Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3164

Appeal PA12-413

Ministry of Community Safety and Correctional Services

February 20, 2013

Summary: The appellant made a request to the ministry for the dates that DNA samples were taken from victims and/or identified addresses as part of the investigation relating to a criminal case that has received significant public attention. The ministry denied access to the responsive record in full, claiming the application of the mandatory personal privacy exemption in section 21(1). In his appeal, the appellant raised the possible application of the public interest override in section 23 of the *Act*. This order decides that the ministry properly applied the personal privacy exemption to the entire record, but that there is a compelling public interest in the disclosure of the record. The ministry is ordered to disclose the record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) ("personal information"), 21(1), 21(3)(b) and 23.

Orders and Investigation Reports Considered: P-1398, PO-3025.

Report Considered: *Bernardo Investigation Review: Summary: Report of Mr. Justice Archie Campbell* (Toronto: Ministry of the Solicitor General, June 1996).

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the dates that DNA samples were taken from victims and/or

identified addresses as part of an investigation relating to a criminal case that has received significant public attention.

[2] The ministry identified a record responsive to the request and issued a decision, advising the requester that it denied access to the record in full. The ministry decided that access to the responsive record was denied pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*, taking into account the presumption at section 21(3)(b) and the factor weighing against disclosure at section 21(1)(f).

[3] The requester, now the appellant, appealed the ministry's decision to this office. In his appeal, the appellant raised the possible application of the public interest override provision in section 23 of the *Act*.

[4] As no useful purpose would be served through mediation, the appeal was transferred directly to the adjudication stage where I conducted a written inquiry.

[5] During my inquiry into this appeal, I sought and received representations from the ministry. I also notified and sought representations from an individual who may have interest in the subject matter of the record (the affected party). The affected party did not submit representations. The ministry's representations were shared, in full, with the appellant, who then provided representations which were similarly shared with the ministry. Finally, the ministry provided me with representations in reply to those submitted by the appellant.

[6] In the discussion that follows, I find that the record is exempt from disclosure under section 21(1) of the *Act*. However, I find that there is a compelling public interest in the disclosure of the record under section 23 and order the ministry to grant the appellant access to it.

RECORD:

[7] The record at issue in this appeal consists of a two page report.

[8] Page one provides information from the Ontario Provincial Police (OPP), including the dates that certain DNA samples were collected by the OPP, the dates the samples were sent to the Centre for Forensic Science (CFS), and the dates of the subsequent CFS reports.

[9] Page two provides information from the CFS, including the dates that DNA samples were received from the OPP, the dates of CFS reports, the dates the results were uploaded to the National DNA Data Band (NDDB) and relevant comments.

ISSUES:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. Does the mandatory exemption at section 21(1) apply to the record at issue?

C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[10] The ministry relies on the mandatory exemption in section 21(1) to withhold the entire record at issue. Before I can determine whether the personal privacy exemption may apply to the record, it is necessary to decide whether it contains "personal information" and, if so, to whom it relates.

[11] The term "personal information" is defined in section 2(1) of the *Act* as follows:

> "personal information" means recorded information about an identifiable individual including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (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,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or view of the individual except where they relate to another individual,

> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[1]

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[2]

[14] The ministry submits that the record contains the personal information of the affected party and three other identifiable individuals. Having no knowledge of the information contained in the record, the appellant does not dispute that the record contains the personal information of the affected party and three other individuals.

[15] I have carefully reviewed the record and find that the information contained in the record includes the affected party's personal information and that of two other identifiable individuals.

[16] With regard to the affected party, I find that the entire record can be considered to contain his personal information as it relates to his criminal history, as set out in paragraph (b) of section 2(1). To the extent that the record relates to the collection of DNA samples that were later identified as his, the record can also be considered to contain his personal information as contemplated by paragraphs (c) and (h) of section 2(1).

[17] In addition to the affected party, I find that the record contains the personal information of two other identifiable individuals, consisting of their names, along with other personal information relating to them (paragraph (h)).

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[1] Order 11.
[2] Order PO-1880, upheld.

[18] With regard to a third individual identified by the ministry, I find that the record does not contain their personal information as the individual is not identified by name.

[19] In addition, the record contains an address that has been identified as the address of a fourth unidentified individual, who is an unnamed victim of the affected party. Under section 2(1), a home address is generally only found to be the "personal information" where it relates to an "identified individual". However, in *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*[3], the Divisional Court found that a home address combined with environmental test results "arguably" constituted the personal information of home owners. Applying this reasoning to information that has been collected part of a law enforcement investigation, I find that this address is "personal information" within the meaning of section 2(1) of the *Act*.

[20] Therefore, I find that the record contains the personal information of the affected party, two identified individuals and an unidentified individual.

B. Does the mandatory exemption at section 21(1) apply to the record at issue?

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

[22] Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the individuals' personal privacy. Section 21(2) provide some criteria for the ministry to consider in making its determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[23] In its decision letter, the ministry claimed that disclosure of the record would constitute an unjustified invasion of personal privacy under section 21(1), taking into account the presumption at section 21(3)(b) and the factor weighing against disclosure at section 21(2)(f).

Section 21(3)(b)

[24] The ministry submits that the release of the record at issue would give rise to a presumed unjustified invasion of privacy under section 21(3)(b). Section 21(3)(b) of the *Act* reads as follows:

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[3] 2011 ONSC 2956.

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
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> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[25] In its representations, the ministry submits that the record falls squarely within the mandatory presumption listed in section 21(3)(b). The ministry states that the record was compiled by, and is identifiable as part of, police investigations into offences committed against identified individuals or at identified home addresses. Also, the ministry submits that the collection of biological samples for the purposes of DNA testing is an integral part of a contemporary law enforcement investigation. With regard to the record at issue, the ministry submits that the DNA samples were part of the evidence collected, which resulted in charges under the *Criminal Code* being laid against the affected party.

[26] The appellant did not make submissions on whether the presumption in section 21(3)(b) applied to the record at issue.

[27] I have carefully reviewed the record at issue and find that the presumption at section 21(3)(b) applies to the entire record. I am satisfied that the information contained in the record was compiled by law enforcement officials and is identifiable as part of an investigation into possible violations of the *Criminal Code*. I accept the ministry's submission that the DNA samples were collected on the dates listed in the record as part of a criminal investigation into crimes committed against the identified individuals and at the identified addresses.

[28] Therefore, I find that the presumption at section 21(3)(b) applies to the entire record.

[29] The Divisional Court has stated that 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" in section 23 applies.[4] I have considered the exceptions set out in section 21(4) of the *Act* and find that none of those exceptions apply.

[30] Accordingly, I find that the disclosure of the records is presumed to constitute an unjustified invasion of privacy under section 21(3)(b). Therefore, I find that the disclosure of the record would constitute an unjustified invasion of personal privacy under section 21(1), subject to my review of the "public interest override" below.

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[4] *John Doe v. Ontario (Information ad Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.).

C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 21(1) exemption?

[31] The appellant has taken the position that the public interest override at section 23 of the *Act* should be applied to require the ministry to disclose the record.

[32] Section 23 states:

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

[33] In Order P-1398,[5] former Inquiry Officer John Higgins outlined the requirements for the application of section 23 of the *Act*. He stated:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a compelling public interest in disclosure, and (2) this compelling public interest must clearly outweigh the purpose of the exemption.
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> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect a valid interest, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

[34] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[6]

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[5] Upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.).

[6] Order P-244.

Compelling Public Interest

[35] The appellant submits that there exists a compelling public interest in the disclosure of the records. The appellant states that he is a member of the media and it is his intention to share this information publicly in print and online, should the record be released. The appellant submits that the record should be disclosed for public health and safety reasons, as its release would shed light on whether the DNA samples collected during the investigation were submitted and processed by law enforcement in a timely manner. The appellant refers to the Paul Bernardo investigation and the subsequent review by Justice Archie Campbell.[7] During the Bernardo investigation, the offender's DNA sample was lost, which resulted in his avoiding criminal charges for over two years and allowing him to commit further offences. The appellant submits that the public has a right to know whether the police investigation in this case was conducted in a proper and timely manner.

[36] In its representations, the ministry submits that, while it recognizes that the affected party and the investigation were the focus of public attention, it does not find that there is a compelling interest in the disclosure of this particular record. The ministry refers to Order PO-3025, which found that the fact that records are newsworthy or that there may be widespread curiosity about the records "does not automatically lead to the application of the public interest override". Further, the ministry submits that it is not aware of any compelling public interest that would justify overriding important privacy interests of the identified individuals. In fact, the ministry submits that there exists a compelling public interest in ensuring that the privacy interests of the identified individuals are protected.

[37] In considering whether there is a "public interest" in the disclosure of the record, the first question is to ask whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[8] Previous orders have stated that 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.[9]

[38] A public interest is not automatically established where the requester is a member of the media.[10]

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[7] *Bernardo Investigation Review: Summary: Report of Mr. Justice Archie Campbell* (Toronto: Ministry of the Solicitor General, June 1996). ("*Bernardo Report*").
[8] Orders P-984 and PO-2607.
[9] Orders P-984 and P-2556.
[10] Orders M-773 and M-1074.

[39] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[11]

[40] Any public interest in *non*-disclosure that may exist must also be considered.[12] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[13]

[41] A compelling public interest has been found to exist where, for example, the integrity of the criminal justice system has been called into question.[14]

[42] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[15]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[16]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light in the matter[17]

[43] Having reviewed the party's representations and considered the record, I am satisfied that there is a compelling public interest in the record's disclosure.

[44] In my opinion, there is a strong interest on the part of the media and the public in the crimes committed by the affected party. There has been extensive media coverage and public discussion of the affected party's crimes, for which he has now been convicted. Given the notoriety of the crimes committed by the affected party, it is clear that his activities have roused "strong interest or attention."

[45] I agree with the submission made by the appellant that the manner in which the investigation was conducted and particularly, whether DNA evidence was collected and entered into the NDDB in a timely manner is a matter of strong public interest.

[46] I have reviewed Justice Campbell's report on the Bernardo investigation, in which he found that Paul Bernardo's DNA sample was submitted in December 1990, but was lost at the CFS. The result of this error was a delay of over two years before Bernardo's arrest and conviction. In his final report, Justice Campbell states: "If the five suspect

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[11] Order P-984.
[12] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[13] Orders PO-2072-F and PO-2098-R.
[14] Order PO-1779.
[15] Orders P-123/124, P-391 and M-539.
[16] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[17] Order PO-1779.

samples including Bernardo's had been given the highest priority on December 13, 1990, the DNA match to Bernardo could have been found in early January 1991."[18] This issue of timely cataloguing of DNA evidence is clearly the focus of the appellant's request.

[47] The disclosure of the information contained in the record at issue will inform the citizens of Ontario when crucial and time sensitive evidence was collected and catalogued by law enforcement. It will shed light on whether the investigation suffered delays similar to those in the Bernardo investigation or if the police collected and inputted evidence in a timely manner. Further, unlike the records considered in Order PO-3025, which I found would only inform the citizens of Ontario about the named individual's potential criminal activities, the disclosure of the record in this appeal will provide the citizens of Ontario with information relating to the activities and decision-making processes of law enforcement during an extremely notorious and high-profile investigation.

[48] Therefore, I find that there is a compelling public interest in the disclosure of the record.

Purpose of the exemption

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

[50] 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.[19]

[51] As previously noted, the ministry submits that it is not aware of any compelling public interest that would justify overriding the important privacy interests of those identified in the records. In fact, the ministry submits that there is a compelling interest in ensuring that the privacy interests of the identified individuals are safeguarded. For example, in its reply representations, the ministry states that:

> ...the affected third party individuals continue to have privacy rights in accordance with the *Freedom of Information and Protection of Privacy Act* (FOIPPA) regardless of whether a case has become publicized or not. To suggest that individuals cease to have their privacy protected under the FOIPPA simply because a crime has been extensively reported is, in fact, incompatible with the plain meaning of the FOIPPA.

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[18] *Bernardo Report*, *supra* note 6, at Chapter 3.

[19] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

[52] The affected party did not make submissions on whether the public interest outweighs the purpose of the personal privacy exemption.

[53] I have found that the personal information of the affected party, two identified individuals and an unidentified individual in the record at issue qualifies for exemption under section 21(1) of the *Act*.

[54] As previously discussed, section 21(1) is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.[20] The exemption reflects one of the two key purposes of the *Act*: to protect the privacy of individuals with respect to personal information about themselves held by institutions.[21] Therefore, it is important to carefully balance the public interest against the privacy interests of the individuals identified in the record.

[55] After considering the ministry's representations, I am satisfied that the compelling public interest in disclosure of the record at issue clearly outweighs the purpose of the section 21(1) exemption. The public has an interest in knowing whether or not the law enforcement agencies involved conducted their investigation into the crimes committed by the affected party in a timely and effective manner, especially in light of the disturbing nature of these crimes. I find that due to the nature of these crimes, the need for transparency in relation to the investigation outweighs the privacy interests of the affected party, the two identified individuals and one unidentified individual.

[56] With regard to the privacy interests of the affected party, I note that he did not make representations, even though invited to do so. Although not determinative of the issue, without submissions arguing against the disclosure of his personal information from the affected party, I am without a basis for making a finding that the affected party's privacy rights should be given preference over the public interest that exists in the disclosure of the record.

[57] I am also satisfied that the impact of disclosure on the privacy interests of the affected party, two identified individuals and an unidentified individual would be minimal, if any. The guilt of the affected party was acknowledged in open court, as were the details of the preceding police investigation. Media coverage was extensive. It would come as no surprise to anyone that, as part of the police investigation, DNA samples were collected from the locations where crimes were thought to have occurred. In fact, the ministry's representations note that the taking of DNA samples is "an integral part of a contemporary law enforcement investigation." I am unable to see how disclosure of the dates relating to the processing of those samples could in any way impact significantly on the affected party's personal privacy.

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[20] Order P-568.
[21] Order PO-2805.

[58] Similarly, the identities of the other two individuals whose personal information is found in the record are well known. Their names were revealed in court and in the media. In fact, a simple internet search quickly produces their identities. Again, it would come as no surprise that as part of the police investigation into the affected party's criminal activities, DNA samples would have been collected in locations relating to these individuals. The record simply discloses dates relating to the collection and processing of those samples.

[59] Although I am sympathetic to the privacy interests of the affected party's victims and their families, I have carefully reviewed the record at issue and am satisfied that it does not contain information that would cause them more distress if disclosed. It is important to note that the record does not contain any specific details about the crimes committed or about these individuals. The record only contains the dates that DNA samples were collected and processed. After careful consideration of the privacy interests of all individuals related to the record at issue, I find that the public interest in disclosure clearly outweighs the purpose of the section 21(1) exemption.

[60] Accordingly, I find that the public interest override in section 23 of the *Act* applies to the withheld portions of the records at issue.

ORDER:

I order the ministry to disclose the entire record to the appellant by **April 2, 2013**, but not before **March 25, 2013**.

Original signed by: February 20, 2013
Brian Beamish
Assistant Commissioner