)(f) is applicable to some of the personal information of individuals other than the deceased. I have also found that some of the information in the records falls within the presumptions at sections 21(3)(a),(b), (d) and (f) of the *Act*. Accordingly, I find that the exception at section 21(1)(f) is not established and the personal information is exempt under section 21(1) of the *Act*.

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[18] Orders M-1053, PO-1681 and PO-1736.
[19] PO-2617, MO-2262 and MO-2344.

[68] I have highlighted in yellow the personal information that I have found to qualify for exemption under section 21(1) of the *Act* on a copy of the pages of the records that I have included with the ministry's copy of this order.

C. Is there a compelling public interest in the disclosure of information found to be exempt that outweighs the application of section 21(1) of the *Act*?

[69] The appellant takes the position that the "public interest override" provision in section 23 of the *Act* applies to the information that I have found to be exempt.

[70] Section 23 reads:

> 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.

[71] 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.

[72] In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[20] In order to find a compelling public interest in disclosure, the information in the 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.[21]

[73] A public interest is not automatically established where the requester is a member of the media.[22]

[74] A public interest does not exist where the interests being advanced are essentially private in nature.[23] However, where a private interest in disclosure raises issues of a more general application, a public interest may be found to exist. [24]

[75] The word "compelling" has been defined in previous orders as "rousing strong interest or attention". [25]

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[20] Orders P-984 and PO-2607.
[21] Orders P-984 and PO-2556.
[22] Order M-773.
[23] Orders P-12, P-347, and P-1439.
[24] Order MO-1564.
[25] Order P-984.

[76] Any public interest in non-disclosure that may exist also must be considered.[26] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[27]

[77] In its initial representations, the ministry submits that the public interest override at section 23 does not apply in the circumstances of this appeal. The ministry submits that:

> … the records at issue are similar to the records that would ordinarily be created by fire and police responders and a coroner in responding to a deadly fire or in otherwise performing their duties. In other words, there is nothing in the records that suggests that disclosing them would "shed light on the operations of government" or would "inform the citizenry about the activities of their government".
>
> The ministry submits that the media has already reported on the fire, and to the extent that there might be a compelling public interest, it has already been met through the reporting that has already occurred.
>
> … The ministry submits that in this instance, there is an important public interest in not disclosing records, given the express wishes of a close relative, and concerns that any order to disclose records could affect future cooperation from the public with fire and police officials if the public believes that the personal information they provide is subject to disclosure in the manner contemplated in this appeal.

[78] The appellant's submissions on the application of section 21(1) of the *Act* have some relevance here. As set out above, he submitted that:

> There is indeed a third - more significant - perspective beyond the interests of the deceased and the deceased's family members. That third perspective is represented in greater numbers and with a greater interest in the information - that of our newspaper's readers the community's residents, and the general public.
>
> Consider the interest of that third perspective - the local homeowner and taxpayer who expects to learn the details of the tragic fire that cost the life of their neighbour - not out of some prurient interest or entertainment value, but instead a need to know in order to be educated and properly protect themselves, their family members and their community from further tragic fires and fire deaths. The OFM holds this information but is

[26] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[27] Orders PO-2072-F, PO-2098-R and PO-3197.

> hiding it from public scrutiny, contrary to its mandate to inform, educate and protect. Release of this information could prevent future tragedy - a greater good that outweighs personal privacy or the protection of government from public embarrassment.
>
> … release would provide valuable public safety education that could prevent further deaths - and mean that the death of this individual would serve some valuable purpose. Any invasion of privacy - which we submit is minimal, unlikely and inconsequential - would be justified in two significant ways: by preventing future deaths and also holding the government agency for investigating fires, fire deaths and protecting the public up to public scrutiny.

[79] In his representations specifically addressing the application of section 23 of the *Act*, the appellant submits there is a compelling public interest in disclosure of the records "that clearly outweighs the potential of minimal personal embarrassment". The appellant further submits that:

> These documents relate to a public safety issue where a man was killed accidentally in his own home. The findings of the OFM report should provide information that will help prevent future fires, future economic loss and future deaths. The records will help educate the public about a significant public safety issue and fulfill the mandate of the [OFM].
>
> Disclosure would shed light on fire prevention, fire safety and death prevention - all significant public safety issues. These public safety issues are more important than minimal personal distress of the deceased's family members, which we do not accept as a significant issue.

[80] The appellant refers to a directive of the OFM[28] and to sections 9(1)(e) and 9(2)(e) of the *Fire Protection and Prevention Act* (*FPPA*)[29] and asserts that these mandate the disclosure of the records at issue. The appellant further submits:

> We are fully prepared to help the OFM adhere to its legislated mandate by providing free newspaper articles about fire safety matters and fire

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[28] The appellant points to Directive 08-001 of July 2008 which provides in part that "… information collected by the OFM on fire incidents and other fire department calls is vital for the purpose of identifying fire safety issues that affect Ontario residents."

[29] 1997 S.O. 1997, c. 4. Section 9(1)(e) provides that the Fire Marshal has the power "to co-operate with any body or person interested in developing and promoting the principles and practices of fire protection services". Section 9(2)(e) states that it is the duty of the Fire Marshall "to provide information and advice on fire safety matters and fire protection matters by means of public meetings, newspaper articles, publications, electronic media and exhibitions and otherwise as the Fire Marshal considers advisable".

> protection matters raised in the organization's fire investigation report into this specific matter.
>
> We submit that it's the duty of the OFM to release these documents. Provincial law requires the OFM to release it.
>
> …
>
> Not releasing these documents will contradict the [*FPPA*] and mean the OFM and the ministry is breaking provincial law.
>
> Additionally, any potential misconduct the OFM and the ministry is attempting to cover up by hiding these important educational records can be exposed by release of the records. It serves the public interest to know about government misconduct and botched investigations as appears to have occurred in this particular matter.
>
> …
>
> The profound public interest outweighs the personal interests of a few the ministry claims to be protecting. We submit the ministry is only attempting to protect itself from the humiliation of public scrutiny and ask the IPC not to become complicit in a government cover-up of public documents. The integrity of the OFM has been called into question - and will continue to be called into question in this community until the records are released, and the OFM finding shared with the community.

[81] The appellant concludes his submissions by referring to Order PO-1833, and submitting:

> Ontario's [*PIA*] and [*FPPA*], as well as OFM policy directives, clearly establish the great public interest in public release of fire safety reports. This is a public safety issue, not a personal privacy issue.
>
> Even if the IPC were to somehow accept the reports constitute personal information of a highly sensitive nature, we are confident there is a clear and significant public interest in learning the details of the fire investigation - the causes and circumstances of the fire that killed a member of the community.
>
> We are also gravely concerned that a government ministry is using a local family and its grief as an excuse not to release public documents to the community. The government's actions further compound the tragedy of

> this man's death in an effort to protect the government and its agency from required public scrutiny.

[82] In reply, as set out above, the ministry refers to Order PO-3133 as well as this office's approach to section 21(4)(d) and submits that:

> We stand by the position set out in the original submissions not to release the records and we maintain we have acted in full compliance of all laws, including [*FIPPA*].

[83] Finally, with respect to Order PO-1833, the ministry submits in reply that there are differences between the facts at issue in that order and in this appeal. The ministry gives as an example that in Order PO-1833, the exemptions in 21(2)(f) and in 21(3)(a) were not claimed, whereas in this appeal they are at issue.

Analysis and Finding

[84] In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. Section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained, except where infringements on this interest are justified.

[85] I have considered the extensive submissions provided and the content of the portions of the records at issue that I have found to be subject to section 21(1) of the *Act* and should be withheld. In my view, the appellant has failed to establish that there is any compelling public interest in the exempt information at issue that outweighs the purpose of the section 21(1) exemption. The information relates to a house fire in a dwelling that resulted in a fatality. The circumstances are not extraordinary, though they are tragic. In my view, the information at issue does not satisfy the requirements of section 23 of the *Act*.

[86] In any event, the information about this fire and its consequences that is already in the public domain, combined with the information that I will order to be disclosed to the appellant would, in my view, be sufficient to satisfy any compelling public interest that I may have found to exist.

[87] Accordingly, I find that section 23 does not apply to override the section 21(1) exemption which I have found applies to exempt the personal information at issue that I have ordered to be withheld.

D. Can the records be reasonably severed without revealing exempt information?

[88] Where a record contains exempt information, section 10(2) requires the ministry to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[30]

[89] Based upon my review of the information in the pages of the records that I have not ordered to be disclosed, in the circumstances of this case, any possible severance would either reveal exempt information or result in disconnected snippets of information being revealed.

[90] Accordingly, I have only included with the ministry's copy of this order the pages of records which I have ordered to be disclosed in part, or in full.

ORDER:

1. I uphold the ministry's decision to withhold the personal information in the records that is highlighted in yellow on a copy of the pages of the records included with the ministry's copy of this order. To be clear, the ministry is not to disclose the information highlighted in yellow. Nor is the ministry to disclose any information in those pages of records that the ministry withheld under section 14(1) or that it identified as non-responsive to the request.

2. I do not uphold the ministry's decision to withhold the balance of the information in the pages of records included with the ministry's copy of this order.

3. I order the ministry to disclose the pages of records included with the ministry's copy of this order to the appellant, with the exception of the information set out in paragraph 1 above, by **January 3, 2014** but not before **December 30, 2013**.

[30] Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

4. In order to ensure compliance with this order, I reserve the right to require the ministry to provide me with a copy of the material sent to the appellant.

Original signed by: November 26, 2013
Steven Faughnan
Adjudicator