



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

ORDER PO-1743

Appeal PA-990174-1

Ministry of the Attorney General



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 requester is a lawyer representing two children (the appellants) whose parents were killed in a motor vehicle accident. The requester submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of the Attorney General (the Ministry) for any documentation which would demonstrate that the vehicle driven by the other driver involved in the accident (the offender) was stolen and/or uninsured. The appellants' representative seeks this information in order to make a claim against the Insurer of the appellants' parents' vehicle, under the Family Protection Endorsement in their motor vehicle liability policy. She indicates further that, without this information, she will be required to bring a motion in court to compel its production, with the attendant costs associated with such a proceeding.

The Ministry denied access to all of the responsive records pursuant to the following sections of the Act:

- solicitor-client privilege - section 19;
- invasion of privacy - sections 21(1) and 49(b), with reference to section 21(3)(b).

The appellants' representative appealed the Ministry's decision to deny access to the records.

This office provided a Notice of Inquiry to the Ministry and to the appellants. Because the appellants made reference to matters pertaining to the deceased parents' estate, the parties were also asked to address the possible application of section 66(a) (personal representative of a deceased person) of the Act. Further, in the event that section 66(a) is applicable, the parties were also asked to address the possible application of section 49(a) (discretion to refuse requester's own information) of the Act.

Representations were received from the appellants and the Ministry.

RECORDS:

The 38 pages of responsive records consist of an interview report, will say statement, vehicle data search printouts, reports, supplementary reports, documents supplied by insurance companies and correspondence to and from a Crown Attorney.

DISCUSSION:

PERSONAL REPRESENTATIVE OF THE DECEASED PERSONS

The term "personal representative" in section 66(a) is not defined in the Act. However, section 66(a) relates to the administration of an estate of an individual and the meaning of the term must be derived from this context.

An appellant would be able to exercise the deceased's right to request and be granted access to the deceased's personal information if she is able to demonstrate that she is the deceased's "personal

representative" **and** that her request for access to the information "relates to the administration of the deceased's estate".

The term "personal representative" in section 66(a) of the Act means an executor, an administrator, or an administrator with will annexed (Order P-294). The phrase "relates to the administration of the individual's estate" in section 66(a) should be interpreted narrowly to include records relating to financial matters to which the personal representative requires access in order to wind up the estate.

In order for the appellants' representative to establish that she (or one of the children) is the personal representative of the children's parents, for the purposes of section 66(a) of the Act, the appellants' representative would be required to provide evidence of her authority to deal with the estate of the deceased. The production by the appellants' representative of letters probate, letters of administration or ancillary letters probate under the seal of the proper court would be necessary.

[Orders M-919, M-1075 and PO-1654]

Along with her submissions, the appellants' representative provided me with copies of several documents indicating that the brother of the deceased father has been appointed as Estate Trustee Without a Will of the estate of the deceased mother, and also the litigation guardian of the appellant children in an action against the offender and the Insurer of the parent's vehicle. The appellants' representative also provided me with the pleadings in that action. In its Statement of Defence, the Insurer pleads that the onus of proof is on the plaintiffs in that action (the surviving children, by their litigation guardian) to establish that the vehicle driven by the offender was not insured at the time of the accident. The appellants submit that without access to the information contained in the records, they are unable to establish that the offender had no insurance, thereby preventing recovery from the Insurer of the parent's vehicle.

I am satisfied, based on my review of the pleadings in the action against the offender and the parents' Insurer, that the appellants' representative also acts for the Litigation Guardian, who has brought the action on behalf of the children. I have not, however, been provided with any evidence that the appellants' representative acts on behalf of the estate as the deceased parents' "personal representative," as is required by section 66(a). Nor have I been provided with any evidence that the request for access to the information contained in the records "relates to the administration of the deceased's estate."

Accordingly, I am unable to find that the appellants' representative is able to exercise the right of access of the deceased parents to the requested information under section 66(a).

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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.

"Personal information" is defined in section 2(1) of the Act. Only information which fits the definition can qualify for exemption under section 14.

It is clear from the wording of the statute that the list of examples of personal information under subsection 2(1) is not exhaustive. This leaves it open for [the person who will be making the decision in this appeal] to decide whether or not information contained in the records which does not fall under subsections (a) to (h) ... constitutes personal information.

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The information contained in the records was compiled by the Police in the course of their investigation into the ownership and insurance coverage of the offender's vehicle at the time of the accident. As a result of these investigations, the offender was charged with, and ultimately convicted of, several offences under the Criminal Code, including possession of a stolen vehicle.

Pages 1 to 4 consist of a witness statement/will say taken by the Ontario Provincial Police (the OPP) with respect to the witness' knowledge of the offender's activities. These records contain the personal information of the witness and the offender. Pages 5 to 11 are computer printouts from the Ministry of Transportation relating to several vehicles, including that operated by the offender. These documents contain the personal information of the offender and other identifiable individuals. Page 12 is a stolen vehicle report which contains only the personal information of the vehicle's owner. Pages 13 to 21 are supplementary reports prepared by the OPP in the course of its investigation into the accident. They contain the personal information of the offender, a number of lay witnesses, and, at Pages 15 and 16, the deceased parents and the appellant children.

Pages 22 to 31 and 34 relate to a claim for restitution filed by the Insurer of the stolen vehicle and contain information relating to the insurance coverage afforded to the vehicle's owner. The offender is referred to in the covering pages to which this information is attached. As such, I find that these pages contain the personal information of the offender and the vehicle's owner. Pages 32 and 33 are a FAX cover sheet and a standard form disclosure letter from the Crown Attorney to counsel for the offender. The offender's name is included in the cover page and it is, accordingly, his personal information. Pages 35 to 38 relate to the Police investigation of the offender's insurance coverage. These pages contain only the personal information of the offender.

With the exception of the reference on Pages 15 and 16 to the deceased parents and the appellant children, in their capacity as victims in the accident, none of the records contain any of the personal information of the appellants.

INVASION OF PRIVACY

I have found above that, with the exception of the references to the appellants on pages 15 and 16, the records in this case contain only the personal information of other identifiable individuals. Therefore, the

relevant exemption to consider regarding the other records is section 21, which prohibits an institution from releasing personal information relating to individuals other than the requester, unless one of the exceptions in paragraphs (a) through (f) of section 21 applies. In this case, the only exception which could apply is section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure 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 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. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2), and that 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 a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption. John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 (Div. Ct.).

The Ministry submits that the presumption at section 21(3)(b) is applicable in the circumstances. That section reads:

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.

The Ministry submits that the information was compiled and is identifiable as part of an OPP investigation into a possible violation of the Highway Traffic Act and the Criminal Code (Canada) and that these records document the OPP's investigation into the activities of the offender. On this basis, the Ministry submits that disclosure of the personal information in the records would constitute a presumed unjustified invasion under section 21(3)(b). The Ministry further submits that none of the exceptions at section 21(4) applies in this case to overcome the application of section 21(3)(b).

The appellants' representative has not made any submissions with respect to the application of sections 21(1) and 49(b) to the information contained in the records.

In my view, the content of the records, in these circumstances, supports the Ministry's position, and I find that section 21(3)(b) applies to the information found by the Ministry to be exempt. In addition, I find that section 21(4) has no application here. Therefore, section 21(1)(f) does not apply, and the information contained in these records is exempt under section 21(1).

Insofar as the information in Pages 15 and 16 of the records is concerned, only the appellants' names are listed, along with the names of other individuals who were involved in the investigation. In my view, no useful purpose would be served by severing and disclosing the names of the appellants from this document. I find that the remaining information was also compiled as part of an investigation into a possible violation of law. As such, it too falls within the ambit of the presumption in section 21(3)(b). Again, section 21(4) has no application to this information. Accordingly, I find that the information which is found at Pages 15 and 16 of the records, with the exception of the names of the appellants, is also exempt from disclosure under section 49(b) of the Act.

I understand the appellants' desire to obtain information regarding the status of the offender's insurance coverage. However, in the circumstances of this appeal, where a presumed unjustified invasion of personal privacy has been established under section 21(3), the Divisional Court's decision in John Doe indicates that the factors favouring disclosure under section 21(2) cannot overcome the presumption. The appellants' representative has made reference to alternative means of obtaining the information sought through a motion to court to compel its production. I expect that this access mechanism may prove to be more successful.

Because of the manner in which I have disposed of the issues raised by this appeal under sections 2(1), 21 and 49(b), it is not necessary for me to consider the application of sections 19 and 49(a) of the Act.

PUBLIC INTEREST IN DISCLOSURE

The appellants' representative has made submissions which raise the possible application of section 23 of the Act to the information contained in the records. Section 23 reads:

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

In Order P-1398, upheld on judicial review in Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner), (1999), 118 O.A.C. 108 (C.A.), former Inquiry Officer John Higgins held that:

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.

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 valid interests, 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.

I agree with this approach to the analysis under section 23.

The appellants' representative argues that there is an overriding public policy rationale for disclosing the documents which pertain to the details of insurance coverage on the offender's vehicle. She submits that if the appellants are unable to establish that the offender's vehicle was uninsured, they will be unsuccessful in their action against the Insurer of their parents' vehicle. As a result, the children may become a burden on the state for the cost of their care. This could be averted if the appellants are successful in their action against the Insurer, by proving that the offender's vehicle was uninsured.

In my view, the public interest described in the appellants' submissions is not a sufficiently compelling one to bring it within the meaning of section 23. I find that the disclosure of the information sought by the appellants would primarily assist the appellants in their private litigation against the Insurer of their parents' automobile. I have not been provided with sufficient evidence to establish that any compelling public, as opposed to a private, interest would be served by the disclosure of the information sought. Accordingly, I find that section 23 has no application in the circumstances of this case.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Donald Hale
Adjudicator

January 20, 2000