Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4567

Appeal PA20-00248

Ministry of Children, Community and Social Services

November 4, 2024

Summary: A journalist requested copies of serious occurrence reports provided to the ministry by a particular Indigenous children's aid service provider for a specified 10-month period. The ministry refused to provide the journalist with copies of these reports, stating that providing the records would infringe the privacy rights of the individuals in the reports [the reason (exemption) at section 21(1) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*)]. The journalist did not seek the names of the children in care but information about each occurrence and how it was handled. The ministry maintained that disclosure of the information sought was not permitted for the personal privacy reason stated in *FIPPA*.

In this order, the adjudicator finds that some of the records are not able to be accessed under *FIPPA* due to the *Youth Criminal Justice Act*. Regarding the remaining information, the adjudicator agrees with the ministry and dismisses the appeal. The adjudicator also addresses the ministry's claim made during the inquiry that some of the records could not be disclosed due to a confidentiality provision in the *Child, Youth, and Family Services Act, 2017*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2 (personal information), 21(1), 23, 67(1), 67(2); *Youth Criminal Justice Act*, S.C. 2002, c. 1, sections 2 (record), 110, 111, 116(1), 116(2), 118(1), 129; *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1, section 87(8).

Orders Considered: Orders MO-4421, PO-3236, and PO-3239.

OVERVIEW:

[1] A serious occurrence report is a report used by service providers under the *Child, Youth and Family Services Act, 2017* (the *CYFSA*) to report serious occurrences to the Ministry of Children, Community and Social Services (the ministry), which may include occurrences such as death, serious injury, and alleged abuse of children and youth.[1]

[2] Under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), a journalist sought access from the ministry to copies of certain categories of serious occurrence reports and "enhanced serious occurrence reports" pertaining to a specified Indigenous service provider (the service provider) for a specified 10-month period.

[3] The ministry denied access to the requested records relying on the personal privacy exemption at section 21 of *FIPPA,* stating in its decision that there was a risk of re-identification of the individuals in the records.

[4] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). A mediator was assigned to explore resolution. The parties confirmed their positions, and the appellant stated that he believed it was in the public interest for the ministry to disclose the records, thereby raising the possible application of the public interest override at section 23 of *FIPPA.*

[5] The appeal transferred to the adjudication stage, and I conducted a written inquiry in which I sought representations from the ministry and the appellant. In addition to its section 21(1) claims, the ministry asserted for the first time that section 87(8) of the *CYFSA* applies to prevent disclosure under *FIPPA* of some or all of the records*.*

[6] Later in the inquiry, based on my review of the records, I invited and received the parties' representations about the possible relevance of the *Youth Criminal Justice Act* (*YCJA*) to the appeal.

[7] In this order, I dismiss the appeal. I find that the *YCJA* and not *FIPPA* governs access to some of the information at issue. I also find that the remaining information is exempt from disclosure under section 21(1) of *FIPPA* and that section 23 does not apply to override the privacy interests at risk in disclosure of the records*.*

RECORDS:

[8] The records consist of 31 reports submitted by the service provider to the ministry. Many of the reports contain duplicate information because the same form is used for each occurrence to include updated information. This means that although there are 31 reports at issue, the total number of unique occurrences is less than 31.

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[1] As explained in the ministry's representations.

ISSUES:

A. Does the *YCJA* or *FIPPA* govern access to information in certain records?

B. Does section 87(8) of the *CYFSA* apply to the records?

C. Does the information requested by the appellant consist of "personal information"?

D. Does the mandatory personal privacy exemption at section 21(1) of *FIPPA* apply to the information at issue?

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21 exemption?

DISCUSSION:

Issue A: Does the *YCJA* or *FIPPA* govern access to information in certain records?

[9] Some of the information in the reports relates to youth involvement with the youth criminal justice system and the *YCJA*. The *YCJA* is a federal law. The doctrine of paramountcy of federal legislation provides that where there is a conflict between federal legislation (such as the *YCJA*) and provincial legislation (such as *FIPPA*), the federal legislation will prevail.

[10] Part 6 of the *YCJA* governs the management, publication and disclosure of records kept under the *YCJA* and information that would identify individuals who become involved in the youth criminal justice system. The scope and purpose of the *YCJA* was discussed in the Ontario Court of Appeal decision, *S.L. v. N.*B.[2] (*S.L. v. N.B.*). The Court in *S.L. v. N.B.* held that Part 6 of the *YCJA* is an exclusive and comprehensive regime governing the disclosure of information about young persons involved in the youth criminal justice system.

[11] During the inquiry, I formed the preliminary view that some of the reports may be records within the meaning of sections 116(1) or (2) of the *YCJA* and that therefore disclosure of these records was governed by the *YCJA* and not *FIPPA.* (Sections 118(1) and 129 of the *YCJA* limit the disclosure of the records described in sections 116(1) and section 116(2) of the *YCJA*.)

[12] It was also my preliminary view that disclosure under *FIPPA* of some of the information could run afoul of the *YCJA* because of the obligation in section 110(1) of the *YCJA* not to publish the name or other information related to a young person "if it would identify the young person as a young person dealt with under [the *YCJA*];" or the

[2] [2005] O.J. No. 1411.

obligation in section 111(1) of the *YCJA* that no person shall publish the name or other information related to a child or a young person, "if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person."

[13] "Publication" is defined in the *YCJA* to mean "the communication of information by making it known or accessible to the general public through any means" including via media. IPC adjudicators have held that, with limited exceptions, disclosure under the access provisions of *FIPPA* is equivalent to disclosure to the world because there are generally no limits on the dissemination of records accessed under *FIPPA*.[3]

[14] I shared my preliminary views with the parties and invited their representations, which are discussed below.

Discussion and analysis

Regarding sections 116(1) and (2) – YCJA records

[15] Sections 116(1) and (2) of the *YCJA* describe the circumstances under which a government department or agency may keep "records" involving young persons and the *YCJA*.[4] The ministry submits that serious occurrence reports are not records that are governed by section 116(1) or (2) of the *YCJA.* The ministry refers to the definition of "record" in section 2(1) of the *YCJA,* which states (emphasis added):

> ***record*** includes any thing containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, <u>that is</u>

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[3] See for instance Order P-164, P-578, P-679, P-1635, PO-2018, PO-2465, PO-4414 and also (under the equivalent provision in the *Municipal Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. M.56) Order M-96, upheld on judicial review *O.S.S.T.F., District 39 v. Wellington (County) Board of Education*, Toronto Doc. 407/93 (Ont. Div. Ct.), leave to appeal refused, Doc. M15357 (C.A.).

[4] These sections state:

> 116 (1) A department or an agency of any government in Canada may keep records containing information obtained by the department or agency
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> (a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
>
> (b) for use in proceedings against a young person under this Act;
>
> (c) for the purpose of administering a youth sentence or an order of the youth justice court;
>
> (d) for the purpose of considering whether to use extrajudicial measures to deal with a young person; or
>
> (e) as a result of the use of extrajudicial measures to deal with a young person.
>
> Other records
>
> (2) A person or organization may keep records containing information obtained by the person or organization
>
> (a) as a result of the use of extrajudicial measures to deal with a young person; or
>
> (b) for the purpose of administering or participating in the administration of a youth sentence.

> created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act.

[16] The ministry says that serious occurrence reports are not kept for a purpose under the *YCJA,* but rather kept pursuant to a regulatory requirement under the *CYFSA* or the ministry's policy. The ministry says that the purpose of serious occurrence reporting is to allow service providers to manage incidents and support the ministry in monitoring and overseeing service providers in the delivery of services.

[17] The appellant also argues that the records at issue are not governed by sections 116(1) or (2) of the *YCJA*. Regarding the possible application of section 116(2), the appellant says that for a record to qualify it must be established that the report at issue was a result of "extrajudicial measures." The appellant argues that for extrajudicial measures to be present, a high threshold must be met: it must be established that the young person committed an offence *and* the police officer decided to implement extrajudicial measures instead of pursuing a criminal charge. (The appellant refers to *R. v. (M.)(C.),*[5] *R. v. Burgess,*[6] *R. v. (B.)(A.).*[7] in support of his position.)

[18] I am persuaded by the parties' arguments, and I agree that none of the records at issue in this appeal are "records" within the meaning of the *YCJA* and that therefore disclosure of these records is not governed by sections 118(1) and 129 of the *YCJA.* In this appeal, the particular records at issue were created or kept for a purpose of the *CYFSA* and not the *YCJA.* While there may be circumstances where a record can be both, I am satisfied based on the content of the records before me that this is not such a circumstance.

Regarding the restriction on publication – sections 110 and 111

[19] The ministry submits that the reports contain information that identifies young persons who have been dealt with under the *YCJA* and that therefore section 110(1) of the *YCJA* prohibits publishing any information that would identify any young person as having involvement with or investigation by police services. The ministry refers to Order F18-38 of the B.C. IPC in support of its position that disclosure of this information could constitute publication.

[20] The appellant says that when the restriction against publication arises under the *YCJA* due to sections 110 and 111, it is not the same as a restrictive sealing order or publication ban, citing paragraph 39 of *K.B. v. Toronto District School Board.*[8] (*K.B.* deals with an application for an extension of a sealing order over a court file in the context of a civil proceeding; it does not address *FIPPA*.)

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[5] 2010 ONSC 2177 at paras 19 and 22.
[6] 2021 ABPC 80.
[7] 2015 O.J. No. 7113.
[8] *K.B. v. Toronto District School Board (2006)*, 81 OR (3d) 56.

[21] The appellant says that the effect of sections 110 and 111 is to restrict only the publication of the "names and identifying information relating to the accused, victim and witnesses," citing *K.B.* at paragraph 36. The appellant argues that disclosure – if it is publication – of anonymous information does not necessarily offend the *YCJA.*

[22] The appellant argues that determining whether the *YCJA* prevails over *FIPPA,* I must take into account the context, scope and purpose of the *YCJA* when assessing the particular records at issue. The appellant also submits that the *YCJA* is not intended to protect organizations like the service provider that, he says, are responsible for serious misconduct. It says that any withholding of information arising due to the *YCJA* must be limited to what is necessary to protect the intended persons.

[23] The appellant refers to the *Canadian Victim Bill of Rights*[9] for its definition of "victim" and the *Witness Protection Program Act*[10] for its definition of "witness" and submits that these terms as defined by these statutes should be considered when interpreting and applying the *YCJA.* Regarding the definition of witness, the appellant submits that it is notable that it excludes individuals who were eyewitnesses to an offence or who happened to be in the vicinity during the commission of an offence and that therefore the protections as it relates to witnesses must only be provided to witnesses who meet the threshold set out in the definition.

[24] The appellant says that the presumptive remedy that the *YCJA* offers for the protection of the privacy of young persons is the redaction of their names and identifying information where necessary and not the complete withholding of documents in which their involvement in criminal matters is only incidentally implicated.

Finding

[25] In Order MO-4421, the IPC concluded that in the context of a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) disclosure under *MFIPPA* can be equivalent to publication under the *YCJA.* Order MO-4421 states:

> [32] "Publication" is defined in the *YCJA* to mean "the communication of information by making it known or accessible to the general public through any means" including via media. IPC adjudicators have held that, with limited exceptions, disclosure under the access provisions of the *MFIPPA* is equivalent to disclosure to the world because there are generally no limits on the dissemination of records accessed under the *MFIPPA*. [citation omitted] The Ontario IPC has not yet considered whether disclosure under the *Act* is equivalent to publication under the *YCJA.* However, the British Columbia Information and Privacy Commissioner has considered this issue and found that disclosure under the B.C. equivalent to *MFIPPA* of certain information protected by the *YCJA* amounts to "access to the world at large"

[9] S.C. 2015, c. 13.
[10] S.C. 1996, c. 15.

> and moreover "publication" under section 110 of the *YCJA*. [Order F18-38 (British Columbia Information and Privacy Commissioner)] In consideration of the Ontario IPC's consistent approach in relation to disclosure and the principles protected by the *YCJA,* I find that disclosure under the *Act* would be equivalent to publication under the *YCJA.*

[26] I find that the same considerations apply to the right of access under *FIPPA* and that disclosure under *FIPPA* amounts to publication under section 110 of the *YCJA.* When it does, it is my view that the *YCJA* prevails over an appellant's access rights as set out in *FIPPA*.

[27] I agree with the appellant that sections 110(1) and 111(1) of the *YCJA* should be interpreted in a way that is connected to the purpose of those sections. However, when I consider the Part 6 of the *YCJA* as a whole – the part of the *YCJA* that prescribes in detail the obligations and duties arising from records and information about youth involvement with the *YCJA* – I am of the view that a cautious approach is warranted.

[28] Taking this approach and based on the content of the records themselves which I cannot describe further in this order, I conclude that the *YCJA* and not *FIPPA* governs access to the information on several pages.[11] The information on these pages is the type of information contemplated by 110(1) and 111, and cannot be disclosed under *FIPPA,* and I will not address it further in this order. In some cases, I have concluded that access to an entire page is governed by the *YCJA* and not *FIPPA.* I have reached this conclusion because it is my view that the existence of the recorded information itself alone would reveal that the youth was dealt with under the *YCJA.*

[29] The remainder of this order will consider the appellant's rights under *FIPPA* to access the remaining information.

Issue B: Does section 87(8) of the *CYFSA* apply to the records?

[30] During the inquiry, as an alternative to its personal privacy claim, the ministry raised the possible application of section 87(8) of the *CYFSA*, a prohibition on publication. The ministry argues that access to some of the information at issue may be governed by section 87(8) of the *CYFSA* and that this provision prevails over the access provisions in *FIPPA* by virtue of sections 67(1) and (2) of *FIPPA.* The ministry refers to Order PO-3236, which dealt with the equivalent provision [section 45(8)] in the now-repealed *Child and Family Services Act.*[12]

[31] Section 87(8) of the *CYFSA* states:

> **Prohibition re identifying child**

[11] Pages 14-16, 22, 24-25, 28, 30-32, 40, 49-50, 52-53, 78-80, and 85-86.
[12] R.S.O. 1990, Chapter C.11.

> (8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

[32] Section 67 of *FIPPA* specifically references section 87(8) of the *CYFSA,* as follows [emphasis added]:

> 67(1) This Act [*FIPPA*] prevails over a confidentiality provision in any other Act unless subsection (2) or the other Act specifically provides otherwise.
>
> (2) The following confidentiality provisions prevail over this Act:
>
> …
>
> 2. Subsections **87(8)**, (9) and (10), 98(9) and (10), 130(6) and 163(6) and section 227 of the *Child, Youth and Family Services Act, 2017.*

[33] The proceedings at issue in section 87(8) of the *CYFSA* are child protection proceedings. The ministry says that children placed in the care of the service provider may have been witnesses, participants or subjects of proceedings under the *CYFSA,* although because it is not involved in the direct care of the individuals who are subject of the reports, it is not able to confirm that this is the case for any of the individuals named in the records. The ministry did not provide any further argument or rubric to assist in identifying which type of information could reveal that these individuals are involved in a hearing or proceeding. As I understand it, the ministry argues that a reasonable assumption be drawn in the case of some of the children described in these reports (unspecified by the ministry) that they were involved in such a proceeding.

[34] The appellant does not dispute that the *CYFSA* and not *FIPPA* may be the controlling statute for access to the information. However, he argues that the ministry's inability to specifically identify and confirm whether any of the individuals named in the records did in fact participate in a hearing is fatal to its claim in this appeal.

[35] As explained by the adjudicator in Order PO-3236, section 67(2) of *FIPPA* is not a jurisdiction-limiting provision that excludes certain categories of records from *FIPPA*'s application. Rather, it provides that *FIPPA* is not the controlling statute for protecting information that falls within the scope of one of the listed confidentiality provisions, such as section 87(8) of the *CYFSA.* Section 87(8) will prevail when the information at issue consists of "information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family."

[36] In my view, when considering the privacy objectives that section 87(8) of the *CYFSA* is intended to advance and when considering the wording ("has the effect of identifying" as further discussed by the adjudicator in Order PO-3239), it is appropriate

to apply this section in a broad and cautious manner to ensure that sufficient privacy protections are in place. The protections afforded by section 87(8) are important protections.

[37] As conceded by the ministry, it is not automatic that every child who is discussed in the reports was involved in a proceeding contemplated by section 87(8). I considered whether I could make a reasonable assumption that this was the case in the context of some or all of the information at issue. However, I do not have sufficient information before me to do so and I am therefore unable to conclude that the records could have the effect of identifying a child described in section 87(8) of the *CYFSA*. I therefore find that section 67(1) of *FIPPA* does not apply.

[38] I will next consider the ministry's main arguments – whether the information at issue consists of personal information and the application of the mandatory personal privacy exemption at section 21(1).

Issue C: Does the information requested by the appellant consist of "personal information"?

Positions of the parties

[39] Because the mandatory personal privacy exemption at section 21(1) of *FIPPA* is at issue in this appeal, it is necessary to determine whether the records contain "personal information," a term defined in *FIPPA.* The parties do not dispute that the records contain personal information. The dispute is what information qualifies as personal information and whether the personal information can be severed from the records.

[40] The appellant believes that if certain information is severed from the records, they will no longer contain personal information. The ministry disagrees and submits that if all of the personal information contained in the records is severed, the records will consist only of "skeleton" reports devoid of any information at all.

[41] Another dispute between the parties is whether the records contain personal information of individuals acting in their official or professional capacity, such as some of the children's caregivers or the employees of the service provider. However, the ministry does not argue that disclosure of the identities of the service provider's employees would reveal these employees' own personal information. The ministry's argument is that disclosure of this information would identify the children in care. It submits that the communities served by the service provider are small, and that in most cases, specific workers are assigned to particular communities, meaning that the identity of the service provider employee would enable someone to identify the community in question. On this point, the appellant says that given the high turnover of staff knowing which workers support which communities is not readily ascertainable information.

Discussion

[42] I agree with the parties that the records contain personal information of the children, their family members (in some cases), and their caregivers. 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.[13] Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[14]

[43] The personal information in the records consists of the children's names, initials, dates of birth, ages, caregivers, case workers, other workers, family members, health information, school information, involvement with law enforcement, and their living situations. These records pertain only to a 10-month period of time. As described above, although there are 31 reports, they pertain to lower number of incidents. In other words, it does not follow that because there are 31 reports at issue, there were 31 occurrences; there were less.

[44] I also find that to the extent there is information in the reports that identifies certain caregivers or employees of the service provider, this is also the children's personal information as it would associate them with the service provider. I have reached this conclusion in consideration of the circumstances described in the records, the unique circumstances pertaining to each occurrence and the short period of time for which the appellant seeks this information.

[45] As noted, the dispute between the parties is whether the records may be severed so that they no longer contain personal information. The appellant does not seek access to the names, initials or birthdates of the children and submits that if this information is severed in accordance with section 10(2) of *FIPPA*, the records will not contain personal information. The appellant also submits that other types of personal information, if present, could be severed and that the focus and purpose of the request is to obtain access only to information "surrounding the occurrence, how it was handled… any follow up measures taken, and the number of various (or similar occurrences) …."

[46] The ministry says that if the records are severed as suggested by the appellant, they would still contain personal information and submits that personal information has been found to mean information that, taken as a whole, will lead on a balance of probabilities to the identification of an individuals, citing *Pascoe*.[15] The ministry argues

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[13] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.) ("*Pascoe*").
[14] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225. See also sections 2(2.1) and 2(2.2).
[15] Cited above.

that information about children in care would allow for re-identification of the children involved. It submits that the narratives and timeframes combined with information available in the small communities at issue would enable the requester to re-identify the individuals in question.

[47] The appellant submits that the populations served by the service provider are not as small as stated by the ministry. The appellant listed the communities served by the service provider with their corresponding populations. He submits that one child even among the smallest of the communities is difficult to identify because there are such a wide variety of care options, including those outside of the communities in question.

[48] The appellant specifically disputes any notion that he would be able to re-identify the children in question. In support, he points to a prior access request for similar information, to which the ministry provided access to redacted records. As I understand the argument, the appellant asserts that the ministry's concerns are not credible because it did not make similar arguments in relation to the prior request.

[49] Regarding its prior decision to disclose similar records, the ministry submits that how it treated prior requests does not set a precedent for how it will treat future requests. It says that it tries to be consistent but that each request and record must be viewed individually. It also says that its approach evolves with new legislation, case law and an increased understanding of the environment of widely available information that can be used to re-identify individuals.

[50] I considered whether the records would contain personal information if the names, initials and dates of birth of the children were severed as argued by the appellant. I agree with the ministry that even if this information is severed the remaining information would consist of personal information that is detailed and specific enough – especially considering the nature of some of the occurrences in particular, the short time-frame and the low number of overall occurrences at issue – that the children in care could be identifiable.

[51] Regarding the appellant's argument about the ministry's prior access decisions, institutions are not bound by their prior access decisions in response to similar information. I agree with the ministry that each request and record must be considered in its own context and – of relevance to this appeal in particular – its approach may evolve due to a variety of factors including the increasingly amount of publicly-available information that can be used to re-identify individuals.

[52] I also agree with the ministry that if all of the personal information was severed what would remain are a series of "skeleton" reports. I find that ordering the disclosure of this information would result in the disclosure of meaningless or disconnected snippets of information that would not constitute reasonable severance within the meaning of

section 10(2).[16] Therefore, I will not order that the reports be severed to remove all of the personal information and be disclosed.

[53] I will consider next whether disclosure of the personal information (other than the names, initials and dates of birth, which the appellant does not seek) would be an unjustified invasion of the children's personal privacy.

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

[54] Section 21(1) of *FIPPA* creates a general rule that an institution cannot disclose personal information about another individual to a requester. This general rule is subject to a number of exceptions. The section 21(1)(a) to (e) exceptions are relatively straightforward. If any of the five exceptions covered in sections 21(1)(a) to (e) exist, the institution must disclose the information.

The exception for research purposes at section 21(1)(e) does not apply

[55] The appellant argues that the exception in 21(1)(e) applies. This exception provides for the disclosure of personal information for a research purpose; however, the exemption contains specific prerequisites before it can be invoked. Section 21(1)(e) states:

> 21 (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (e) for a research purpose if,
>
> (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
>
> (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
>
> (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations; or

[56] The ministry denies that this section applies. It submits that the information has not been requested for a research purpose nor is there any information to suggest that the appellant will adhere to the prescribed conditions.[17] The appellant submits that he is

[16] See Order PO-1663 and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [2012] 1 SCR 23.
[17] R.R.O. 1990, Reg. 460: General, section 10.

a journalist whose work has focused on the child welfare system in Ontario and, in particular, on the service provider at issue in this appeal. He says that this request is to further his research and has the goal of transparency and improving the child welfare system for a vulnerable population.

[57] While there is no doubt that the appellant seeks the information to advance his research efforts into important issues, there is no evidence before me that the children whose personal information is in the records would have any reasonable expectation that this information would be disclosed for a research purpose, nor is there any information about any agreement about the use of the information as contemplated by section 21(1)(e)(iii). I find that section 21(1)(e) does not apply.

The justified invasion of personal privacy exception at section 21(1)(f) does not apply

[58] The section 21(1)(f) exception allows the institution to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy." Other parts of section 21 must be looked at to decide whether disclosure of the other individual's personal information would 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.

[59] Sections 21(3)(a) to (h) should generally be considered first. These sections outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. If the personal information at issue does not fit within any presumptions under section 21(3), one must next consider the factors set out in section 21(2) to determine whether or not disclosure would be an unjustified invasion of personal privacy.

[60] If disclosure of the personal information would constitute an unjustified invasion of personal privacy, it cannot be disclosed unless one of the situations in section 21(4) applies or there is a "compelling public interest" under section 23 that means the information should nonetheless be disclosed. None of the situations in section 21(4) are relevant to this appeal. Section 23 will be discussed further below.

Presumption for medical information – section 21(3)(a)

[61] Some of the personal information contained in the records "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation" [from section 21(3)(a)]. The nature of the information is not able to be described further in this order. Disclosure of this information is presumed to be an unjustified invasion of their personal privacy, and it is exempt from disclosure under section 21(1). I therefore find that disclosure of certain of the information at issue is a presumed unjustified invasion of the personal privacy.

[62] The factors outlined in section 21(2) cannot be used to rebut (disprove) a

presumed unjustified invasion of personal privacy under section 21(3).[18] In other words, if disclosure of the personal information is presumed to be an unjustified invasion of personal privacy under section 21(3), section 21(2) cannot change this presumption.

The section 21(2) factors

[63] There is some information at issue that is not covered by the section 21(3)(a) presumption. For this personal information, it is necessary to consider the factors at section 21(2).

[64] As I explain below, I find that there are no factors that favour disclosure the information at issue and that therefore disclosure of the remaining information would constitute an unjustified invasion of personal privacy.

[65] The list of factors under section 21(2) is not a complete list. Each of the first four factors, found in sections 21(2)(a) to (d), if established, would tend to support disclosure of the personal information in question, while the remaining five factors found in sections 21(2) (e) to (i), if established, would tend to support non-disclosure of that information.

[66] The following factors, that the appellant argues should weigh in favour of disclosure, are discussed below:

> (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;
>
> (b) access to the personal information may promote public health and safety;

Is disclosure desirable for public scrutiny [section 21(2)(a)]?

[67] This factor, when relevant, supports disclosure when disclosure would subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[19]

[68] The appellant submits that the ministry should consider the broader interests of public accountability when considering whether disclosure is "desirable" or appropriate to allow for public scrutiny of its activities.[20]

[69] The appellant says that the service provider is funded by significant public funds

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[18] *John Doe v. Ontario (Information and Privacy Commissioner) (1993),* 13 O.R. (3d) 767.
[19] Order P-1134.
[20] Order P-256.

and that the ministry has oversight responsibility over it. The appellant says, further, that the ministry has a responsibility to analyze the serious occurrence reports to help inform the development of policies and programs. The appellant points to publicly reported serious incidents of misconduct by the service provider and argues that heightened scrutiny over the service provider by the ministry is warranted. The appellant says that the information in the serious occurrence reports would shed light on whether the ministry is effective in its oversight of the service provider.

[70] The ministry disputes that disclosure of the records is desirable for subjecting the ministry to public scrutiny. The ministry says that the serious occurrence reports are not generated by the ministry but are reports from the service provider. Further, the ministry says that the serious occurrence reports do not shed any light on how the ministry would take action in response to any of the reported events.

[71] Considering the information remaining at issue, I am unable to conclude that disclosure of any of it would shed any light on the actions of the ministry. I acknowledge that the ministry's receipt of these reports is a function of its oversight of the service provider. I also considered that the volume and nature of the reports would be relevant to understanding how the ministry might react or respond. However, I agree with the ministry that these records in particular do not shed light on the ministry's actions, other than to confirm that these reports are being duly received.

[72] I find that this factor does not apply and does not therefore weigh in favour of disclosure.

Would disclosure promote public health and safety [section 21(2)(b)]?

[73] The factor at section 21(2)(b), when relevant, weighs in favour of disclosure where disclosure of the personal information would promote public health and safety.

[74] The appellant submits that the welfare of Indigenous children is important to Canada's future. He provides important context that Indigenous children experience poorer health outcomes than most Canadian children and that there is a high number of children in care with the service provider. He argues that disclosure of the information could help to improve the well being of the children served by the service provider and that because of the high number of children who come into the care of the service provider, disclosure of this information would promote public health.

[75] The ministry disputes that the section 21(2)(b) factor applies. It submits that the serious occurrence reports contain specific information about specific individuals and that this information would pertain only to those individuals and not more broadly.

[76] I agree with the ministry that this factor does not apply to the information at issue and therefore does not weigh in favour of disclosure. This is not to diminish the important public health issues raised by the appellant. Rather, I am persuaded by the ministry's arguments and my review of the records themselves that disclosure of these records

would not promote public health or safety.

[77] Because there are no factors that favour disclosure, it is not necessary to consider and weigh the factors that the ministry argues weigh against disclosure. I find that disclosure of the remaining personal information would constitute an unjustified invasion of personal privacy of the children described in the records. I will next consider the appellant's claim that the public interest override applies.

Issue E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

[78] Section 23 of *FIPPA*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under section 21(1) if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[79] In order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[21] "Compelling" has been interpreted to mean a "rousing strong interest or attention."[22]

[80] 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. 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.[23]

Discussion

[81] The appellant, a journalist, seeks disclosure in order to shed light on the operations of government as administered through the service provider. The appellant acknowledges that he is not presumed to have a public interest simply by virtue of his profession; however, he argues that the specific project he has undertaken demonstrates a compelling public interest.

[82] He seeks to report on mistreatment of children cared for by the service provider. He explains that his focus goes beyond individual, isolated incidents that might be considered purely private matters. He argues that the service provider has been negligent, and that the ministry has not adequately supervised its activities. He argues that the reports provide insight into the cause of serious occurrences, whether certain service provider employees are responsible for misconduct, and the adequacy of the

[21] Orders P-984 and PO-2556.
[22] Order P-984.
[23] Order P-1398, upheld on judicial review in *Ontario v. Higgins,* 1999 CanLII 1104 (ONCA), 118 OAC 108.

ministry's oversight. He argues that disclosure of this information is necessary to enable the public to judge whether the service provider is an appropriate organization to which the ministry should entrust this work.

[83] The ministry submits that disclosure of the records at issue shed no light on any ministry response or its oversight of the service provider. However, its main argument is about the importance of the interests protected by the exemption.

[84] The ministry reiterates that the privacy exemption exists to protect the privacy of vulnerable children in care of the service provider. The ministry says that a core component of the child protection system is to maintain confidentiality over information, particularly when a service provider acts "in loco parentis" and the circumstances of these children's lives are immortalized in records, such as the serious occurrence reports. The ministry says:

> A child is not given a choice to be taken into care – and though any child could experience [incidents that could require a serious occurrence report], children not in the care of a [service provider] do not have their stories or personal tragedy recorded. While these reports are necessary for the ministry to maintain oversight over their care, privacy is their right, and it is the ministry's responsibility to protect that right.

[85] The ministry submits that the service provider's activities are governed by the *CYFSA*, a statute that contains numerous provisions designed to protect the privacy of persons it deals with, and that this also heightens the privacy interests of the children in care. The ministry says that in this case, in these circumstances and in consideration of these records, the public interest in maintaining a "secure" system is supported by protecting the privacy rights of these children in care.

[86] While I accept that there is a compelling public interest in addressing the important issues raised by the appellant, I am not satisfied that disclosure of the records at issue would advance that objective. In my view, the information in the reports pertains to private situations that are focused primarily on the circumstances of the children in care. In reaching this conclusion I considered that there is some high-level information that could perhaps shed some light about the ministry's response to certain incidents; however, having reviewed them, I find that the primary focus of these records is the personal circumstances of the children in care.

[87] I also agree and find that in this case the privacy rights protected by section 21(1) weigh heavily against any public interest in disclosure because of the nature of the information and because of the unique experience of children in care. As stated by the ministry, there is a need to document and report the information in the records for oversight purposes, but the fact that these circumstances are recorded requires maximum caution to protect the privacy of the children at issue in the records. In these circumstances, even if I were to find that there is a compelling public interest in disclosure

of the records, that public interest is heavily outweighed by the personal privacy rights of the children in care.

[88] In reaching this conclusion, I considered again the fact that the appellant seeks only severed information and that he does not seek this information to attempt to reidentify anyone. I also considered again that the appellant's interests and objectives are geared at assisting and *advancing* the interests of children in care by shining a light on the system, one of the *Act's* purposes. Against this backdrop, I considered whether disclosure of any portion of the reports would advance a compelling public interest that is outweighed by the privacy interests at stake. I have been unable to identify portions that could be disclosed that could shed meaningful light on the ministry's actions to oversee the service provider without improperly infringing on the privacy interests discussed above.

[89] I find that section 23 does not apply to the information at issue.

ORDER:

I dismiss the appeal.

Original Signed by:	November 4, 2024
Valerie Jepson Adjudicator	