



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

ORDER PO-1665

Appeal PA-980172-1

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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant submitted two requests to the Ministry of the Solicitor General and Correctional Services (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act). Collectively, these two requests asked for access to the following records:

- a copy of statements taken by London Ontario Provincial Police (the OPP) Constable(s) in connection with a motor vehicle accident which occurred on March 7, 1998 in which the appellant was seriously injured;
- report #6J00-8-0231;
- photographs taken of the scene and the vehicle;
- accident reconstruction report;
- investigation reports; and
- police officers' handwritten notes and/or interviews with the investigating officer.

The Police denied access to the requested records in full pursuant to sections 49(a), 14(1)(a), (b), (f), 14(2)(a), 49(b), 21(3)(a) and (b). The Ministry indicated that the matter was currently under investigation and was before the courts.

The appellant appealed the denial of access. The appellant indicated that he is involved in litigation regarding this matter and requires the requested information for this purpose. The appellant has, therefore, raised the possible application of section 21(2)(d) of the Act.

During mediation, the appellant indicated that he was not seeking access to Report #6J00-8-0231, which is the Motor Vehicle Accident Report, as he already has a copy of this record. He indicated further that he was no longer seeking access to photographs and the Accident Reconstruction Report as he was advised that these records are available from the OPP for a fee. Finally, the appellant accepted that an investigation report does not exist. The appellant confirmed that the only records to which he was seeking access are witness statements and police officers' handwritten notes.

Also during mediation, the appellant indicated that he was particularly interested in obtaining the address of the next of kin of an individual who died in the motor vehicle accident.

Finally, the Ministry confirmed that charges against the driver of the vehicle under the Highway Traffic Act were pending and that a court date had been set for December 17, 1998.

The mediator sent out the Mediator's Report which describes the issues in this appeal and outlines the results of mediation.

Following receipt of the Mediator's Report, the appellant wrote to this office to advise that the London OPP refused to provide him with access to the photographs and the Accident Reconstruction Report.

The Mediator contacted the Ministry and was told that the Ministry had decided to deny access to these records. In addition, the Ministry advised that an Accident Reconstruction Report does not exist. Rather, the responsive record consists of a Technical Accident Investigation On-Scene Report. The Ministry issued a second decision in which it denied access to the photographs and the Technical Accident Investigation On-Scene Report on the basis of sections 49(a), 14(1)(a), (b), (f) and 14(2)(a).

The appellant indicated that he wished his appeal to include the denial of access to these records.

I sent a Notice of Inquiry to the Ministry and the appellant.

During the Inquiry stage of this appeal, the Ministry issued a new decision regarding access on the basis that the charges against the driver of the vehicle had been withdrawn. The Ministry withdrew sections 14(1)(a), (b) and (f) as the basis for non-disclosure, and granted partial access to the records. The Ministry added section 14(1)(l) as the basis for non-disclosure of the "ten-codes" contained in some of the records at issue. In addition, the Ministry identified one additional responsive police report which is being partially released to the appellant (pages 46-50). The Ministry also indicated that some information was removed from the records as it was not responsive to the request.

The Ministry submitted representations which reflect the recent changes to its decision. The appellant did not submit representations.

Because of the new issues raised by the Ministry's second decision, I sent a Supplementary Notice of Inquiry to the parties asking for representations on the application of the discretionary exemption in section 14(1)(l). As well, I asked the parties whether the Ministry should be able to raise a new discretionary exemption at this late stage in the appeals process. Finally, because the Ministry withheld information as being not responsive to the request, I asked the parties to address this issue. Only the Ministry provided supplementary representations.

RECORDS:

The records at issue consist of the following:

- witness statements (pages 1-5), denied in full;
- police officers' handwritten notes (pages 6-35), denied in part;
- Technical Accident Investigation On-Scene Report (pages 36-44), denied in part;
- Homicide/Sudden Death Report (pages 46-50), denied in part.

PRELIMINARY MATTERS:

NON-RESPONSIVE RECORDS

The Ministry indicates that it withheld a number of entries contained in the investigating officers' notebooks as they relate to other unrelated law enforcement activities involving other incidents which occurred during the officers' tour of duty. The Ministry submits that since these entries do not concern the appellant, the affected persons or the motor vehicle accident at issue, they are not reasonably related to the request and are, therefore, not responsive to it. I agree. I have reviewed all of the entries which were marked as being not relevant to the request and I am satisfied that the Ministry's characterization of them is correct. Therefore, I find that these portions of the records are not responsive to the request and will not be considered further in this order.

LATE RAISING OF A DISCRETIONARY EXEMPTION

On June 30, 1998, the Commissioner's office provided the Ministry with a Confirmation of Appeal which indicated that an appeal from the Ministry's decision had been received. This Confirmation also indicated that, based on a policy adopted by the Commissioner's office, the Ministry would have 35 days from the date of the confirmation (that is, until August 6, 1998) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

It was not until January 15, 1999, following the issuance of the Notice of Inquiry, that the Ministry indicated for the first time that it wished to rely on section 14(1)(l) of the Act to deny access to the "ten-codes" which are contained in some of the records at issue in this appeal.

Previous orders issued by the Commissioner's office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

In Order P-658, Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act.

Adjudicator Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, Adjudicator Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the policy enacted by the Commissioner's office is to provide government organizations with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In the present case, the Ministry was advised of the policy in question yet decided to rely on a new discretionary exemption approximately six and a half months after the Confirmation of Appeal was issued. The Ministry acknowledges that it has raised a new discretionary exemption late in the appeals process, however, it submits that there are special mitigating factors in the circumstances of this appeal.

In this regard, the Ministry states that at the time the original decision was issued, the matter was before the courts and it applied the exemptions which it believed were most appropriate in the circumstances. The Ministry points out that as soon as the charges against the driver of the vehicle were withdrawn, it immediately issued a new decision and provided the appellant with partial access to the records. The Ministry submits that its timely action in responding to the changing circumstances in this matter was to the benefit of the appellant. The Ministry indicates further that the application of section 14(1)(l) is limited to the "ten-codes" and since it believes that this information would have fallen under one of the other exemptions which it had previously claimed for the records, there was no need to claim the additional exemption at that time. Finally, the Ministry notes that as a result of its new decision letter, and the issuance of the Supplementary Notice of Inquiry, the appellant has been given an opportunity to address the application of section 14(1)(l). The Ministry submits that any prejudice to the appellant is minimal and is mitigated by the disclosure which he has already received.

In my view, the change in circumstances regarding the status of this matter before the courts necessitated a review by the Ministry of its initial decision regarding access. I commend the Ministry for the timeliness of its response to the appellant in this regard. I am satisfied that the approach taken by the Ministry in not claiming every possible exemption but rather relying only on those which it believed to be most appropriate was reasonable. Because the change in circumstances resulted in the Ministry withdrawing those exemptions which it now believes to be no longer applicable generally, it was left exposed on particular parts of the records. I find, in the circumstances, that the Ministry should be allowed to add a new discretionary exemption at this stage. I would point out, however, that this is only because, the amount of information is small and, in the circumstances, it was reasonable for the Ministry not to complicate the issues in the appeal by claiming every possible exemption which might apply to every portion of the records. Finally, given that the change in the Ministry's position has resulted in early disclosure of portions of the records, and the fact that the appellant is clearly aware of the new exemption, I find that he has not been prejudiced by any delay caused by the new exemption claim. Therefore, I will consider the application of section 14(1)(l) to the "ten-codes".

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. The Ministry submits that the records at issue consist of recorded personal information about the appellant, the driver of the involved vehicle, the other passengers in the motor vehicle, witnesses to the accident and other identifiable individuals. The records document the investigation conducted by the police into a fatal motor vehicle accident and as such, they contain information about the
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driver and passengers in the vehicle, including the appellant, witnesses and family members who were contacted during the investigation. I find that the records contain the personal information of all of these individuals. I note that the appellant has been provided with the photographs, the technical documentation relating to the vehicle and the accident, as well as details of the accident. The information which has been withheld consists of personal identifiers of the individuals involved and other personal information about them, such as date of birth, addresses and telephone numbers, injuries, family members and statements of their view of the events.

FACILITATE THE COMMISSION OF AN UNLAWFUL ACT/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

The Ministry has relied on section 49(a) to deny access to the undisclosed portions of the records. Under section 49(a), an institution has the discretion to deny access to an individual's own personal information in instances where the exemptions in sections 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

The Ministry has applied section 14(1)(l) of the Act to exempt from disclosure the OPP's operational "ten-codes". Section 14(1)(l) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry has applied this exemption to withhold OPP message codes, commonly known as "ten-codes", from the investigating officers' responsive notebook entries.

The Ministry states that "ten-codes" are used by OPP officers in their radio communications with each other and their Detachments and Communication Centres. The Ministry submits that release of the "ten-codes" would compromise the effectiveness of police communications and possibly jeopardize the safety and security of OPP officers. In this regard, the Ministry details how this could reasonably be expected to occur. The Ministry relies on previous orders of this office which have upheld the application of section 14(1)(l) or its municipal equivalent to "ten-codes" (see Orders M-393 and M-757).

In determining this issue, I have taken into account the previous decisions of this office and I concur with them. In my view, disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with

each other on publicly accessible radio transmission space. Therefore, I find that the Ministry has properly applied section 14(1)(l) to this information and it is exempt under section 49(a) of the Act.

INVASION OF PRIVACY

Where a record contains the personal information of both the appellant and another individual, section 49(b) allows the Ministry 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.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption [Order M-1154; John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.)].

Section 21(3)(b) states that:

A disclosure of personal privacy is presumed to constitute an unjustified invasion of personal privacy if 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;

The Ministry indicates that the records document the investigation undertaken by the London Detachment of the OPP in response to the March 7, 1998 fatal motor vehicle accident involving the appellant and other identifiable individuals. The Ministry states further that, in the course of investigating the accident, the OPP interviewed the involved individuals and witnesses. The Ministry submits that it is necessary in such law enforcement investigations to collect large amounts of personal information in order to come to specific conclusions as to whether there have been any violations of law under the Criminal Code or the Highway Traffic Act. The Ministry states that in this particular case, the driver of the vehicle involved in the accident was charged under the Highway Traffic Act with making an unsafe lane change.

Based on the Ministry's representations and my review of the records, I am satisfied that the personal information in the withheld portions of the records remaining at issue was compiled and is identifiable as part

of an investigation into a possible violation of law and that its disclosure would constitute a presumed unjustified invasion of privacy under section 21(3)(b). Previous orders of this office have held that the presumption may still apply even if no charges were laid (Orders P-223, P-237 and P-1225). In my view, this approach is equally applicable where, as in this case, charges were withdrawn. Although small amounts of the information in the records relate directly to the appellant, they are so intertwined with the personal information of the other individuals identified and/or identifiable in the records that it is not possible to sever the appellant's personal information without disclosing that of other identifiable individuals. I am satisfied that the Ministry's exercise of discretion in withholding this information was made on proper considerations and the information is, therefore, exempt under section 49(b) of the Act.

Because of this finding, it is not necessary for me to consider the application of section 14(2)(a) to the Homicide/Sudden Death Report.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Laurel Cropley
Adjudicator

_____ April 1, 1999