

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4519

Appeal PA21-00033

Ministry of the Solicitor General

May 21, 2024

Summary: The appellant sought access to OPP records regarding her husband's death in a motor vehicle collision. The ministry disclosed several records to the appellant because to do so would be desirable for compassionate reasons as set out in section 21(4)(d) of the *Act*. The appellant sought access to additional information. In this order, the adjudicator finds that an audio recording of a witness statement should be disclosed to the appellant because to do so would be desirable for compassionate reasons. The adjudicator upholds the remainder of the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 21(1), 21(1)(f), 21(4)(d), 49(b), and 2 ("personal information").

Orders and Investigation Reports Considered: Order MO-2237.

OVERVIEW:

[1] The requester's husband died in a motor vehicle collision. The requester sought access to Ontario Provincial Police (OPP) records about the collision. The request was made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Solicitor General (the ministry), which is responsible for responding to access requests for OPP records.

[2] For compassionate reasons as described in section 21(4)(d) of the *Act*, the ministry granted partial access to the records. Portions were withheld pursuant to the section

14(1)(l) law enforcement exemption, the personal privacy exemptions at section 21(1) and 49(b) or, on the basis that certain information was not responsive to the request.

[3] The requester, now the appellant, appealed the ministry's decision and the appeal was first assigned to a mediator to explore resolution. During the mediation, the appellant advised that she is not pursuing access to certain portions of the records, which narrowed the issues under appeal. The focus of the appellant's request is to obtain access to a witness statement made by a specified individual (the affected party).

[4] The appeal transferred to the adjudication stage, and I conducted an inquiry in which I initially invited representations from the ministry and the affected party about the issues and records remaining under appeal.

[5] The ministry made representations and the affected party objected to disclosure. The ministry's representations and the affected party's position were shared with the appellant, and she was invited to make representations about the issues set out in a Notice of Inquiry. The appellant did not provide specific arguments about the issues described in the Notice of Inquiry, but she maintained her interest in obtaining access to the information at issue.

[6] For the reasons that follow, I order the ministry to disclose the audio recording of the witness statement to the appellant because to do so would be desirable for compassionate reasons as provided in section 21(4)(d) of the *Act*. I uphold the balance of the ministry's decision.

RECORDS:

[7] The information at issue is:

- Audio recording of a witness statement.
- Homicide/sudden death report: withheld information on pages 4 and 5.
- Handwritten police officers' notes: withheld information on pages 7, 8, 9, 10, 15, 18, 21, 22, 24, and 31.¹

ISSUES:

A. Do the records contain "personal information" and, if so, whose?

¹ The scope of the information at issue was set out in the Mediator's Report and the Notices of Inquiry in this appeal.

- B. Should I uphold the ministry's claim that the information at issue must not be disclosed because of the personal privacy exemptions?

DISCUSSION:

Issue A: Do the records contain "personal information" and, if so, whose?

[8] The ministry claims the personal privacy exemptions over the information remaining at issue.² It is therefore necessary to determine whether the records contain "personal information" as defined in the *Act* and if so, whose. If the records contain the appellant's own personal information, her access rights are greater than if they do not.³

[9] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." It also gives a list of examples of personal information. Personal 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.

[10] The ministry submits that the records at issue contain the names and other identifying information belonging to the affected party, namely, his address, date of birth and statements provided to the police in audio and written form. The ministry says that although the appellant does not seek access to the affected party's name and address, the remaining information is nevertheless personal information because it could lead to identification of the affected party. (The appellant already knows the identity of the affected party.)

[11] Although neither the appellant nor the affected party made specific arguments about this issue, it is implicit in their views that the information at issue contains personal information.

[12] Based on my review of the records, I make the following findings.

[13] The homicide/sudden death report (report) contains the personal information of the appellant, the deceased individual and other individuals, including the affected party. This information consists of details about the collision and their connection to it, which reveals something of a personal nature about all of these individuals.

[14] Because the report contains the appellant's personal information, I will consider the ministry's personal privacy claim about the report under section 49(b). Although the information remaining at issue in the report does not contain the appellant's personal information, the IPC makes the determination about whether a record contains an

² Initially, the ministry claimed both sections 49(b) and 21(1). In its representations, it argues that only section 21(1) applies.

³ 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.

individual's personal information on a "record by record" basis.⁴

[15] Each of the handwritten police notes (the notes) at issue are discrete records. Each contain the personal information of the deceased individual and other individuals, including the affected party, but not the appellant. This personal information includes details about the collision and their connection to it, which would reveal something of a personal nature about these individuals.

[16] The audio recording is the affected party's statement to the OPP about the collision. It contains the personal information of the deceased individual and of the affected party. The personal information includes details about the collision and these individuals' connection to it, which would reveal something of a personal nature about them.

[17] Because the notes and the audio recording do not contain the appellant's personal information, I will consider the ministry's personal privacy claim about these records under section 21(1).

Issue B: Should I uphold the ministry's claim that the information at issue should not be disclosed because of the personal privacy exemptions?

Regarding the report

[18] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information, subject to some exemptions. Relevant to this appeal, section 49(b) says that if a record contains the personal information of both an appellant and others, the ministry may refuse to disclose information to the requester (the appellant in this case) if disclosing that information would be an "unjustified invasion of another individual's personal privacy." Section 21(1) to (4) provide guidance in deciding whether disclosure would constitute an unjustified invasion of another individual's personal privacy under section 49(b).

Regarding the notes and the recording

[19] When a record does not contain the personal information of the appellant, section 21(1) of the *Act* applies. Section 21(1) says that the ministry cannot disclose personal information about another individual to the appellant, unless an exception applies (as set out in sections 21(1)(a) to (f) of the *Act*). The section 21(1)(f) exception is the only exception relevant to this appeal. Section 21(1)(f) says that the ministry can only disclose another person's personal information to a requester if to do so would not be an "unjustified invasion of personal privacy."

⁴ Order M-352.

Unjustified invasion of personal privacy

[20] Under both sections 49(b) and 21(1)(f), sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

[21] Sections 21(3)(a) to (h) describe situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. If a section 21(3) presumption applies to information in a record that does not contain the appellant's personal information, disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 21(3) and no additional factors need to be considered. When a record contains the appellant's personal information and a presumption at section 21(3) applies, the presumption is weighed and balanced with any other relevant factors, including those described in section 21(2), as well as the interests of the parties.⁵ The presumption at section 21(3)(b) and the factor at section 21(2)(f) are relevant to this appeal and I will discuss them below.

[22] The only relevant part of section 21(4) is 21(4)(d). Section 21(4)(d) says that disclosure of information to a close relative or spouse of a deceased individual's personal information that is desirable for compassionate grounds does not constitute an unjustified invasion of personal privacy.

[23] The ministry's position is outlined in more detail below. The affected party objects to disclosure, referring to his privacy rights. The appellant did not make arguments about the sections 21(3) or (2) presumptions or factors. Her statements during the inquiry have focused on the existence of compassionate grounds requiring disclosure to her. Her position is discussed in more detail below in relation to section 21(4)(d).

The presumptions and factors

[24] The section 21(3)(b) presumption arises when the information at issue is related to an investigation into a possible violation of law.⁶

[25] The ministry submits that the information at issue was collected as part of a law enforcement investigation resulting from the collision. The ministry submits that the IPC has consistently held that section 21(3)(b) applies information similar to the information at issue citing IPC Orders PO-3218, PO-3544, PO-3766, PO-3712 and PO-3897.

[26] Having reviewed the information at issue in the audio recoding, the report and the notes, and considering the context, I agree that section 21(3)(b) applies, meaning that disclosure of the personal information of the deceased individual and other individuals, including the affected party, is a presumed invasion of their personal privacy.

⁵ Order MO-2954.

⁶ Orders P-242 and MO-2235.

Conclusion regarding the audio recording and the police notes

[27] I conclude therefore that disclosure of the information at issue *in the audio recording and the notes* would constitute an unjustified invasion of privacy under section 21(1)(f) and they are therefore exempt from disclosure, subject to my findings about compassionate grounds below [section 21(4)(d)].

Discussion and conclusion about the report

[28] Because the report also contains the appellant's personal information, the section 21(3)(d) presumption is not determinative; it must be considered and weighed against any other relevant factors.

[29] The section 21(2)(f) factor weighs against disclosure when the evidence shows that personal information at issue is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.⁷

[30] The ministry's arguments focus on the affected party. It submits that as a witness, the information the affected party provided to the OPP in a police investigation may be considered highly sensitive, referring to IPC Orders P-1618 and PO-3712. The ministry says that Order PO-3712 is similar to the present appeal because it is an example of when the factor at 21(2)(f) applied, in part, because the affected party did not consent to disclosure.

[31] I find that the factor at section 21(2)(f) applies, although I give it moderate weight in this case. I find that a witness involved in a collision of the nature that occurred here would have a reasonable expectation that their impressions and observations provided to the police were unlikely to remain completely confidential.

[32] No other factors have been raised except for compassionate reasons, which I will discuss further below.

[33] Subject to my consideration of section 21(4)(d), I find that disclosure of the personal information at issue *in the report* would constitute an unjustified invasion of another individual's personal privacy within the meaning of section 49(b). I reached this conclusion after weighing the presumption at section 21(3)(b) and the factor at 21(2)(f), which weigh in favour of privacy protection, the absence of any section 21(2) factors weighing in favour of disclosure, and the interests of the parties.

Is further disclosure desirable for compassionate reasons?

[34] The appellant, as the spouse of the deceased individual, is eligible to obtain access to the deceased individual's personal information if it is desirable for compassionate

⁷ Orders PO-2518 and PO-2617.

reasons.⁸ This situation is set out in section 21(4)(d) of the *Act*, 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.

[35] What I must determine is whether “in the circumstances,” further disclosure “is desirable for compassionate reasons,” taking into account factors such as the need to assist the appellant in the grieving process.⁹ The IPC has recognized that for surviving family members, greater knowledge of the circumstances of their loved one’s death is by its very nature compassionate.¹⁰

[36] Personal information about a deceased individual can be intertwined information that also belongs to another individual, such as is the case here. The factors referred to in section 21(2) may provide some help in deciding whether the personal information belonging to individuals other than the deceased 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.¹¹

[37] I find that disclosure *of the audio recording* is desirable for compassionate reasons and therefore that its disclosure would not constitute an unjustified invasion of privacy.

[38] The appellant has received a significant amount of disclosure on the basis of section 21(4)(d). The ministry submits that the information that has already been provided to the appellant addresses the requirements of section 21(4)(d).

[39] The appellant seeks further information about the collision and in particular, the affected party’s perspective on the collision. She is aware that there is an audio recording, and she specifically seeks access to it. The death of her husband has had devastating effects on her family and the appellant seeks the information to understand more about what happened.

[40] The statement is short. Its sole focus is on the collision and the affected party’s observations of the moments leading up to the collision. It contains few details about the affected party that are unrelated to the collision. It appears to be the only first-hand

⁸ Orders MO-2237 and MO-2245, regarding the equivalent section in the *Municipal Freedom of Information and Protection of Privacy Act*.

⁹ Order MO-2245.

¹⁰ Order MO-2237.

¹¹ Order MO-2237.

account of the final minutes of the deceased individual's life. I am persuaded that having access to the recording would assist the appellant with her grieving process.

[41] The affected party objects to disclosure of his personal information and wishes for his privacy rights to be protected. The ministry submits that additional disclosure would not be compassionate if it breached the privacy of the affected party.

[42] As established above, information about the affected party's involvement in this collision is certainly highly sensitive, a factor weighing in favour of privacy protection. However, it was, or ought to have been, reasonably foreseeable to the affected party that his account of this collision would not be maintained in strict confidence. Considering the circumstances as well as the brevity and content of the recording, it is my view that the affected party's privacy interests are outweighed by the compassionate reasons that would be advanced by disclosure.

[43] I also find that none of the other information at issue (in the report and the police notes) must be disclosed for compassionate reasons under section 21(4)(d). Some of the notes and other portions of the record contain written summaries of the affected party's statement contained in the audio recording; however, it is my view that the compassionate purposes for disclosure are best advanced if the appellant is provided with the most direct and complete information. This is found on the audio recording.

[44] There are snippets of other information belonging to other individuals in the notes and the report (e.g. other individuals who were at the scene of the collision when the police arrived). I am unable to conclude that disclosure of this information is desirable for compassionate reasons. I find that section 21(4)(d) does not apply to it.

Summary

[45] In summary, I find that disclosure of *the audio recording* would not be an unjustified invasion of personal privacy as provided for in section 21(4)(d) and I will therefore order the ministry to disclose this information to the appellant.

[46] I uphold the ministry's decision to withhold the remaining information at issue in *the notes* on the basis of section 21(1) because disclosure of this information would constitute an unjustified invasion of personal privacy.

[47] I find that disclosure of the information at issue *in the report* would constitute an unjustified invasion of personal privacy within the meaning of section 49(b). Section 49(b) is discretionary, meaning that although the ministry is entitled to rely on it, it may exercise its discretion not to do so. On appeal, the IPC reviews an institution's exercise of discretion to confirm that an institution did, in fact, exercise its discretion, that it did not take into account irrelevant factors or act in bad faith. The ministry submits that it exercised its discretion properly and with due regard to the operational requirements of the OPP and to the personal privacy interests of the affected party. I accept that the ministry exercised its discretion, taking into account appropriate considerations and I uphold its decision to

withhold this information.

ORDER:

1. I order the ministry to disclose to the appellant the audio recording by June 25, 2024 but not before June 20, 2024.
2. I uphold the remainder of the ministry's decision.
3. In order to verify compliance with order provision 1, I may require the ministry to provide me with a copy of the recording disclosed to the appellant.

Original signed by: _____

Valerie Jepson
Adjudicator

_____ May 21, 2024