

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4578

Appeal PA23-00175

Ministry of the Solicitor General

November 29, 2024

Summary: The Ministry of the Solicitor General (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a police report relating to the suicide of an individual. The request was made by the sister of the deceased. The ministry decided to disclose parts of the police report to the requester for compassionate reasons, under section 21(4)(d) of the *Act*, but not the rest of the report. The requester did not appeal the ministry's decision to withhold the rest of the report, but the widower of the deceased appealed the ministry's decision to disclose any information about his late wife. In this order, the adjudicator upholds the ministry's decision and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definitions of "personal information" and "close relative"), 21(1), 21(3)(a), 21(3)(b), 21(4)(d), and 66(a).

Orders Considered: Orders PO-3504, PO-4563, MO-2237, and MO-2245.

OVERVIEW:

[1] This order addresses a close relative's access to the personal information of a deceased individual on compassionate reasons under the *Freedom of Information and Protection of Privacy Act* (the *Act*). In doing so, this order discusses whether a surviving spouse (who opposes disclosure to the requester) can exercise the rights of the deceased under the *Act*.

[2] The record in this appeal is a police report relating to a tragic event, the suicide of an individual.

[3] The sister of the deceased individual requested this police report from the Ministry of the Solicitor General (the ministry) under the *Act*.

[4] The ministry notified the widower of the deceased individual about the request. The ministry asked for his views about disclosure before deciding about access to any part of the police report (including parts that contain his personal information). The widower objected to the disclosure of the police report.

[5] The ministry ultimately decided to withhold parts of the police report under various sections of the *Act*, including the mandatory personal privacy exemption at section 21(1) of the *Act*, but decided that parts of the report could be released to the requester under section 21(4)(d) of the *Act* (which is an exception to the mandatory personal privacy exemption, for compassionate reasons).

[6] The requester did not appeal the ministry's decision to withhold parts of the police report.

[7] The widower of the deceased (now the appellant) appealed the ministry's decision (to disclose parts of the police report) to the Information and Privacy Commissioner of Ontario (IPC).

[8] I conducted a written inquiry under the *Act* on the issues in the appeal. The appellant and the requester provided written representations in response,¹ and the ministry did not. However, when I asked the ministry for clarification as to why it referred to the appellant as the "designated representative" of the deceased in its decision letter (as such a person has limited access rights under the *Act*), the ministry provided a written response.

[9] For the reasons that follow, I uphold the ministry's decision to grant access to the information at issue pursuant to section 21(4)(d) of the *Act* and I dismiss the appeal.

RECORD:

[10] The record at issue is a nine-page Ontario Provincial Police Occurrence Summary. The information at issue is the information that the ministry decided should be disclosed. The information that the ministry decided to withhold is not at issue because the requester did not appeal the ministry's decision.

¹ I shared the non-confidential portions of the appellant's representations with the requester and withheld portions due to confidentiality concerns, under *Practice Direction 7* of the IPC's *Code of Procedure*.

ISSUES:

- A. Can the appellant exercise the rights of the deceased under the *Act*?
- B. Does the record contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the compassionate reasons exception apply to the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

DISCUSSION:

Issue A: Can the appellant exercise the rights of the deceased under the *Act*?

[11] Before explaining why I uphold the ministry’s decision to disclose portions of the police report to the requester under the compassionate reasons exception to the personal privacy exemption, I must address the situation of the appellant.

Background information

[12] Having reviewed the police report, I can confirm that it contains the personal information of several identifiable individuals, including the deceased and the appellant (but not the requester). Since the responsive record contains the appellant’s personal information, he is a party whose interests may be affected by disclosure of the personal information relating to him in the record, so the ministry notified him about the request, under section 28(1)(b) of the *Act*.² The ministry’s notice letter asked the appellant to indicate in an enclosed form “whether [he] would consider disclosure of this information to be an invasion of [his] personal privacy.”

[13] However, when the ministry issued its decision, it described its earlier correspondence to the appellant differently, saying: “In your capacity as the personal representative of the deceased, we sought your views regarding the disclosure of the deceased’s personal information contained in the records.” The ministry’s decision letter went on to assure him that even though it decided to disclose some of the deceased’s personal information, it had withheld all of *his* personal information from disclosure.

[14] During the inquiry, I asked the ministry to clarify the basis of designating the appellant as the deceased’s “personal representative.” I asked the ministry to include criteria, evidence, or specific legislation that it relied on to inform its determination that the appellant had authority to consent to, or deny, the requester’s access to the deceased’s personal information in the records.

² I am not aware of whether it notified any of the other identifiable individuals whose personal information is in the police report.

[15] The ministry explained that it had not contacted the appellant specifically because he is the personal representative and it did not rely on section 66(a) of the *Act* (which deals with the rights or powers of personal representatives of an estate under the *Act*).³ Rather, the ministry said that it contacted the appellant because he is the spouse of the deceased individual and the request was for a deceased person's personal information for compassionate reasons. The ministry said it could not be satisfied that such disclosure was compassionate unless it consulted with the spouse of the deceased and described him as "a party that had an interest in the outcome of the appeal."⁴

Does the Act give a spouse the right to prevent disclosure to a close relative if compassionate reasons for disclosure to the close relative are established?

[16] The *Act* does not give a spouse the right to prevent disclosure to a close relative if compassionate reasons for disclosure to the close relative are established, for the reasons that follow.

[17] As noted, the *Act* requires an institution to consult with affected parties when determining whether information is exempt (if their personal information is involved or if disclosure may impact their privacy), under section 28(1)(b) of the *Act*. Affected parties may include anyone whose personal interests or information are implicated by disclosure, not just a deceased's spouse or close relative.

[18] As an *exception* to the privacy protections in the *Act*, section 21(4)(d) permits disclosure of otherwise exempt personal information belonging to the deceased individual.

[19] Once this exception is raised, the primary consideration shifts to the requester's compassionate reasons. *If compassionate reasons for its disclosure to a close relative are established*, a non-requester's objections cannot automatically prevent disclosure of the deceased individual's personal information.

How are compassionate reasons for disclosure of a deceased's personal information established?

[20] In Order MO-2237 (and later in Order MO-2245),⁵ former Commissioner Brian Beamish found that there is a three-part test to determine whether the compassionate reasons exception applies. For section 21(4)(d) to apply, the following conditions must apply:

³ Section 66(a) says: "Any right or power conferred on an individual by this Act may be exercised, where the individual is deceased, by the individual's personal representative *if exercise of the right or power relates to the administration of the individual's estate*["]."³ [Emphasis added.]

⁴ A similar scenario was involved in the appeal resolved by Order PO-4563.

⁵ These orders were decided under the *Municipal Freedom of Information and Protection of Privacy Act*, refers to section 14(4)(c), which is the municipal equivalent of section 21(4)(d).

1. the records must contain the personal information of someone who has died,
2. the requester must be a spouse or "close relative" of the deceased individual, and
3. the disclosure of the personal information of the deceased individual must be desirable for compassionate reasons given the circumstances of the request.⁶

[21] This three-part test does not consider the objections of affected parties, personal representatives or spouses, to disclosure of a deceased's personal information to a close relative if the close relative requesting the information has established that there are compassionate reasons to do so.

[22] In Order MO-2245, the former Commissioner discussed the legislative history and purpose of the compassionate reasons exception – and who determines what kinds of personal information would help with grieving or not, in light of that purpose. The IPC has consistently applied the reasoning in that order to compassionate reasons appeals, so I will summarize some of its main points, as they underpin my decision.

- The surviving spouse or close relative of a deceased individual who requests the personal information of a deceased person is best able to act in their own "best interests" about whether particular kinds of information would help the grieving process or not. By introducing a compassionate reasons exception to the personal privacy exemption, the Legislature was "tacit[ly] recogniz[ing]" this. (Note that this refers to considering the views of a spouse or close relative *who is the requester* about what may help them grieve, not a non- requester.)
- If an institution were to see its role as acting in the best interests of the deceased (since they cannot consent to the release of their personal information), it would be acting against the clear purpose of the compassionate reasons exception. (Consent of a living individual is dealt with in a different exception to the personal privacy exemption, under section 21(1)(a), but that section is irrelevant if the compassionate reasons exception applies.)
- The compassionate reasons exception created a special class of requesters (made up of spouses and close relatives) with a special interest in gaining access to the personal information of a deceased individual. In other contexts, access under the *Act* is considered access to the world, but "institutions have been directed to very specific criteria when considering disclosure to this group [spouses and close relatives] as compared to 'disclosure to the world.'"

[23] That "specific criteria" which institutions (and, on appeal, the IPC) are directed to consider is the three-part test for section 21(4)(d).

⁶ Orders MO-2237 and MO-2245.

Analysis/findings

[24] Adopting the approach in Order MO-2245, I must consider the specific criteria of the three-part test to determine whether the requester can receive disclosure of her deceased sister's personal information for compassionate reasons. This three-part test does not contemplate spousal or next of kin consultation as a pre-condition to applying the exception in section 21(4)(d) *if* the personal information of those other individuals is not intermingled with the personal information of the deceased.

[25] Since the appellant's personal information is not intermingled with the deceased's personal information at issue (that is, with the parts of the police report that the ministry decided should be disclosed for compassionate reasons), he cannot prevent disclosure of the deceased's personal information if the three-part test is met. As a result, when I consider whether the requirements of the three-part test are met, below under Issue C, I will only consider the representations of the requester.

Issue B: Does the record contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[26] In order to decide which sections of the *Act* may apply to a specific case, the IPC must first decide whether the record contains "personal information," and if so, to whom the personal information relates.

[27] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[28] Based on my review of the police report as a whole, it does not contain the personal information of the requester.

[29] There is no dispute, and I find, that the personal information that the ministry decided should be disclosed under section 21(4)(d) is personal information belonging to the deceased. Based on my review of this information, I find that it is not mixed with the appellant's personal information or the personal information of any other identifiable individual.

[30] Since the record does not contain the requester's personal information, I must determine any right of access that she may have to the information at issue under the mandatory personal privacy exemption at section 21(1) of the *Act*.

Issue C: Does the compassionate reasons exception to the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

[31] One of the purposes of the *Act* is to protect the privacy of individuals with respect to personal information about themselves held by institutions.

[32] Section 21(1) of the *Act* 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.⁷

Section 21(1)(f) exception: disclosure is not an unjustified invasion of personal privacy

[33] The section 21(1)(f) exception requires 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.

[34] Under section 21(1)(f), if disclosure of the personal information would not be an unjustified invasion of personal privacy, the personal information is not exempt from disclosure.

[35] Sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy, but section 21(3) should generally be considered first.⁸

Section 21(3): is disclosure presumed to be an unjustified invasion of personal privacy?

[36] Sections 21(3)(a) to 21(3)(h) outline several situations in which disclosing personal information is presumed to be an unjustified invasion of personal privacy. If one of these presumptions applies, the personal information cannot be disclosed *unless* there is a reason under section 21(4) that disclosure of the information would *not* be an "unjustified invasion of personal privacy," or unless there is a "compelling public interest" under section 23⁹ (but that is not claimed or relevant here).

[37] None of the parties cited any of these presumptions as applicable to the personal information at issue.

[38] However, since I must consider any right of access under the *mandatory* personal privacy exemption, I must examine the information at issue myself to decide whether any section 21(3) presumptions apply.

[39] Based on my review of the information at issue, I find that the presumptions at sections 21(3)(a) (medical information) and section 21(3)(b) (investigation into a possible violation of law) are relevant.

[40] I am unable to elaborate on the nature of the information that qualifies under

⁷ The exceptions at sections 21(1)(a) to (e) and 21(4) (a) to (d).

⁸ If any of the section 21(3) presumptions are found to apply, they cannot be rebutted by the factors in section 21(2) for the purposes of deciding whether the section 21(1) exemption has been established.

⁹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

section 21(3)(a) without revealing it.

[41] Turning to the presumption at section 21(3)(b), this presumption requires only that there be an investigation into a *possible* violation of law.¹⁰ So, even if criminal proceedings were never started against the individual, section 21(3)(b) may still apply.¹¹ Here, I find that the personal information at issue in this appeal, in the context of the record in which it is found, is subject to the presumption at section 21(3)(b) because the personal information about the deceased was compiled and is identifiable as part of an investigation into a possible violation of law. The fact that the deceased died by suicide does not change the nature of the record as one compiled and identifiable as part of an investigation into a *possible* violation of law (seeing as the police were engaged because someone had been found deceased).

[42] Given my finding that two section 21(3) presumptions apply, it is not necessary to consider factors set out in section 21(2), and I will not do so. Since these section 21(3) presumptions apply, disclosure of the personal information of the deceased is presumed to be an unjustified invasion of her personal privacy and is exempt under the mandatory personal privacy exemption at section 21(1).

[43] However, this appeal involves an exception to that exemption, the compassionate reasons exception at section 21(4)(d) of the *Act*. If that exception applies, then disclosure of personal information is *not* an unjustified invasion of personal privacy, even though two section 21(3) presumptions apply. I consider that question, next.

21(4)(d): personal information of deceased individual for compassionate reasons

[44] This section provides for the disclosure of the personal information of a deceased individual, if disclosure to a “close relative” would be desirable for compassionate reasons.

[45] In order for this section to apply, the following conditions must apply:

1. the records must contain the personal information of someone who has died,
2. the requester must be a spouse or “close relative” of the deceased individual, and
3. the disclosure of the personal information of the deceased individual must be desirable for compassionate reasons given the circumstances of the request.¹²

Parts one and two

[46] I find that the personal information at issue meets parts one and two of the above

¹⁰ Orders P-242 and MO-2235.

¹¹ The presumption can also apply to records created as part of a law enforcement investigation where charges were laid but subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

¹² Orders MO-2237 and MO-2245.

test:

1. the police report contains the personal information of someone who has died, and
2. the requester, as the sister of the deceased, is a "close relative" as that term is defined in section 2(1) of the *Act*.¹³

Part three

[47] The institution (or on appeal, the IPC) must determine whether, "in the circumstances, disclosure is desirable for compassionate reasons," taking into account factors such as the need to assist the requester in the grieving process.¹⁴ As discussed, the IPC has held that close relatives of a deceased individual, and not the institution, are in the best position to determine what information they want to seek out to assist them in the grieving process. Order MO-2245 noted that the compassionate reasons exception to the personal privacy exemption was "designed to allow families to have the records that they feel they require in order to grieve in the way that they choose." The task of the institution in applying section 21(4)(d) is to determine whether, "in the circumstances, disclosure is desirable for compassionate reasons."¹⁵ IPC orders since Order MO-2245 have consistently taken a broad and all-encompassing approach in determining whether or not disclosure is "desirable for compassionate purposes."¹⁶

[48] Here, the requester provided representations containing highly sensitive details that I will not share in this public order. However, to summarize, she states, and I accept, that she is mourning her sister's death and would like access to the information at issue in order to help her with the grieving process. The requester states, and I accept, that understanding more about how her sister died will help her deal with the loss of her sister. In these circumstances, I find that part three of the test is met.

[49] Since all three parts of the test for section 21(4) are met, I uphold the ministry's decision and dismiss the appeal.

ORDER:

I uphold the ministry's decision and dismiss the appeal. I order the ministry to disclose the information at issue to the original requester by **January 3, 2025**, but not before **December 27, 2024**.

Original Signed by: _____
Marian Sami

November 29, 2024

¹³ "Close relative" is defined in section 2(1) of the *Act* as "a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption."

¹⁴ Order MO-2245.

¹⁵ *Ibid.*

¹⁶ See, for example, Orders PO-3273, PO-3951, and MO-4327.

Adjudicator