



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-1121**

**Appeal P-9500585**

**Ministry of the Solicitor General and Correctional Services**



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## **NATURE OF THE APPEAL:**

The Ministry of the Attorney General received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the blood alcohol test results of the deceased driver of an automobile (the driver) who had been involved in an accident which resulted in the death of the requester's mother. The Ministry of the Attorney General transferred the request to the Ministry of the Solicitor General and Correctional Services (the Ministry). The Ministry denied access to the responsive information contained in the record, a report of the Centre of Forensic Sciences, on the basis that it would constitute an unjustified invasion of the personal privacy of the driver (section 21(1) of the Act).

The requester appealed the Ministry's decision.

During the course of the appeal, the requester (now the appellant) raised the possible application of section 23 of the Act, the so-called "public interest override".

A Notice of Inquiry was sent to the appellant and the Ministry, and both parties submitted representations. At the appellant's request, the organization Mothers Against Drunk Driving (MADD) also submitted material in support of her submissions regarding section 23.

## **DISCUSSION:**

### **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual. Section 2(2) goes on to state:

Personal information does not include information about an individual who has been dead for more than thirty years.

The record at issue in this appeal is the portion of the post-mortem forensic test results which contain the blood analysis of the driver who was killed as a result of the automobile accident which also killed the appellant's mother. In my view, these test results constitute recorded information about the driver and qualify as his personal information under section 2(1). Section 2(2) does not apply since the driver's death occurred within the past thirty years.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

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 personal privacy. Where one of the presumptions in section 21(3) applies to the personal information, the Ontario Court of Justice (General Division) (Divisional Court) ruled in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767, that the only way such a presumption against

disclosure can be overcome is if the personal information falls under section 21(4), or where a finding is made that section 23 of the Act applies. This case held that a combination of factors under section 21(2) could not rebut such a presumption under section 21(3)..

The Ministry submits that the information contained in the record gives rise to a presumed unjustified invasion of personal privacy on the basis of section 21(3)(a) of the Act, which reads as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

A number of previous orders of this office have found that forensic test results involving blood alcohol analyses form part of the medical history and/or condition of a deceased person, and that the presumption in section 21(3)(a) applies to this information (Orders P-362, P-412, P-482 and P-945). The appellant submits that these findings are not consistent with the legislative intent of section 21(3)(a), which, in her view, does not cover information which relates specifically to a criminal activity.

Having reviewed the representations of both parties and adopting the reasoning articulated in past orders, I find that the blood alcohol analysis test results are part of the medical history and/or condition of the driver, and disclosure of this information would constitute a presumed unjustified invasion of the driver's personal privacy under section 21(3)(a) of the Act.

I also find that none of the circumstances listed in section 21(4) which would rebut this presumption are present in the circumstances of this appeal, and that the driver's blood alcohol analysis test results, therefore, qualify for exemption under section 21(1) of the Act.

## **PUBLIC INTEREST IN DISCLOSURE**

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

"Compelling" is defined in the Oxford dictionary as "rousing strong interest or attention". In order to find that there is a compelling public interest in disclosure, the information at issue must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to effectively express opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of the exemption which has been found to apply. In my view, this balancing involves weighing the relationship of the information against the Act's central purposes of shedding light on the

operations of government and protecting the privacy of personal information held by government. Section 23 recognizes that each of the exemptions listed in the section, while serving to protect valid interests, must yield on occasion to the public interest in access to information held by government. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

In her representations, the appellant identifies herself as a member of MADD, and states that without official confirmation that the driver was intoxicated at the time of the accident, she is unable to speak publicly about her personal experiences in coming to terms with her mother's death without concern about a possible law suit. Among the various other points raised by the appellant, she argues that the benefit to the community in releasing information regarding blood alcohol levels is far more compelling than the benefits of withholding these figures with respect to a deceased person who would have been prosecuted for his actions had he lived. She also identifies instances where similar information was released by local police forces, and stresses the importance of consistency. If the Act as presently worded does not allow for an interpretation which supports her view, the appellant feels it is flawed and should be revised.

The submissions from MADD reinforce many of the points made by the appellant. They point out that it is important for the public good that the frequency of impaired driving behaviour be known by everyone in society, and that the public be informed whenever alcohol is involved in an automobile accident. The submissions also identify an instance where similar information was released in the context of a different accident, and identify what they see as three important purposes in the public interest that would be served by specific disclosure of the blood alcohol readings of the driver:

- the appellant and her family could begin a process of healing
- the public good would be served by increasing efforts to reduce impaired driving
- disclosure would ensure fair and consistent information being available in similar cases

In my view, many of the submissions provided by the appellant speak to private as opposed to public interests, and I am not convinced on the evidence provided by the appellant and MADD that disclosure of the specific blood alcohol readings of the driver, which I have found to represent a presumed unjustified invasion of privacy under the Act, is necessary in order to advance the public good of reducing impaired driving. The appellant is correct in stating that if the blood alcohol readings had exceeded the allowable limit and the driver had survived the accident he might have been charged, and his personal information may have been disclosed through the criminal justice process. However, it is important to state that a driver in these circumstances would also have been provided with the due process protections of the criminal justice system, something which is not possible in the case of a deceased person.

While I can appreciate the difficulty being experienced by the appellant and her family in dealing with the tragic loss of their mother, having carefully considered all representations, I am not satisfied that disclosure of the specific forensic test results of the driver would contribute in any

meaningful way to the public's understanding of the activities of government, and would be contrary to the other central purpose of the Act, that of protecting personal privacy.

In my view, the appellant has failed to establish a compelling public interest in disclosure of the blood alcohol test results of the driver which would clearly outweigh the purpose of the mandatory personal information exemption, and I find that section 23 does not apply in the circumstances of this appeal.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ February 7, 1996