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

ORDER P-1270

Appeal P-9600166

Ministry of the Solicitor General and Correctional Services

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant made a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Solicitor General and Correctional Services (the Ministry). The request was for access to all records relating to a specified motor vehicle accident, including the investigating officer's notes and all statements taken.

The Ministry granted partial access to six pages of a police officer's notebook. Access was denied to the information severed from the record under the following exemptions:

- discretion to refuse requester's own information/facilitate commission of unlawful act - sections 49(a) and 14(1)(l)
- invasion of privacy - section 49(b)

The appellant appealed the Ministry's denial of access, and claims that additional records responsive to the request should exist. Specifically, the appellant believed that the statement of a named witness was recorded in a police officer's notebook but it was not identified as a responsive record.

During mediation of the appeal, the appellant confirmed that he is not pursuing access to the "10-codes" used by police officers in their communication with one another. Accordingly, this information and the exemptions under sections 49(a) and 14(1)(l) are not at issue in this appeal.

A Notice of Inquiry was sent to the Ministry, the appellant and the drivers of two other vehicles involved in the accident and the named witness. Representations were received from the Ministry, the appellant and the named witness.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking and the Ministry indicates that further records do not exist, it my responsibility to ensure that the Ministry has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Ministry to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the Ministry must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The Ministry conducted three additional searches during the inquiry stage of this appeal. The first search was conducted by a member of the Infrastructure Support Bureau, Transport section in Orillia, who located the notebook of a police officer who attended the scene of the accident but had retired in 1992. The notebook contained a notation indicating the officer attended the

motor vehicle accident. The Ministry searched the notebook entries for several days beyond the date in question and no witness statements or responsive records were located.
The second and third searches were conducted at the North Bay Detachment of the Ontario Provincial Police. During the second search, a typed version of one of the other drivers' statement was located. This statement was identical in content to this individual's statement as recorded in the first police officer's notebook. During the third search, no additional responsive records were located.

Having reviewed the representations provided to me and these two additional records, I am satisfied that Ministry has now made a reasonable effort to identify and locate records responsive to the request.

INVASION OF PRIVACY

With respect to the two additional records located during this inquiry, the Ministry indicates that it intends to disclose the notebook entry to the appellant. Accordingly, this order will contain a provision to that effect. The Ministry also indicates that as the typed version of the other driver's statement is identical in content to the parts of pages 5 and 6 of the record that have been withheld under section 49(b), its position is that this exemption also applies to the typed version.

Personal information is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual." Having reviewed the record, I find that it contains the personal information of the appellant, the witness, the two other drivers, and a passenger in the appellant's vehicle.

On reviewing the specific severances made by the Ministry, I find that the severance made to page 2 contains the personal information of the appellant only, the last three lines severed from page 3 relate to the witness who has consented to disclosure of her personal information, and the last eight lines severed from page 4 and the first line severed from page 5 do not contain any personal information. These parts of the record should, therefore, be disclosed to the appellant.

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 38 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the institution to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellant is not required to prove the contrary.

Sections 21(2), (3) and (4) provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the institution can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in

section 21(3) apply, the Ministry must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The remaining severances on pages 3-6 and the typewritten statement relate to the two other drivers involved in the accident. The Ministry submits that this information describes the injuries sustained by one of the drivers and the statement given by the other. The Ministry indicates that disclosure of this information is presumed to be an unjustified invasion of personal privacy under section 21(3)(b) of the Act, which states:

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

I am satisfied that these parts of the record and the typewritten statement were compiled during the course of a law enforcement investigation conducted by the North Bay detachment of the Ontario Provincial Police, an agency which has the function of enforcing and regulating compliance with a law, and I find that section 21(3)(b) applies. Section 21(4) does not apply in the circumstances of this appeal, and the appellant has not raised the application of section 23. Accordingly, the information is properly exempt under section 21 of the Act.

The appellant submits that the information is required in order to assist in the defence of a civil action launched by the driver who sustained injuries in the accident, and indicates that both drivers are required to disclose all material facts under the Rules of Civil Procedure. In this regard, I draw the appellant's attention to the provisions of section 64 of the Act, which states:

> (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

This provision indicates that, for the purposes of his lawsuit, the appellant's rights to obtain discovery or to require production of documentary evidence are preserved, whether or not he is entitled to access under the Act.

In this context, the appellant also submits that section 21(2)(d) applies. As I have previously indicated, once a presumption in section 21(3) is found to apply, the only way in which it can be rebutted is if it falls under section 21(4) or where section 23 is found to apply. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767. Consequently, the application of section 21(2)(d) could not override or rebut the presumption I have found to apply, and the information is properly exempt under section 21 of the Act.

ORDER:

1. I order the Ministry to disclose the following information to the appellant by sending him a copy by **November 8, 1996** but not earlier than **November 4, 1996**.

    - all information severed from page 2 of the record;
    - the last three lines severed from page 3 of the record;
    - the last eight lines severed from page 4 of the record;
    - the first line severed from page 5 of the record;
    - the notebook entry located during the inquiry.

2. I uphold the Ministry's decision to withhold the remaining information.

3. I find that the Ministry has now made a reasonable effort to locate records responsive to the request, and I dismiss this aspect of the appellant's appeal.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: October 4, 1996
Holly Big Canoe
Inquiry Officer