

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4260

Appeal PA20-00208

Ministry of the Solicitor General

May 10, 2022

**Summary:** As a result of a medical emergency, a man incarcerated at a correctional facility was transported to a nearby hospital where he later died. His parents made a request to the ministry to access their son's file at the correctional facility, including his medical file. The ministry initially denied access to all of the records pending the conclusion of an unspecified investigation. The parents appealed to the IPC.

Shortly after the mediation concluded and the inquiry had begun, the investigation concluded and the ministry then decided to disclose most of the records at issue taking into account section 21(4)(d) of *FIPPA*, which requires disclosure of personal information about a deceased individual to a close relative of the deceased person if to do so would be desirable for compassionate reasons.

The ministry withheld some information on the basis of sections 14(1)(j), (k) and (l), pertaining to security of the correctional facility. Some information was withheld on the basis of section 21(1), relating to personal information of third parties, not the appellants nor their son. One page was withheld because the ministry asserted that it was excluded from *FIPPA* due to the labour relations exclusion at section 65(6)3.

In this order, the adjudicator finds that the labour relations exclusion at section 65(6)3 applies to the page for which the ministry claimed it. She upholds part of the ministry's decision to withhold some information because it is not responsive to the request or because of the personal privacy exemption at section 21(1) of *FIPPA*, after considering section 21(4)(d) and the public interest override at section 23 of the *Act*. She also rejects the ministry's claims under sections 14(1)(j), (k) or (l). She orders the ministry to disclose the non-exempt information to the appellants.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 14(1)(j), 14(1)(k), 14(1)(l), 21(1), 21(4)(d), 65(6)3; *Personal Health Information Protection Act*, 2004, S.O. 2004, c. 3, Sched. A.

**Orders Considered:** Orders MO-2237 and PO-3732.

## **OVERVIEW:**

[1] As a result of a medical emergency, a man incarcerated at a correctional facility was transported to a nearby hospital and later died. His parents made a request to the Ministry of the Solicitor General (the ministry) for a copy of their son's file maintained by the correctional facility, including his complete medical file. The parents, now the appellants, referred to both the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) and the *Personal Health Information Protection Act* (*PHIPA*) in their request.

[2] The ministry issued an initial decision under *FIPPA* denying access to the requested records, "as the records concern a matter that is currently under investigation." The ministry did not provide any particulars of the investigation it referred to.<sup>1</sup> The ministry relied on several exemptions and an exclusion in the *Act* to withhold the information, including the law enforcement exemption (section 14(1)), the personal privacy exemption (section 21(1)),<sup>2</sup> and the labour relations exclusion (section 65(6)3).

[3] The appellants appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] A mediator was assigned to canvass the issues and to attempt to resolve the appeal. The ministry informed the mediator that the investigation was ongoing and that therefore its decision to withhold the records would not be revised. The appellants informed the mediator that they wished for the appeal to proceed to adjudication.

[5] In their access request and during the mediation, the appellants stated that they should be permitted to access their son's file on the basis of section 21(4)(d) of the *Act*, which requires disclosure of personal information about a deceased individual to a close relative of the deceased person if to do so would be desirable for compassionate reasons. At the mediation, the appellants also stated that any exemptions claimed should be overridden by the public interest override at section 23 of the *Act*, which requires disclosure when there is a compelling public interest that overrides the purpose

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<sup>1</sup> Although the ministry did not specify the nature of the investigation or who led it, it was not necessary in the circumstances of the issues before me to inquire further about it.

<sup>2</sup> The ministry's decision (including its subsequent decisions) also referred to sections 49(a), 49(b) and 49(e). These exemptions would only have been relevant if the records contained the appellants' personal information. These sections were not argued by either of the parties in this inquiry and, as discussed below, none of the records at issue in this order contain the appellants' personal information.

of an applicable exemption.

[6] The file was transferred to the adjudication stage of the appeal and I conducted a written inquiry.

[7] After the inquiry began, the ministry issued two supplementary decisions in which it disclosed much of the information at issue to the appellants, including the deceased's complete medical file. The ministry explained that it had revised its initial decision because the unspecified investigation was at an end.

[8] After reviewing the newly-disclosed records, the appellants informed me that they wished to pursue access to the remaining withheld information and so the inquiry proceeded.

[9] In its supplementary decisions, the ministry:

- narrowed the list of exemptions claimed,
- explained that in deciding to disclose the records, it had – as had been suggested by the appellants – considered section 21(4)(d), the section that requires disclosure of a deceased person's personal information to close relatives when it is desirable to do so for compassionate reasons, and
- explained that some of the information that had been identified in its search for records is, upon further review, outside of the scope of the request and access is denied on that basis.

[10] I invited and received representations from the ministry and the appellants about the scope of the request, the labour relations exclusion, the remaining section 14(1) law enforcement claims, and the remaining section 21(1) personal privacy claims. I also invited the parties to make representations about whether the appeal ought to proceed under *FIPPA* or *PHIPA* because the appellants' original request was made under both statutes.

[11] The ministry's representations were shared with the appellants in full. I did not find it necessary to share the appellants' representations with the ministry because they did not raise any issues that had not already been addressed. I also took into consideration the materials filed by the appellants when making their appeal to the IPC.

[12] In this order, I explain why the remaining issues under appeal are decided under *FIPPA*, not *PHIPA*.

[13] Also in this order, I find that the labour relations exclusion at section 65(6)3 applies to the one page of the records for which the ministry claimed it. I also partially uphold the ministry's decisions to withhold some information because it is not responsive to the request.

[14] I reject the ministry's claims that some of the information is exempt under sections 14(1)(j), (k) or (l), relating to safety of a correctional facility.

[15] I then consider the application of the personal privacy exemption at section 21(1), taking into account that the records contain the personal information of the deceased, as well as (in some cases) other third parties. For the information consisting of the deceased's personal information only, I find that disclosure would not constitute an unjustified invasion of personal privacy.

[16] However, I find that disclosure of the deceased's personal information that is intertwined with third parties' personal information would constitute an unjustified invasion of personal privacy of the third parties and that neither the exception for compassionate grounds at section 21(4)(d) nor the public interest override at section 23 applies to this information.

[17] As a result of my findings, I order the ministry to disclose the non-exempt information to the appellants.

## **RECORDS:**

[18] The ministry identified 274 pages of records consisting of emails, forms, logs, and reports pertaining to the appellants' son while incarcerated at the correctional facility.

[19] The table below summarizes the remaining pages or portions of pages that are at issue, together with the applicable exemption or exclusion claim. (There were some discrepancies between the ministry's representations and the ministry's Index. In these instances, the representations prevailed over the Index and the table below reflects the representations.)

<b>Claim(s)</b>	<b>Pages</b>
14(1)(j),(k),(l) and/or 21(1)	48 (partial), 49 (partial), 55 (partial), 73 (partial), 81 (partial), 144 (partial), 183 (partial), 244 (partial), 248 (partial).
Not responsive (N/R), 14(1)(l) and/or 21(1)	82-83 (partial).
N/R	84-85 (partial), 131 (partial), 172 (full).
N/R and/or 14(1)(l)	86-89 (partial), 90 (full), 173-174 (partial), 177 (partial).
14(1)(l)	91 (partial), 98 (partial), 100 (partial), 101 (partial), 102 (partial), 103 (partial), 104 (partial), 106-108 (partial), 112-113 (partial), 115-117 (partial), 187 (partial), 232

	(partial).
21(1)	95 (partial), 233 (partial), 236 (partial), 238 (partial), 242 (partial), 250 (partial), 253-254 (partial).
65(6)	147 (full).

## ISSUES:

- A. Why this appeal is proceeding under the *Freedom of Information and Protection of Privacy Act* rather than the *Personal Health Information Protection Act*.
- B. Does the labour relations exclusion at section 65(6) exclude page 147 from the *Act*?
- C. Is some of the information identified in the ministry's search not responsive to the request because it does not reasonably relate to the deceased?
- D. Do the records contain "personal information" as defined in section 2(1) and, if so, whose?
- E. Do the discretionary exemptions at sections 14(1)(j), (k), or (l) for law enforcement apply to the information at issue?
- F. Does the mandatory exemption at section 21(1) for personal privacy apply to the personal information at issue?
- G. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?

## DISCUSSION:

### **Issue A: Why this appeal is proceeding under the *Freedom of Information and Protection of Privacy Act* rather than the *Personal Health Information Protection Act*.**

[20] *PHIPA* sets out rules for the collection, use and disclosure of personal health information maintained by health information custodians.<sup>3</sup>

[21] Part of the access request was for the appellants' son's medical file at the correctional facility's medical centre. Understandably therefore, the appellants referred

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<sup>3</sup> "Personal health information" is defined in section 4 of *PHIPA*. "Health information custodian" is defined in section 3 of *PHIPA*.

to *PHIPA* in their request. They also referred to *FIPPA*.

[22] The ministry made its access decisions referring only to *FIPPA*. In these decisions, the ministry fully disclosed records from the medical centre at the correctional facility. As I will explain further below, the records from the medical centre are not at issue in this appeal because they have been fully disclosed.

[23] I invited the parties to make representations about whether *PHIPA* should govern part of the request. (I made this invitation at a time prior to the ministry's supplementary access decisions in which it disclosed much of the information at issue, including the entire file from the medical centre.)

[24] In its representations, the ministry submitted that because the records of the medical centre had already been disclosed, the appeal should continue to proceed under *FIPPA*.

[25] The appellants' representations in this inquiry did not address the issue; however, they have consistently and clearly argued that they should be granted maximum access to the requested records.

### ***Discussion***

[26] The ministry fully disclosed pages 1-47 of the records, which it identified as "health care records." Based on my review of the "health care records," they include treatment notes and other similar records made or maintained by healthcare practitioners in the correctional facility's medical centre about the deceased's medical condition or his incarceration.

[27] If any of the information in the "health care records" was at issue in the appeal, it may have been necessary to decide whether access to them is governed by *PHIPA* instead of *FIPPA*.<sup>4</sup> However, because of the ministry's decision to disclose the "health care records" in their entirety it is not necessary to consider this issue in relation to the health care records.

[28] As will be discussed in more detail below at Issue D, the remaining records contain the deceased's personal information. In some cases, this includes information about his medical condition.

[29] However, based on my review of them, the remaining records (i.e. pages 48 to 247) are created, maintained or used by correctional officers and other non-healthcare staff at the correctional facility. In other words, the remaining records are those that are in the custody of the ministry operating the correctional facility.

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<sup>4</sup> Taking into account sections 3(1)1 and 8(4), among others, of *PHIPA*. See for example, *PHIPA* Decision 117.

[30] The ministry is not a health information custodian as defined in *PHIPA*.<sup>5</sup> It is, however, an institution under *FIPPA*. This means that *FIPPA* is the prevailing authority for access to the information remaining at issue.<sup>6</sup> In these circumstances, there is no reasonable basis to find that *PHIPA* applies to any of the remaining information at issue and I have therefore proceeded pursuant to *FIPPA*.

[31] Before I leave this issue and with the understanding that the appellants' wish is to obtain maximum access to the records, I observe that there is no prejudice to the appellants by the appeal proceeding pursuant to *FIPPA*. In other words, the appellants would have had no greater right of access to the information remaining at issue if the ministry were a health information custodian and the appeal had been decided under *PHIPA*.

**Issue B: Does the labour relations exclusion at section 65(6) exclude page 147 from the *Act*?**

[32] The ministry withholds page 147 on the basis that it is excluded from the *Act*. The ministry relies on paragraph 3 of section 65(6). Page 147 is a memorandum from a ministry employee to another ministry employee. As will be elaborated on below, it is a notice given pursuant to an applicable collective agreement.

[33] Section 65(6) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.<sup>7</sup>

[34] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.<sup>8</sup>

[35] Section 65(6)3 states:

Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[36] If section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies, the records are excluded from the scope of the *Act*, meaning that

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<sup>5</sup> See *PHIPA*, section 3(1).

<sup>6</sup> Section 8(1).

<sup>7</sup> Order PO-2639.

<sup>8</sup> *Ontario (Ministry of Community and Social Services) v. John Doe*, 2015 ONCA 107.

the IPC may not order the record to be disclosed.

[37] The type of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.<sup>9</sup> Section 65(6) does not exclude all records concerning the actions or inactions of an employee of the institution simply because their conduct could give rise to a civil action in which the institution could be held vicariously liable for its employees' actions.<sup>10</sup>

[38] Broken down into its requisite parts, to show that section 65(6)3 applies, the ministry must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or use was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[39] The ministry says that, on the face of it, record 147 was prepared by the ministry. It explains that it is a memorandum that was prepared to serve as notice under a relevant collective agreement about an investigation conducted by ministry staff. It argues that therefore the memorandum was prepared for discussions or communications in relation to labour relations in which the ministry has an interest as an employer.

[40] For the record to have been prepared in relation to (in this case) communications, there must be "some connection" between the preparation and the communications.<sup>11</sup> Based on my review of it, record 147 was prepared by the ministry in relation to communications and the ministry has therefore established that parts 1 and 2 are present.

[41] To establish part 3, the communications must be "about" labour relations or employment matters. The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships.

[42] Based on my review of it, record 147 is exclusively about the ministry's obligations as an employer under a relevant collective agreement. The ministry is

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<sup>9</sup> *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.) (*Ministry of Correctional Services*).

<sup>10</sup> *Ministry of Correctional Services*, cited above.

<sup>11</sup> Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).



providing a required notice as the employer party to a relevant collective agreement. I find therefore that page 147 is excluded from the *Act* because of section 65(6)3.

[43] I considered whether any of the exceptions in section 65(7) of the *Act* are present and I agree with the ministry that they are not. The record is not in and of itself an agreement of any kind (paragraphs 1-3 of section 65(7)), nor is it an expense account (paragraph 4).

[44] I therefore uphold the ministry's decision to withhold page 147.

**Issue C: Is some of the information identified in the ministry's search not responsive to the request because it does not reasonably relate to the deceased?**

[45] The ministry submits that some of the information has been withheld because it does not relate to the appellant's son and was included within the collection of identified records in error. In other words, the ministry says that some of the information is "not responsive" to the request.

[46] The appellants did not specifically address this issue although I have taken into account that the appellants' main objective is to understand the circumstances leading up to their son's death and that they seek maximum access to related information.

[47] The request was, in part:

We are writing to request ... a copy of [the deceased's] complete correctional file regarding his stay at [a specified correctional facility], to better understand his circumstances there, as concerned parents.

We understand that the [*Act*] permits disclosure of personal information about a deceased person, to close relatives for compassionate reasons.

We are also writing to request his complete medical file from his time at the institution. ... We understand that [PHIPA] permits disclosure of personal health information to next of kin relating to the circumstances of death. ...

[48] To be considered responsive to a request, records must "reasonably relate" to the request.<sup>12</sup> Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*.

[49] The ministry says that the following information is not responsive: 82-89 (partial), 90 (full), 131 (partial), 172 (full), 173-174 (partial), 177 (partial).

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<sup>12</sup> Orders P-880 and PO-2661.

[50] Having reviewed the information at issue and considering the request, I make the following findings.

***Pages 82-84, 88 and 89***

[51] Pages 82-84, 88 and 89 are pages from log books; they are not dedicated solely to the appellants' son, but to a specific area within the correctional facility (but not the medical centre) on the date of the medical emergency. Only the entries that pertain directly to the appellants' son have been disclosed to the appellants. Some of the other entries relate specifically to other individuals (inmates or staff), but some relate to general matters at the correctional facility.

[52] In my view, some portions of the logbook on pages 82, 83, 88 and all of page 84 consist of non-responsive information because they record events that are not proximate in time to the medical emergency, or refer specifically to another inmate's activities that are unrelated to the appellants' son.

[53] However, I find that some of the withheld information on pages 82, 83, 88 and 89 is responsive to the request. I find that this information is related to the request because it is information about activities and events within the correctional facility in the location where the deceased was housed. As noted, the objective of the appellants' request is to obtain information that would shed light on the circumstances surrounding their son's death, and I find that a liberal reading of the appellants' access request supports such an interpretation. Although I find this information to be responsive, I must also consider the ministry's alternative claims that this information is exempt from disclosure on the basis of sections 14(1)(l) and/or 21(1), which I will do under Issues E and F below.

***Page 85***

[54] Page 85 is a cell location sheet, which is a table containing information about which inmates occupied which cells. The row identifying the location of the appellant's cell has been disclosed. I agree that the remaining information is not responsive to the request because it does not reasonably relate to the deceased's circumstances.

***Pages 86 and 87***

[55] Pages 86 and 87 are nearly identical copies of a log book reflecting a count of inmates in a part of the correctional facility. The portion directly related to the appellants' son has been disclosed. I agree that the remainder of the withheld information on pages 86 and 87 is not responsive to the request because it does not reasonably relate to the appellants' son.

***Page 81***

[56] I find that the withheld portions on page 81 are also not responsive. Although

the ministry has not expressly made this claim in relation to page 81, it contains a similar type of information as in pages 86 and 87, in that it reflects a count of inmates entering or leaving the correctional facility. The ministry has fully disclosed the entry pertaining to the deceased. In my view, the remaining information is not responsive because it describes other discrete events that are unrelated to the deceased.

***Page 90***

[57] Page 90, which has been withheld in its entirety, is a log book from a date several weeks prior to the medical emergency and does not reference the appellants' son. I agree with the ministry that this page is not related to the appellants' son nor the circumstances leading up to the medical emergency and I find that it is not responsive to the request because it does not reasonably relate to the appellants' son.

***Page 131***

[58] Unlike some of the records discussed above (eg. log books), page 131 is a brief report pertaining exclusively to the appellants' son. All but a small portion of it has been disclosed. The withheld portion consists only of the name of another inmate. According to the ministry, the other inmate's name was used in error in the report. Having reviewed page 131 and other information contained in the records, it is clear that the other inmate's name was used in error. To be clear, the person who made the report used the wrong name to refer to the appellants' son when they prepared the report at page 131.

[59] Although the other inmate's name appears on page 131 in error, I am unable to conclude that this information may be withheld on the basis that it is not responsive to the request. As indicated, page 131 is a report that pertains only to the appellant – that there is an error in it does not make the information non-responsive. However, I will consider below under Issue F whether the mandatory personal privacy exemption at section 21(1) of the *Act* applies to that information.

***Page 172***

[60] Page 172 has been withheld in its entirety. It is an email that pertains only to another individual and matter. I agree with the ministry that it is not responsive to the appellants' request because it does not reasonably relate to the appellants' son.

***Pages 173, 174 and 177***

[61] Information on pages 173, 174 and 177 has been withheld on the basis that it is not responsive, among other claims. Pages 173, 174 and 177 consist of email exchanges among staff at the correctional facility involving the appellants' son and other unrelated matters. In my view, all of the information on these pages is responsive with the exception of one portion contained on page 177, which pertains entirely to another individual.

[62] Although I find the other withheld information on pages 173, 174 and 177 is responsive, I must consider the ministry's alternative claim that this information may be withheld on the basis of section 14(1) or whether any of the responsive information consists of personal information and is possibly subject to the mandatory personal privacy exemption at section 21(1) of the *Act*. I will address this issue below under Issues E and F, below.

### ***Summary***

[63] As a result of my findings above:

- I uphold the ministry's decision not to disclose the entirety of pages 90 and 172, all of the withheld information on pages 84 and 85, and portions of the withheld information on pages 81, 82, 83, 86, 87, 88, and 177 on the basis that the information is not responsive to the appellant's request.
- I will consider under Issues E and F below the ministry's alternative exemption claims with respect to the portions of the withheld information pages 82, 83, 88, 89, 131, 173, 174, 177 that I have found to be responsive.

### **Issue D: Do the records contain "personal information" as defined in section 2(1) and, if so, whose?**

#### ***Context and positions of the parties***

[64] In this inquiry, the ministry relies on the mandatory personal privacy exemption at section 21(1) of the *Act* to withhold some information on the basis that it contains the personal information of individuals other than the appellants or the deceased. The ministry disclosed most of the responsive information to the appellants pursuant to section 21(4)(d) of the *Act*, which requires disclosure of a deceased individual's personal information to a close relative when disclosure is desirable for compassionate reasons.

[65] The main basis of the appellants' appeal is their assertion that their son's personal information ought to be disclosed to them as close relatives pursuant to section 21(4)(d). When the appellants filed their appeal to the IPC – which was before any records were disclosed to them – they stated, "if there is information that exposes personal information of other persons that could be redacted."

[66] It is therefore necessary to determine whether the information at issue consists of personal information and if so whose.

#### ***Analysis and findings***

[67] For the reasons that follow, I find that the information at issue consists of the deceased's personal information as well as the personal information of individuals other

than the deceased or the appellants.

[68] Section 2(1) of the *Act* defines “personal information” as “recorded information about an identifiable individual.” Information is “about” the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Information is about an “identifiable individual” if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with other information.<sup>13</sup>

[69] Section 2(2) of the *Act* states that personal information does not include information about an individual who has been dead for more than thirty years. The deceased’s information in the records, therefore, qualifies as his personal information if it reveals something of a personal nature about him.

[70] Generally, information about an individual in their professional, official or business capacity is not considered to be “about” the individual.<sup>14</sup> In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.<sup>15</sup>

[71] Section 2(1) of the *Act* gives a list of examples of personal information, such as information relating to the individual’s race, ethnic origin or family status (paragraph (a)), information relating to the individual’s medical, criminal or employment history (paragraph (b)), the individual’s identifying numbers or symbols (paragraph (c)), and the individual’s name where the disclosure of their name would reveal other personal information about them (paragraph (h)).

### *The deceased*

[72] Almost all of the records responsive to the request document and describe the deceased’s incarceration at the correctional facility, including his location in the facility, his interactions with correctional officers and medical staff, as well as documentation about activities occurring in the facility in proximity to him. The information in the records reveals something of a personal nature about the deceased and it is his personal information.

[73] The remaining withheld information is contained within these records and is therefore the personal information of the deceased. However, it is important to stress that most of the deceased’s personal information has already been disclosed. All that remains are small portions of records that have otherwise been disclosed to the appellants. For example, the ministry has withheld words or a phase from a log entry

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<sup>13</sup> Order PO-1880, upheld on judicial review in Ontario (Attorney General) v. Pascoe, [2002] O.J. No. 4300 (C.A.).

<sup>14</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>15</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

pertaining to the deceased on the basis of section 14(1) (law enforcement). Or, on the basis of section 21(1), the ministry has withheld the names only of other individuals appearing on a court document pertaining to the deceased. When it has withheld information on the basis of section 21(1), the ministry does so because it submits that it is the personal information of *other individuals* and not the deceased.

*The appellants*

[74] Having reviewed the records remaining at issue, I find that none of them contain the appellants' personal information. For completeness, I observe that some of the records *that have already been fully disclosed* to the appellants contain their personal information.

*Other individuals*

[75] I will now turn to the ministry's claims that the records contain personal information of individuals other than the appellants or their son – who I will generally collectively refer to as third parties in the reasons below. The ministry makes two types of claims in this regard.

[76] First, it submits that some of the records contain the personal information of a ministry employee who is identified as having claimed certain benefits and that this information is inherently personal because it was not prepared in response to the employee's normal duties. Information of this nature is contained in a single sentence appearing on pages 49, 73, and 183, which have otherwise been disclosed in full.

[77] I agree with the ministry that disclosure of the name of the employee in the context of the other information in the records would reveal something personal about the employee and I find that it is personal information. In reaching this conclusion, I considered that information about an individual in their official capacity is not considered to be "about" the individual and therefore is not personal information. However, it is my view that this is a case where disclosure of this employee's name in conjunction with information about the benefit claimed would reveal something of a personal nature about that employee and it is therefore personal information.

[78] I considered whether the name of the employee could be severed from the sentence. However, I have concluded that based on the surrounding circumstances the employee would nevertheless be identifiable and I have therefore concluded that the entirety of the sentence on pages 49, 73 and 183 is personal information.

[79] Next, the ministry submits that the remaining withheld information contains the personal information of other individuals, including inmates at the correctional facility and, possibly, individuals associated with the offences for which the deceased was charged.

[80] I find that the withheld information on pages 55 and 131<sup>16</sup> contains personal information of other inmates. Disclosure of the information on these pages would reveal something of a personal nature about these individuals, including details of their incarceration at the correctional facility or involvement in the correctional system. This includes their names, identifying inmate numbers or their locations within the correctional facility.

[81] The following pages contain the names of individuals whom the deceased was prohibited from contacting by an order of the Ontario Court of Justice in the warrant remanding him into custody: 48, 95, 144, 233, 236, 238, 242, 244, 248, 250, 253 and 254. Disclosure of the names on these pages would reveal something of a personal nature about these individuals and their connection to the deceased or the deceased's alleged offences. That their names appear on these pages is these individuals' personal information.

[82] There is some information contained on these pages<sup>17</sup> that does not consist of personal information. Generally speaking, this includes administrative information or, in some cases, titles of fields of information from the ministry's information systems or forms.

[83] Because the section 21(1) exemption is mandatory, I have also reviewed the information that I have found to be responsive on pages 82, 83, 88, 89, 173, 174, 177 to determine whether this information contains any personal information of third parties.

[84] I find that page 177 contains personal information pertaining to another inmate. Without revealing the content of this record, this page contains information of a personal nature about this individual.

[85] Pages 173, 174, 177 contain phone numbers for medical staff and correctional officers who were involved in the medical incident. The names of these individuals have already been disclosed to the appellants, along with the rest of the page. The ministry did not claim the personal privacy exemption over the phone numbers, claiming only the law enforcement exemption.

[86] Based on my review of these pages and after comparing with the business phone numbers of other correctional officers in the records (that have been disclosed), I conclude that the phone numbers on pages 173, 174 and 177 are the personal phone numbers for these individuals that were gathered for purposes of the investigation. In

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<sup>16</sup> As indicated above, the ministry did not claim that section 21(1) applied to the withheld information on page 131 (the other inmate's name used in error). Because of my finding here – that the name is another individual's personal information, I must still consider the application of section 21(1) to this information because section 21(1) is a mandatory exemption – meaning that the ministry must not disclose it if it applies.

<sup>17</sup> Pages 48, 95, 144, 233, 236, 238, 242, 244, 248, 250, 253 and 254.

my view, these personal phone numbers of correctional officers and medical staff are identifying numbers or symbols (paragraph (c) of the definition of personal information) that appear in a personal, rather than business capacity, and are therefore the personal information of these individuals.

[87] The responsive information on pages 82, 83, 88 and 89 does not contain personal information. It contains administrative information and information about the activities of correctional officers.

**Issue E: Do the discretionary exemptions at sections 14(1)(j), (k), or (l) for law enforcement apply to the information at issue?**

[88] Having found that the records at issue contain the personal information of individuals other than the appellants, I must consider whether the personal privacy exemption in section 21(1) applies. Before doing so, and because there is some overlap in the information withheld under sections 21(1) and 14(1), I will first address the ministry's section 14(1) claims.

[89] Of the pages remaining at issue, the ministry withholds portions of information on the following pages on the basis of the sections 14(1)(j), (k) or (l): 48, 49, 55, 73, 82, 83, 88, 89, 91, 98, 100, 101, 102, 103, 104, 106-108, 112, 113, 115, 116, 117, 144, 173, 174, 177, 183, 187, 232, 244, 248.

[90] Sections 14(1)(j), (k) and (l) state:

14 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[91] Many of the exemptions listed in section 14 apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record. The section 14(1) exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.<sup>18</sup>

[92] To establish that section 14(1) applies, an institution must provide detailed evidence about the risk of harm if the record is disclosed. Harm can sometimes be

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<sup>18</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) ("Fineberg").



inferred from the records themselves or the surrounding circumstances.<sup>19</sup>

[93] Institutions resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>20</sup> However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.<sup>21</sup>

[94] For section 14(1)(j) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the escape from custody of a person who is under lawful detention.

[95] For section 14(1)(k) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to jeopardize the security of a centre for lawful detention.

[96] For section 14(1)(l) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime.

### ***Representations***

[97] The ministry refers to *Fineberg*,<sup>22</sup> in support of the principle that harms associated with disclosing correctional records are not necessarily obvious or predictable and the specific context in which those records are created must be considered. Further, the ministry refers to Order PO-2332, in which the adjudicator held in relation to the application of section 14(1)(k) involving a security audit in a correctional institution that, “even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security.”

[98] The ministry says that the withheld information, contained generally within correctional records, could reasonably be expected to cause the harms in sections 14(1)(j), (k) and (l). The ministry argues that the three exemptions claimed are closely related in the context of the present appeal and it therefore makes the following general arguments in relation to all three, collectively.

[99] Generally, the ministry submits that records describing operational processes in the correctional institution by their very nature pose a risk because there are no restrictions on further dissemination of such information once disclosed.

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<sup>19</sup> Orders MO-2363 and PO-2435.

<sup>20</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>21</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

<sup>22</sup> Cited above.

[100] It says that the records contain “flags and alerts in institutional records,” citing page 48 as an example. The ministry argues that this type of information consists of sensitive information that is used to communicate internally and provide notice to staff on issues of critical importance, such as risk factors posed by inmates.

[101] Referring to page 98 as an example, the ministry argues that the records contain information about shift scheduling and breaks. The ministry says that it is “concerned that the disclosure of this information would provide details as to the start times for correctional officers shifts as well as their breaks” and that this could be used to identify institutional vulnerabilities based on the beginning and ending of shift times and other breaks.

[102] Referring to page 187 as an example, the ministry argues that if information that reveals the structure and layout of ministry databases was disclosed, it would render those databases vulnerable.

[103] Referring to page 183<sup>23</sup> as an example, the ministry argues that information that identifies that a ministry employee claimed a benefit ought to be withheld under either of sections 14(1)(j), (k) or (l) because there is a policy interest in recording this kind of information that would be discouraged if disclosure was ordered.

[104] The appellants do not specifically address the section 14(1) exemption. However, they argue, in general, that they are distrustful of the correctional facility and its resistance to disclosing records.

### ***Findings***

[105] I am not persuaded by the ministry’s evidence provided during the inquiry or on the basis of the records themselves that the harms in section 14(1)(j), (k) and (l) could reasonably be expected to occur if the information withheld on these bases is disclosed.

[106] I will consider first the ministry’s arguments about information that reveals shift schedules. In most cases, information of this nature in the records is a snippet of information scattered within other records that have already been fully disclosed.<sup>24</sup> I am unable to discern how disclosure of the snippets of information about a name of a shift or a particular officer’s start, end or break time could reveal the entirety of correctional facility’s shift and break times in general. Even if I was so persuaded, I am unable to conclude on the basis of the information before me that this kind of information could reasonably be expected to facilitate the escape from custody of a person who is under lawful detention (j), jeopardize the security of the correctional facility (k), or facilitate the commission of an unlawful act or hamper the control of crime (l).

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<sup>23</sup> The ministry’s representations refer to page 83 but this type of information is not contained on page 83; it is contained on page 183.

<sup>24</sup> Pages 88, 89, 91, 98, 100, 101, 102, 103, 104, 106, 107, 112, 113, 115, 116, 117, 177.

[107] Regarding the “flags and alerts” and the database information<sup>25</sup> I am unpersuaded that the fact that the correctional facility tracks and communicates different types of alerts, or has the capacity to sort this information, within the facility could reasonably be expected to give rise to the suggested harms. The alert and database information is in the nature of “boilerplate” information that is contained within the correctional facility’s information system. The types of boilerplate alerts described in the records at issue and the portions of the database are, in my view, unsurprising types of alerts that one would expect to see within a correctional facility.

[108] Regarding the information pertaining to the employee claiming a benefit,<sup>26</sup> I am unpersuaded on the basis of the evidence before me that disclosure of this kind of information could jeopardize security of the correctional facility, the only section 14(1) harm that appears to be arguable. While I accept the ministry’s point that it is desirable to encourage disclosure and record-keeping when an employee seeks a benefit, I am unable to conclude how disclosure of this particular information could reasonably be expected to jeopardize the security of the facility itself.

[109] Some of the records contain withheld information that could generally fall into the category of operational information, such as the routine or scheduled actions of correctional officers.<sup>27</sup> The ministry argues that disclosure of operational information by its very nature could cause risks because of the lack of control over how the information is disseminated. In my view, the risk of disclosure of the kind of operational information on the specified pages sheds light on actions that occurred during a specific time period in relation to events involving or surrounding the deceased – but nothing more. On the basis of the evidence before me I am unable to conclude that disclosure of the operational information on the specified pages could reasonably be expected to facilitate the escape from custody of a person who is under lawful detention (j), jeopardize the security of the correctional facility (k), or facilitate the commission of an unlawful act or hamper the control of crime (l).

[110] In reaching these conclusions, I have been mindful that, in some circumstances, information that may otherwise appear innocuous could reasonably be expected to cause the relevant harms. However, in order for me to make such a conclusion, I would need sufficient evidence to do so. In the present appeal, to make such a conclusion, I would be required to speculate and devise a scenario under which such harms would occur. In my view, the ministry has not met its burden to show how the harms could reasonably be expected to result from disclosure.

[111] In conclusion, I find that section 14(1) does not apply to the information the ministry withheld on that basis. I will now consider whether the mandatory personal privacy exemption applies to any of the information remaining at issue.

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<sup>25</sup> Pages 48, 144, 187, 232, 244, and 248.

<sup>26</sup> Pages 49, 73, and 183.

<sup>27</sup> Pages 82, 83, 88, 89, 103, 104, 106, 107, 108, 173, 174, 177.

**Issue F: Does the mandatory exemption at section 21(1) for personal privacy apply to the personal information at issue?**

[112] Section 21(1) of the *Act* creates a general rule that an institution cannot disclose personal information about another individual to a requester. The requesters in this case are the appellants.

[113] Section 21(1) lists a number of exceptions to the general rule prohibiting disclosure of personal information. The ministry and the appellant both make arguments in relation to the section 21(1)(f) exception only. I agree that none of the other exceptions (21(1)(a) to (e)) are relevant to the circumstances of this appeal.

[114] The section 21(1)(f) exception provides that an institution must disclose another individual's personal information to a requester if to do so would not be an "unjustified invasion of personal privacy." In other words, personal information may only be disclosed if to do so would not be an unjustified invasion of personal privacy. Sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[115] In this appeal, the ministry refers only to sections 21(2) and 21(4)(d). The appellants rely on section 21(4)(d). Neither of the parties addressed section 21(3) and, in the circumstances, it is my view that I do not need to make any findings on section 21(3).

[116] Section 21(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.<sup>28</sup> Some of the factors listed in section 21(2) weigh in favour of disclosure, while others weigh against. If no factors favouring disclosure are present, the section 21(1) exemption – the general rule that personal information should not be disclosed – applies because the exception in section 21(1)(f) has not been established.<sup>29</sup>

[117] The list of factors under section 21(2) is not a complete list. The institution must also consider any other circumstances that are relevant, even if these circumstances are not listed under section 21(2).<sup>30</sup>

[118] Of particular relevance in this appeal is section 21(4)(d). Regardless of the outcome of the analysis under section 21(2) (or 21(3)), section 21(4)(d) provides that disclosure of a deceased individual's personal information *to a close relative* would not be an "unjustified invasion of personal privacy" if disclosure is desirable for compassionate reasons.

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<sup>28</sup> Order P-239.

<sup>29</sup> Orders PO-2267 and PO-2733.

<sup>30</sup> Order P-99.

## ***Representations***

[119] The ministry does not seek to withhold any information on the basis that it is the deceased's personal information. Rather, the ministry submits that it is required by section 21(1) to withhold the personal information of third parties contained in the records.

[120] The appellants argue that they are entitled to the deceased's personal information because of the compassionate grounds exception in 21(4)(d), which has been discussed above and which will be discussed further below. On this point, it is important to acknowledge that the ministry has disclosed the lion's share of the information in the records pursuant to section 21(4)(d).

[121] Although the ministry makes no privacy claims on behalf of the deceased, I must consider his privacy rights because section 21(1) is a mandatory exemption and at Issue D, above, I have found that the information at issue consists of the deceased's personal information (as well as the personal information of other third parties).

[122] Pertaining to the personal information of other individuals, the ministry points to the factor for highly sensitive information at section 21(2)(f), which states:

(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,

(f) the personal information is highly sensitive;

[123] The ministry submits that correctional records are by their very nature, highly sensitive.

[124] The ministry also explains that it considered section 21(4)(d) (compassionate grounds) when making its decision to disclose the deceased's personal information but that the compassionate grounds considerations do not apply to the remaining withheld information, which it says consists of the personal information of third parties and not the deceased.

[125] The appellants explain that they seek access to the remainder of the information because they have questions about what happened to their son in the time that led up to the medical emergency. They dispute that the ministry has any reason to deny them access to the remaining information. From the outset, the appellants have referred to section 21(4)(d) (compassionate grounds) as a basis for why the ministry ought to disclose all of the records to them.

[126] Section 21(4)(d) says:

(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 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.

[127] Although not specifically stated, giving the appellants' representations a broad reading, I understand that they also argue that disclosure is desirable for subjecting the correctional facility to public scrutiny, the factor at section 21(2)(a) that favours disclosure. It says:

(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;

[128] Again, giving the appellants' representations a broad reading, I also understand that they argue that I should consider an unlisted factor: they believe that the ministry has not been forthright with them about the events that led up to their son's medical emergency.

### ***Findings***

[129] The personal information that I must address can be grouped into five categories.

- Category 1 - the information withheld on the basis of section 14(1), which includes references to shifts, correctional facility databases, and operational information of the facility in relation to the deceased. This is the deceased's personal information. (Pages 48, 91, 98, 100, 101, 102, 103, 104, 106, 107, 108, 112, 113, 115, 116, 117, 144, 187, 232, 244, and 248.<sup>31</sup>)
- Category 2 - the responsive information on pages 82, 83, 88, 89.<sup>32</sup> This information consists only of the personal information of the deceased.
- Category 3 - the names and other identifying information of other inmates contained in the records. This information is both the personal information of the deceased and the other inmates.

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<sup>31</sup> This information is highlighted on the copy of the records provided to the ministry with this order.

<sup>32</sup> This information is highlighted on the copy of the records provided to the ministry with this order.

- Category 4 - the names of individuals from whom the deceased was restricted from contacting by order of the Ontario Court of Justice. This information is both the personal information of the deceased and the other individuals.
- Category 5 - the name and related information of a correctional employee who applied for benefits and the personal telephone numbers of employees involved in the medical incident relating to the deceased. This, which I will refer to as "employee information," is both the personal information of the deceased and the employees.

*Considering the factors in section 21(2)*

Categories 1 and 2 – deceased's personal information only

[130] As described above, the information at issue in Category 1 pertains to things ongoing in the correctional facility, such as references to shift names or the times of shifts or breaks, boilerplate language in forms or databases maintained by the correctional facility, and information about the activities of correctional officers all in relation to the deceased or the medical incident.

[131] Although it is the deceased's personal information, the withheld information in Categories 1 and 2 pertains more generally to the activities of the correctional facility staff.

[132] In my view, the section 21(2)(a) factor is relevant to determining whether disclosure of the Category 1 and 2 information would constitute an unjustified invasion of the privacy of the deceased.

[133] Section 21(2)(a) supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>33</sup> It promotes transparency of government actions.

[134] The appellants seek to subject the correctional facility and the ministry to public scrutiny regarding the circumstances of their son's incarceration and death. In my view, disclosure of the Categories 1 and 2 information is relevant to subjecting the correctional facility's actions to public scrutiny. The information would shed further light on the actions of the correctional facility in relation to the appellants' son.

[135] I have considered whether there are any factors that favour privacy protection over this information – that is, privacy protection over the deceased's personal information. In this case in relation to the information at issue, I am unable to conclude that any factors favouring privacy protection apply to weigh in favour of the deceased's privacy in relation to the information at issue.

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<sup>33</sup> Order P-1134.

[136] In my view, the section 21(1)(f) exception applies to the deceased's personal information in Categories 1 and 2, meaning that its disclosure would not constitute an unjustified invasion of personal privacy and it should therefore be disclosed.

Category 3 – personal information of the deceased and other inmates

[137] Category 3 consists of the names and other identifying information of other inmates. This is the personal information of both the deceased and the other inmates.

[138] Taking into account the context and content of the information at issue, it is my view that there are no factors favouring disclosure of these names and identifying information of the other inmates. That the inmates' information is included in the records at issue as a matter of mere administration. There is nothing in this information that sheds light on the deceased's interactions or activities at the correctional facility.

[139] Without any factors favouring disclosure, I find that the section 21(1)(f) exception does not apply and the mandatory section 21(1) exemption applies, subject to my findings below about the possible application of section 21(4)(d) to this information.

Category 4 – personal information of the deceased and individuals related to the offence

[140] Category 4 consists of the names of individuals from whom the deceased was restricted from contacting by order of the Ontario Court of Justice. This is both the personal information of the deceased and the other individuals.

[141] As described above, these individuals were identified prior to the deceased's incarceration, meaning that the no contact orders did not arise due to any events that may have occurred in the correctional facility. Taking this into account, there is no basis for me to conclude that they would assist with bringing public scrutiny over the events that occurred while the deceased was incarcerated at the correctional facility.

[142] There is no factor favouring disclosure of the Category 4 information and I therefore find that the section 21(1)(f) exception does not apply and the mandatory section 21(1) exemption applies, subject to my findings below about the possible application of section 21(4)(d) to this information.

Category 5 – personal information of the deceased and correctional employees

[143] Category 5 consists of the employee information, which is both the personal information of the deceased and the employees.

[144] In my view, there is no factor favouring disclosure of this information. I have considered but ruled out that disclosure of this information is desirable for subjecting the correctional facility to public scrutiny. I am unable to conclude that disclosure of this



information is desirable for subjecting the activities of correctional facility to public scrutiny. It contains no more and no less than the name of the officer, the benefit type and the personal phone numbers of other employees already known to the appellants.

[145] Because there is no factor favouring disclosure of the Category 5 information, I therefore find that the section 21(1)(f) exception does not apply and the mandatory section 21(1) exemption applies, subject to my findings below about the possible application of section 21(4)(d) to this information.

*Section 21(4)(d) – compassionate grounds*

[146] I will now consider whether the information in categories 3, 4 and 5 must be disclosed to the appellants because of section 21(4)(d), which states:

(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 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.

[147] In order for this section to apply, the following conditions must be present:

1. the records must contain the personal information of someone who has died,
2. the requester must be a spouse or “close relative” of the deceased individual, and
3. the disclosure of the personal information of the deceased individual must be desirable for compassionate reasons given the circumstances of the request.<sup>34</sup>

[148] The information in Categories 3, 4 and 5 contains the deceased’s personal information and the appellants, his parents, are his close relatives.<sup>35</sup>

[149] I must determine whether, “in the circumstances, disclosure is desirable for compassionate reasons,” taking into account factors such as the need to assist the appellants in the grieving process.<sup>36</sup> Section 21(4)(d) recognizes that for surviving family members, greater knowledge of the circumstances of their loved one’s death is by its very nature compassionate.<sup>37</sup>

[150] Personal information about an individual who has died can include information

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<sup>34</sup> Orders MO-2237 and MO-2245.

<sup>35</sup> Section 2(1) provides that “close relative” includes a parent.

<sup>36</sup> Order MO-2245.

<sup>37</sup> Order MO-2237.

that also belongs to another individual. The factors referred to in section 21(2) may provide some help in deciding whether the personal information belonging to the other individual should be disclosed for compassionate reasons. However, the overall circumstances must be considered when deciding whether the disclosure of information under section 21(4)(d) would interfere with that individual's right to privacy.<sup>38</sup>

[151] The ministry urges me to consider the breadth of the information already disclosed to the appellants pursuant section 21(4)(d) and take that account in making my assessment. It refers to Order PO-3732 in support of its position.

#### Finding about section 21(4)(d)

[152] The appellants seek to know the maximum amount possible about the actions of the ministry and the correctional facility in relation to their son's death. They seek to bring scrutiny and accountability to bear on the correctional facility.

[153] The ministry's decision to disclose most of the information at issue to the appellants pursuant to section 21(4)(d) has shed significant light on the circumstances of their son's incarceration and treatment in response to the medical incident.

[154] What I must decide is whether section 21(4)(d) requires further disclosure of the son's personal information in Categories 3, 4 and 5. On this issue, I observe that the withheld personal information in Categories 3, 4 and 5 consists of the names of other individuals, the fact that an employee claimed a benefit and the personal phone numbers of employees. The information at issue does not consist of descriptive information, such as a witness statement or witness account.

[155] In making my assessment about whether disclosure of this remaining information would be desirable for compassionate grounds, I may consider whether additional disclosure would interfere with the privacy rights of the third parties and may only order disclosure of as much of the personal information of others as is necessary to meet the purpose of section 21(4)(d).<sup>39</sup> I may also consider the amount and nature of information that has already been disclosed to the appellants.<sup>40</sup>

[156] While I may take these things into account, my focus is whether disclosure of the information at issue is desirable for compassionate reasons. Section 21(4)(d) recognizes that for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.<sup>41</sup>

[157] For the reasons that follow, I find that section 21(4)(d) does not apply to the personal information in Categories 3, 4 and 5.

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<sup>38</sup> Order MO-2237.

<sup>39</sup> Orders MO-2237, PO-3732.

<sup>40</sup> Order PO-3732.

<sup>41</sup> Order MO-2237.

[158] I have reviewed the pieces of information at issue within the context of the entire set of records that was disclosed to the appellants.

[159] To begin, there is no arguable basis to assert that the information in Category 4, pertaining to individuals who had no involvement in the deceased's stay at the correctional facility, could shed any light on the deceased's death. There is therefore no basis for me to conclude that disclosure of this information is desirable for compassionate reasons. Section 21(4)(d) does not apply to the information in Category 4 and I uphold the ministry's decision to withhold this information.

[160] Regarding the information in Categories 3 (other inmates) and 5 (employee information), it is my view that the information pertains mainly to the inmates or the employees and not the deceased, and could not shed any further light on the circumstances of the deceased's death. This is particularly so when I considered the comprehensive disclosure that the appellants have already received. In reaching this conclusion, I considered also that disclosure of these pieces of information would negatively impact the privacy rights of the third parties.

[161] I have considered prior orders of the IPC where an adjudicator has found that section 21(4)(d) applies to a deceased's person's personal information that is co-mingled with third parties. In those circumstances, the information at issue often has a direct connection to the immediate circumstances of the deceased's death and is descriptive in nature, including for example records such as witness statements that could shed light on events that happened close in time to a deceased person's death.<sup>42</sup>

[162] The information at issue in this appeal is different in nature. It is information that pertains mainly to individuals other than the deceased and would not shed light on the circumstances surrounding his death. Having had the benefit of reviewing all of the information that was disclosed to the appellants – and that will be disclosed as a result of this order – I am unable to conceive of how disclosure of the remaining information at issue would shed any light, assist with grieving or provide closure.

[163] I can understand how complete, unfettered, disclosure might assist the appellants with their grieving process. However, it is my view that the privacy interests of the third parties in this case in relation to this information must take priority. Although the information at issue is the deceased's personal information, it would reveal information about the third parties, in some cases, that is highly sensitive.

[164] In the end, I find that section 21(4)(d) does not apply to the information in Categories 3 to 5, and this information is therefore exempt under section 21(1). This finding is subject to my findings below in relation to the appellants' claim that the public interest override applies.

[165] However, as a result of my findings above, I find that Categories 1 and 2 of

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<sup>42</sup> See Order PO-4148 for example.

personal information are not exempt from disclosure under section 21(1) and I will order the ministry to disclose them.

**Issue G: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?**

[166] I must now consider whether the public interest override applies to the information that I have found to be exempt under section 21(1). At the outset of the appeal, at a time when the ministry had refused to disclose any records to them, the appellants argued that the public interest override at section 23 of the *Act* should apply to require the ministry to disclose the records if any of them were found to be exempt under section 21.

[167] As a result of my findings above, the only remaining withheld information that could be overridden by section 23 is the information that I have found to be exempt under section 21(1) – that is, the information in Categories 3 to 5, defined above.

***The public interest override in general***

[168] Section 23 of the *Act*, the “public interest override,” provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[169] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[170] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.<sup>43</sup>

***Compelling public interest***

[171] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government.<sup>44</sup>

[172] The IPC has defined the word “compelling” as “rousing strong interest or

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<sup>43</sup> Order P-244.

<sup>44</sup> Orders P-984 and PO-2607.

attention."<sup>45</sup> The IPC must also consider any public interest in not disclosing the record.<sup>46</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."<sup>47</sup>

[173] A compelling public interest has been found to exist where, for example the records relate to the economic impact of Quebec separation.<sup>48</sup>

[174] A compelling public interest has been found not to exist where, for example a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.<sup>49</sup>

#### *Outweighs the purpose of the exemption*

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

[176] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>50</sup>

#### **Representations**

[177] The appellants' representations in this appeal did not specifically address this issue. However, when I consider the request, the appeal filed with the IPC and the appellants' overall position in this appeal, it is clear that they have a pressing and considered interest in learning as much as they can about the death of their son. They put forward every argument available to them to obtain access to information that could shed light on what is clearly a devastating loss for them and that, in their view, raises questions about the actions of the correctional facility.

[178] The ministry disputes that the public interest override applies in this case. The ministry says that the appellants' interest in learning more about their son's death is essentially private in nature.

#### **Finding**

[179] For the reasons that follow, I find that the section 23 public interest override does not apply to the personal information remaining at issue (Categories 3 to 5).

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<sup>45</sup> Order P-984.

<sup>46</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>47</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>48</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

<sup>49</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

<sup>50</sup> Order P-1398, upheld on judicial review in *Ontario v. Higgins*, 1999 CanLII 1104 (ONCA), 118 OAC 108.

[180] Certainly, disclosure that sheds light on the circumstances leading to the death of an inmate in a correctional facility could give rise to compelling public interest. However, the appellants have received a significant amount of information about their son's incarceration because of the ministry's decision to disclose most of the responsive information pursuant to the section 21(4)(d) compassionate grounds exception. They will receive additional information as a result of my findings above.

[181] When I take into account the amount of disclosure that the appellants have or will receive, I am unable to conclude that disclosure of the remaining snippets of information gives rise to a compelling public interest.

[182] Even if I could conclude that there is a compelling public interest in disclosure, I am unable to conclude that, in the circumstances, it outweighs the purpose of the personal privacy exemption in the *Act*. To be clear, the information at issue consists only of the names and identification numbers of inmates, the employee information and the names of other third parties unrelated to the deceased's stay in the correctional facility.

[183] In my view, section 23 does not apply to the information in Categories 3 to 5.

**ORDER:**

1. I find that the *Act* does not apply to page 147 of the records.
2. I partially uphold the ministry's decision to withhold certain information on the basis that it is non-responsive to the appellants' request.
3. I uphold the ministry's decision to withhold the personal information of third parties on the basis of the section 21(1) personal privacy exemption.
4. I order the ministry to disclose to the appellants the information highlighted in the copy of the records included with the ministry's copy of this order by **June 10, 2022**.
5. Upon request, the ministry will provide the IPC with a copy of the records disclosed to the appellants pursuant to order provision 4.

Original Signed by: \_\_\_\_\_  
Valerie Jepson  
Adjudicator

\_\_\_\_\_ May 10, 2022