Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4468

Appeal PA22-00104

Ministry of Education

December 19, 2023

Summary: The appellant seeks access to four videos featuring commentary by high school students prepared for an online civics course. The videos were made available to school boards across the province until they were removed following controversy surrounding one of them. The Ministry of Education denied access to the videos on the basis that they contain personal information belonging to the students that is exempt under the personal privacy exemption in section 21(1). In this order, the adjudicator finds that the presumptions against disclosure in sections 21(3)(d) (educational history) and 21(3)(h) (racial or ethnic origin or religious or political beliefs) apply to the videos and that they are therefore exempt from disclosure under section 21(1). She upholds the ministry's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 21(1)(a), 21(1)(c), 21(1)(f), 21(3)(d) and 21(3)(h).

OVERVIEW:

[1] This appeal addresses a decision by the Ministry of Education (the ministry) to deny access to four videos that were part of a grade 10 civics e-learning course offered to students online. The videos were made available to school boards across the province until they were removed following controversy surrounding one of the videos.

[2] The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the videos and to accompanying

introductory material. The request reads, in part:

> I request a copy of the four video blogs, of which the "[name]" video was one, all unedited and unredacted, along with the full introduction to the four video blogs all in their original sequence and as these were originally presented to students.

[3] The ministry located responsive records and issued a decision granting the appellant partial access. The ministry granted access to two pages of introductory materials. The ministry denied access to the four videos on the basis of the mandatory personal privacy exemption in section 21(1), citing the privacy interests of the students who appear in the videos.

[4] The appellant appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC). A mediator was appointed to explore the possibility of resolution. When a mediated resolution was not possible, the appeal was transferred to the adjudication stage of the appeal process, during which an adjudicator conducted a written inquiry and received submissions from the ministry and the appellant. The appeal was then transferred to me to continue. After assessing the materials before the IPC as part of the appeal, including the parties' representations and the videos, I decided that I did not require further representations in order to issue a decision.[1]

[5] In this order, I find that the presumptions against disclosure in sections 21(3)(d) (educational history) and 21(3)(h) (racial or ethnic origin or religious or political beliefs) apply to the records and that the records are therefore exempt under section 21(1) because disclosure would constitute an unjustified invasion of the personal privacy of the students appearing in the videos. I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[6] At issue are four videos (the records or videos) created for use in an online Civics and Citizenship course (the civics course) by school boards via the ministry's Virtual Learning Environment, or VLE.

[7] The videos feature four students commenting on an issue on the following topics: sweatshops (video 1), the Israel-Palestine conflict (video 2), anti-Black racism (video 3), and alternative approaches to learning and curriculum (video 4). The videos range in duration from less than one minute to less than three minutes.

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[1] The adjudicator conducting the inquiry invited both parties to submit initial representations that were shared between them in accordance with the IPC's *Practice Direction 7* on the sharing of representations, invited the ministry to reply to issues raised in the appellant's representations, and shared the ministry's reply representations with the appellant.

ISSUES:

A. Do the videos contain “personal information” as defined in section 2(1) and, if so, whose?

B. Does the mandatory personal privacy exemption in section 21(1) apply to the videos?

DISCUSSION:

Background about the videos provided in the parties’ representations

[8] According to the ministry, the videos were part of a course developed as an online learning resource in 2013 with five educators and coordinated by a ministry education officer. The ministry says that part of the course (containing the videos at issue) introduced the concept of a “Speakers Corner” to students with the following learning goal:

> As you move ahead in this course, you will learn more about how people come to hold their points of view on a variety of issues within your community. You will also have a chance to consider the different factors that influence a person’s point of view. By the end of this course, you will respond to various points of view by analysing the difference between fact and opinion. All of these things, in turn, will help you to formulate your own informed point of view.

[9] Students taking the course were asked to choose one of the four videos and create a responding vlog of their own.

[10] Several years after the videos were embedded into the online course, video 2 (featuring a student commenting on the Israel-Palestine conflict) attracted controversy and media attention. The ministry received correspondence from prominent organizations expressing concerns about the student’s comments in the video and its inclusion in the course, as well as from MPPs conveying concerns voiced by their constituents.

[11] In response to the complaints, and after meeting with various organisations about video 2’s contents, the ministry conducted a review of the course and revised and re- published it without any of the four videos. The ministry says that it removed the original version of the course from school board access to prevent accidental future use.

[12] Although removed from the course and not disseminated by the ministry outside of the course, a version of video 2 with the student’s face blurred has been circulated online.

Issue A: Do the videos contain "personal information" as defined in section 2(1) and, if so, whose?

[13] The personal privacy exemption in section 21(1) can only apply to "personal information" as that term is defined in the *Act*. I must therefore decide whether the videos contain personal information, and if so, whose.

[14] Section 2(1) defines personal information as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including video or electronic records.

[15] Information is "about" an individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Information is about an "identifiable individual" if it is reasonable to expect that they can be identified from the information either by itself or combined with other information.[2]

[16] Section 2(1) of the *Act* contains a non-exhaustive list of examples of personal information. The following examples are relevant to this appeal:

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
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> (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,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (h) the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual.

[17] Information that does not fall under paragraphs (a) to (h) of the definition of personal information in section 2(1) may still qualify as personal information.[3] It is important to know whose personal information is in the records. If a record contains the requester's own personal information, their access rights are greater than if it does

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

[3] Order 11.

not.[4] If a record contains the personal information of other individuals, one of the personal privacy exemptions might apply.[5]

Representations

[18] The ministry submits that the videos feature four individual students speaking about civic issues and reflect those students' individual opinions on the specific topics covered in their respective videos.

[19] The ministry says that the videos in their entirety constitute personal information within the meaning of section 2(1) because they reflect the students' distinct and personal attributes and contain their names, images, voices and personal opinions. The ministry says that it does not have the students' full names or ages, but that they appear to be under 18 years of age, and that the typical age at the start of grade 10 – the grade level for which the course was used – is 15 years.

[20] The appellant submits that blurring the students' faces would protect their privacy and that, since they likely no longer sound like they did in grade 10, the students could not be identified simply based on their voices. The appellant does not otherwise specifically address the types of personal information described in section 2(1), although later in his representations on the personal privacy exemption in section 21(1), the appellant describes video 2 as "simply [the student's] brief description of the Israel and Palestine conflict."

Analysis and findings

[21] I find that the videos contain personal information belonging to each of the four students featured in them. This includes their images, voices, names, information about their education, and their personal views or opinions about specific topics. In the case of one video, a student expressly identifies their race and ethnic origin while recounting a personal experience. I also find that the videos reveal the students' approximate age based on the associated grade level and the time that the videos were created.

[22] In the case of videos 1 to 3, the students identify themselves by their given names. I find that their names are also their personal information in the circumstances because their names appear with other personal information relating to them. Although the student in video 4 does not state their name, I nevertheless find that video 4 contains that student's image, voice, and personal opinions, including on the student's own experiences in learning.

[23] Collectively, I find that the records contain personal information belonging to the

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[4] Under sections 47(1) and 49 of the *Act,* a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.
[5] See sections 21(1) and 49(b).

students within the meaning of paragraphs (a), (b), (e), and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[24] I will next consider whether this personal information is exempt under section 21(1).

Issue B: Does the mandatory personal privacy exemption in section 21(1) apply to the videos?

[25] Where a requester seeks access to the personal information of another individual, section 21(1) prohibits the institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[26] If the information fits within any of the exceptions to section 21 in paragraphs (a) to (e) of section 21(1), or paragraphs (a) to (d) of section 21(4), it is not exempt from disclosure. The parties do not argue that section 21(4) applies, and I find that it does not.

[27] The appellant argues that the exceptions in sections 21(a), (c) and (f) exist. These require disclosure where there is consent, if the record was intended to be made available to the general public, or if disclosure would not constitute an unjustified invasion of personal privacy.

[28] The section 21(a) and (c) exceptions are relatively straightforward. If the circumstances they describe exist, the institution must disclose the information.

[29] The section 21(1)(f) exception, however, is more complicated. It requires the institution to disclose another individual's personal information to a requester only if disclosure would not be an "unjustified invasion of personal privacy."

[30] The section 21(1)(f) exception requires a consideration of additional parts of section 21. Sections 21(2) and (3) give guidance in determining whether disclosure would or would not be an unjustified invasion of personal privacy.

[31] 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.[6] Some of the factors weigh in favour of disclosure, while others weigh against disclosure. 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 proven.[7]

[32] Section 21(3), meanwhile, sets out situations in which disclosing information is presumed to be an unjustified invasion of personal privacy.

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[6] Order P-239.
[7] Orders PO-2267 and PO-2733.

[33] Sections 21(3)(a) to (h) should generally be considered before the factors in section 21(2) because, if a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by any of the factors or circumstances in favour of or against disclosure under section 21(2), or by any unlisted factors, where the record contains personal information of other individuals but not the requester. In other words, if disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 21(3), the factors in section 21(2) cannot change this presumption. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.[8]

[34] The ministry relies on the presumptions against disclosure in section 21(3)(d) and (h). These state that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information relates to employment or educational history, or indicates a person's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Representations

[35] I note that both parties have provided particulars about the controversy surrounding video 2. The ministry has submitted copies of various media articles discussing the video's contents and the ministry's actions in removing it from the online civics course. Similarly, the appellant's representations denounce the decision to remove the video and include links to reports by various human rights organizations about the nature of Israeli-Palestinian relations and the effects of the political situation on individuals residing in the region. I have reviewed the materials submitted by the parties and have only summarized those portions that are relevant to the issue in this appeal, namely, to the ministry's application of the mandatory personal privacy exemption in section 21(1) to deny access to the four videos at issue.

[36] I do not need to consider whether the controversy surrounding video 2 raises factors that may apply to weigh against or in favour of disclosure pursuant to section 21(2)[9] because I find, below, that disclosure of the videos is presumed to be an unjustified invasion of the students' personal privacy by operation of the presumptions against disclosure in sections 21(3)(h) and (d).

The appellant's representations

[37] The appellant argues that the fundamental issue in this appeal is the ability of students or anyone else that shares the video 2 student's sentiments to be able to express them "in a measured and reasonable manner within Ontario's educational

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[8] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.). The public interest override is not an issue in this appeal.

[9] The appellant claims that disclosure is desirable for the purposes of subjecting the minister's decision to remove the videos to public scrutiny, the factor in section 21(2)(a) which, if it applies, favours disclosure.

system" and that there exists a legitimate political issue associated with removal of what the appellant says "was simply [the student's] brief description of the Israel and Palestinian conflict" to satisfy a political constituency.

[38] The appellant submits that there is no legitimate basis to deny the request as there can be no serious privacy issue in this matter. He submits that the videos are an important part of the course and were produced by the ministry with the intention of making the contents available to the widest possible audience.

[39] He argues that the decision to remove the videos from the course was a political decision made in response to lobbying by special interest groups, and notwithstanding that the course materials explain the importance of free speech and the ability for democracy to accommodate opposing opinions. The appellant states that the four videos are the antithesis of a private expression and were intended to educate students on how to exercise the right of free speech. He submits that it stands to reason that the students, speaking on topics about which they felt strongly, "would have been pleased that their videos were to become part of the curriculum as they would reach a wider audience" and that there is no basis to believe that the students would not have wanted their presentations to reach the "blogosphere."

[40] The appellant's representations focus on video 2, which is the video that attracted controversy because of the student's views expressed in it. However, as noted above, the appellant argues that all four videos must be disclosed to give context to the minister's decision to remove them, and video 2 in particular, from the online course. The appellant submits that, without viewing the entire videos, Ontario citizens will be unable to form an opinion and, where appropriate, hold the government accountable for its decisions (the factor in section 21(2)(a)).[10] He says there "can be no clearer need for the responsible and independent review of the decision of a Ministry to withhold information that may prove to be embarrassing to the Minister presiding over it" and argues that it is not appropriate to review the condemnation of video 2 out of context, so that it should be viewed alongside the other three videos (and the introductory material already disclosed).

[41] The appellant submits that a version of video 2 with the student's face blurred has been disseminated online, but also that he seeks access to an unedited copy while arguing that a blurred version of the videos would protect the students' privacy.

[42] The appellant says that, while the ministry claims it does not know the origins of the curriculum or have consents from the students in the four videos, it knows the identity of the five educators who created the course and could have reached out to them to see if any of them obtained consents or has contact information for the students. He says that, even if there was a real violation of the four students' privacy

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[10] The factor in section 21(2)(a), if it applies, weighs in favour of disclosure of personal information where "the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny."

rights, the violation would be justified by the societal need to know how our elected representatives make decisions and use their power to satisfy special interest groups.

The ministry's representations

[43] The ministry submits that disclosure of the videos would constitute an unjustified invasion of the students' personal privacy in view of the context in which they were produced and the fact that the students are readily visible onscreen providing personal information that includes their personal opinions and beliefs on sensitive topics and describing sensitive personal experiences.

[44] The ministry argues that videos 1, 2 and 3 fall under the presumption against disclosure in section 21(3)(h) because they indicate students' political beliefs, and that the presumption against disclosure in section 21(3)(d) applies to video 4 because it contains a student's discussion of their own educational experiences.

[45] The ministry submits that the videos were not and are not publicly available and were collected and maintained for the purpose of facilitating the learning of students taking the online course. The ministry disputes the appellant's assertion that the videos were made available to the "widest possible audience." The ministry says that the videos were available to those administering or attending the course during a specified time period and that the course was password-protected so that only eligible and enrolled individuals could access it. The ministry acknowledges that a version of video 2 that blurs the student's face is available online, but says that it was never made publicly available by the ministry.

[46] In its reply representations, the ministry submits that the videos were never part of the Ontario curriculum, as the appellant alleges. The ministry says that the Ontario curriculum "describes in broad terms the desired outcomes of the teaching and learning process" and "does not prescribe lesson plans, educational resources or classroom activities." The ministry says that, although the course was consistent with the Ontario curriculum at the time, it is not the curriculum itself.

[47] Finally, the ministry denies that disclosure of the videos would shed light on a ministerial decision because the videos are personal vlogs of secondary school students expressing their opinions on (often sensitive) topics of their choosing. The ministry says that the highly sensitive nature of the personal information in the record (the factor in section 21(2)(f)),[11] weighs in favour of protecting the students' privacy.

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[11] As discussed above, section 21(2) sets out various factors to be weighed when determining whether disclosure or personal information would be an unjustified invasion of personal privacy. Section 21(2)(f) favours privacy protection where the personal information is "highly sensitive," meaning that it's disclosure could reasonably be expected to cause the individual significant personal distress (see, for example, Orders PO-2518, PO-2617, MO-2262 and MO-2344).

Analysis and findings

[48] For the reasons that follow, I find that the videos are exempt from disclosure under section 21(1).

[49] As summarized above, the ministry argues that the presumption against disclosure in section 21(3)(h) applies to videos 1, 2 and 3, and that the presumption against disclosure in section 21(3)(d) applies to video 4.

[50] Because of the mandatory nature of the personal privacy exemption in section 21(1), however, I have considered whether one or the other claimed presumption applies to all or some of the videos. I find that the presumption against disclosure in section 21(3)(h) applies to all four videos, and that the presumption against disclosure in section 21(3)(d) also applies to all four videos.

The exceptions in sections 21(1)(a), (c) and (f)

[51] First, I find that none of the exceptions in sections 21(1) apply to the videos, including the exceptions in sections 21(1)(a), (c) and (f) raised by the appellant.

[52] Sections 21(1)(a), (c) and (f) state that:

> (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates, except,
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> > (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;
> >
> > (c) personal information collected and maintained specifically for the purpose of creating a record available to the general public;
> >
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(a) – prior written request or consent

[53] There is no dispute that the students have not consented to disclosure of their personal information. Section 21(1)(a) does not impose a requirement on the ministry to obtain consents. Without any evidence of consent to disclose, I find that section 21(1)(a) does not apply.

Section 21(1)(c) – record available to general public

[54] I am also not persuaded that the exception in section 21(1)(c), under which disclosure of personal information is not presumed to constitute an unjustified invasion of personal privacy if it was collected and maintained specifically for the purpose of creating a record available to the general public, applies.

[55] It is not enough that a record is available publicly for this exception to apply. Rather, the personal information contained in the record must have been specifically collected and maintained for the purpose of making the record publicly available.[12] Where, for example, information in a record may be available to the public from a source other than the institution receiving the request, and the requested information is not maintained specifically for the purpose of creating a record available to the public, section 21(1)(c) does not apply.[13]

[56] I find that the videos were collected and maintained specifically for use in a grade 10 civics course, and not for the maintenance of a public record. I find that access to the videos was limited to students taking the course (and, by extension, to their parents or supervising adults) and to teachers or course administrators, and that the fact that access was password-protected suggests its intended limited use and an intention by the ministry to limit access.

[57] Although a version of video 2 that blurs the student's face has been circulated online, I am satisfied that the video was never made publicly available by the ministry and that the ministry's actions described above support the conclusion that the ministry did not disseminate the video outside of the course or online e-learning portal.

[58] I therefore find that the exception in section 21(1)(c) does not apply to the videos.

Section 21(1)(f) – unjustified invasion of personal privacy

[59] The only remaining exception that is relevant in the circumstances is the exception in section 21(1)(f). This exception allows for disclosure of personal information where the disclosure is not an unjustified invasion of personal privacy.

[60] For the following reasons, I find that disclosure of the videos would constitute an unjustified invasion of the students' personal privacy by operation of the presumptions against disclosure in section 21(3)(h) and section 21(3)(d), and that the videos are therefore exempt under section 21(1).

[61] As I have already noted, determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy requires consideration of the factors that may apply to weigh in favour of, or against, disclosure (factors enumerated in section 21(2) as well as any relevant unlisted factors), but also of any presumptions against disclosure in section 21(3) that may exist. And, as also noted above, where a record does not contain a requester's personal information but only personal information belonging to other individuals, the presumptions ought generally

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[12] Order P-318.

[13] Order PO-1736 (upheld on judicial review in *Ontario (Public Guardian and Trustee) v. Goodis* (December 13, 20001), Toronto Doc. 490/00 (Ont. Div. Ct.), leave to appeal refused (March 21, 2002), Doc. M28110 (C.A.).

be considered first. This is because, if any apply, disclosure is presumed to constitute an unjustified invasion of personal privacy and this presumption cannot be rebutted unless there is a reason under section 21(4) that disclosure would not be an unjustified invasion of personal privacy or there is a compelling public interest in the information that outweighs the purpose of the section 21(1) exemption.[14]

The relevant presumptions against disclosure in section 21(3)

[62] In addressing the presumptions on which the ministry relies, I will first deal with the ministry's claim that disclosure of videos 1-3 is presumed to constitute an unjustified invasion of the students' personal privacy under section 21(3)(h).

[63] As I have noted above, because the personal privacy exemption in section 21(1) is mandatory, I have considered whether the presumption in section 21(3)(h) also applies to video 4. I find that it does.

Section 21(3)(h) – racial or ethnic origin or religious or political beliefs

[64] Under section 21(3)(h), a disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

> …indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[65] In all four videos, students explain their views and opinions on four political issues. They express their individual opinions on free trade policies, their views on a major international political/religious conflict, anti-Black racism and the public education system. In the case of videos 3 and 4, the students recount their own personal experiences. All four videos suggest adherence to certain political leanings and based on my review of them, I am satisfied that all four videos contain personal information belonging to each individual student that indicates their respective political beliefs on the topics each discusses.

[66] In the further case of video 3, I find that it contains a student's express statement regarding their racial or ethnic origin, which is personal information that indicates racial or ethnic origin as contemplated by section 21(3)(h), in addition to information that indicates that student's political beliefs.

[67] I therefore find that disclosure of all four videos is presumed to constitute an unjustified invasion of each of the four students' personal privacy because of the presumption in section 21(3)(h).

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[14] None of the situations described in section 21(4) are present in this appeal, and the public interest override in section 23 is not an issue in this appeal.

Section 21(3)(d) – educational history

[68] While one presumption against disclosure is sufficient to meet the privacy protections contemplated in section 21(1), I am satisfied that the claimed presumption against disclosure in section 21(3)(d) also applies to all four videos.

[69] Section 21(3)(d) covers information connected to educational history, including information about students' enrolment or academic performance in a course.[15] Past IPC orders regarding the application of the presumption against disclosure in section 21(3)(d) have found that for information to qualify as educational history, it must contain some significant part of the person's education. What is or is not significant must be determined on the facts of each case.

[70] On the facts before me, I am satisfied that the videos contain personal information about the students' educational history. They reveal the students' approximate ages at the time of the videos (and therefore now, based on the ministry's submission that students in grade 10 are typically 15 years old), the approximate year they were in grade 10, and that, during that time, they participated in a large project that was made available for use in school boards across the province. In the circumstances, I find that the presumption against disclosure in section 21(3)(d) also applies to the four videos.

[71] Because I have found that all four videos are exempt because their disclosure is presumed to constitute an unjustified invasion of the students' personal privacy, I need not consider the appellant's argument that the factor favouring disclosure in section 21(2)(a) (where disclosure is desirable for the purpose of subjecting the government or its agencies to public scrutiny) applies. This is because, as noted above, the factors outlined in section 21(2) cannot be used to rebut a presumed unjustified invasion of personal privacy under section 21(3).[16]

[72] For these reasons, I uphold the ministry's decision and dismiss the appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed By: December 19, 2023

Jessica Kowalski
Adjudicator

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[15] Order PO-3819.

[16] Where records do not contain other individuals' personal information but not personal information belonging to a requester, as is the case here. Factors for or against disclosure, even where a presumption against disclosure in section 21(3) applies, are weighed where a record contains mixed personal information belonging to both a requester and other identifiable individuals.