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

ORDER PO-1926

Appeal PA-010122-1

Ministry of Transportation

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 submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Driver Improvement Office of the Ministry of Transportation (the Ministry) for "any and all correspondence, and submission from [a named doctor] submitted to the MTO regarding myself". The appellant indicated that she was requesting this information because "this physician has never met me nor treated me or any one of my family".

In responding to the appellant's request, the Manager of the Driver Improvement Office wrote:

> We have reviewed your file and the records appear to fall under two categories;
>
> 1. Document(s) which we have no problem disclosing;
> 2. Document(s) where the decision is unclear.
>
> In order to provide the best possible customer service, we are disclosing all the document(s) in the first category at this time. However, we are transferring the category 2 document(s) to our Freedom of Information Coordinator for further consideration.

The Ministry's Freedom of Information and Privacy Co-ordinator then issued a decision under the *Act* refusing to confirm or deny the existence of the requested records pursuant to section 21(5) of the *Act*.

The appellant appealed this decision. During mediation the Ministry wrote to this office claiming the application of sections 49(a) (discretion to refuse requester's own information) in conjunction with section 20 (danger to health or safety) and 49(b) (invasion of privacy) to records of the type requested, if they exist.

During discussions between the mediator and the appellant, the appellant described the relationship between the named doctor (the affected person) and herself. In this regard, the appellant indicated that she is involved with the ex-husband of the affected person and their two children. It is apparent from these discussions that the relationship between the parties is acrimonious.

The appellant indicated further during her discussions with the mediator that the Ministry has already confirmed that it has a letter on file from a [named doctor] which is why she submitted the request. The appellant also stated her belief that the Ministry revoked her driver's licence as a result of the affected person's alleged correspondence with it.

I sought representations from the Ministry, initially. In addition, I decided to send a Notice of Inquiry to the affected person seeking her views on disclosure of information that would reveal that she has or has not communicated with the Ministry, regardless of whether any such records exist.

The Ministry submitted representations in response to the Notice of Inquiry. I subsequently sought the appellant's representations on the issues in this appeal. In doing so, I did not provide her with the submissions that I had received, but rather, prepared a summary of them so that the

appellant was able to understand the basis for the position taken. The appellant was asked to review this summary and to refer to it, where appropriate, in responding to the issues in the Notice of Inquiry.

The appellant has submitted extensive representations in response to the Notice of Inquiry. Her representations focus on her views of the affected person and the nature of the interactions between them.

DISCUSSION

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS AND THE PERSONAL INFORMATION EXEMPTION

Introduction

The Ministry relies on section 21(5) of the *Act* as the basis for its decision to refuse to confirm or deny whether responsive records exist. This section reads:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which should be exercised only in rare cases [Order P_339].

An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. An institution must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested record would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P_339, P_808 upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)]

Before the Ministry may be permitted to exercise its discretion to invoke section 21(5), it must provide sufficient evidence to establish that:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy [Order MO_1179].

Part one: disclosure of the records (if they exist)

Definition of Personal Information

Under part one of the section 21(5) test, the Ministry must demonstrate that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under section 2(1), "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 or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The Ministry submits that a letter of the type requested by the appellant would contain the personal information of the person submitting it as well as that of the appellant. In this regard, the Ministry states that the Registrar of Motor Vehicles is responsible for ensuring that the privilege of driving is retained by only those persons who demonstrate that they are likely to drive safely. The Ministry notes that in this capacity, the Registrar routinely receives reports and correspondence from physicians and members of the public concerning a person's ability to operate a motor vehicle safely, or concerning a medical condition that may make it dangerous for a person to operate a motor vehicle.

The Ministry indicates that, similar to the correspondence referred to above, a record such as the one requested by the appellant would likely contain identifying information about both parties. The Ministry adds that the content of such a letter would likely reflect on both parties' activities or actions. Finally, the Ministry submits that it is reasonable to expect that this type of correspondence would have been sent to it implicitly or explicitly in confidence.

As I indicated above, the appellant has requested a copy of correspondence or other documents submitted by the affected person regarding herself. The appellant clarified during mediation that she and the affected person are not only known to each other, but have a connection to each other through the personal interactions of their two families. Finally, the appellant believes that the information that would have been contained in the correspondence that she has requested was responsible for her losing her licence to drive.

The appellant refers to the affected person as a physician. Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official capacity, and found that in some circumstances, information associated with a person in his or her professional or official capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (See Orders P_257, P_427, P_1412 and P_1621). It initially appeared that the appellant was seeking information from a medical doctor relating to her ability to drive which she believes ultimately resulted in the loss of her licence. In Order PO-1792, Senior Adjudicator David Goodis also considered whether information provided by a medical doctor to the Registrar of Motor Vehicles about the appellant in that case qualified as the doctor's personal information. He concluded:

> In my view, the record contains personal information about the appellant only, consisting of the appellant's medical and address information. The address

> associated with the affected person is his/her professional practice address, and therefore does not qualify as personal information [see Reconsideration Order R-980015 and Order PO-1663]. In addition, none of the other information in the record is "about" the affected person within the meaning of the section 2(1) definition. Accordingly, the record contains personal information of the appellant only. Therefore, the exemption at section 49(b) cannot apply, and the only exemption relevant in the circumstances is section 49(a), in conjunction with section 20.

However, as a result of mediation discussions and confirmed by her representations, it is apparent that the type of record the appellant is seeking would not likely fall into the category of a "professional medical opinion" as was the case in Order PO-1792. I am convinced that a record authored by the affected person, if it exists, would more likely be in the nature of correspondence from a member of the public, who happens to be a medical doctor. Consequently, I find that the circumstances of the current appeal are distinguishable from those in Order PO-1792 such that the reasoning in that order is not applicable in this case.

Taken together, the circumstances under which the Ministry is likely to receive correspondence from members of the public and the factual circumstances of the relationship between the two parties in this appeal, lead me to conclude that a record of the type requested by the appellant is more likely than not to contain information about both the author of the correspondence and the individual referred to in it within the meaning of the definition of personal information. On this basis, I find that such a record would contain the personal information of both parties.

Unjustified invasion of personal privacy

I must now determine whether disclosure of such a record would constitute an unjustified invasion of privacy of the affected person. 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.

Under section 49(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

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 institution to consider in making this determination. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

In *John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767, the Divisional Court found that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of factors set out in section 21(2).

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if 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 [Order PO_1764].

The Ministry submits that disclosure of such a record, if it exists would constitute an unjustified invasion of privacy based on the factors in sections 21(2)(e), (f) and (h). These sections provide:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence.

In relying on these provisions, the Ministry refers to the apparently acrimonious relationship between the appellant and the affected person indicating that, in its view, these three factors are of particular significance in favour of non-disclosure in the circumstances of this appeal.

The Ministry also comments on its routine treatment of information received about drivers under the authority of the *Highway Traffic Act* (the *HTA*) which it indicates supports the application of these three factors generally:

> In addition to the above, the Ministry (through the Registrar of Motor Vehicles) has a statutory duty as set out in the [*HTA*] to protect the public by ensuring that the privilege of driving is retained by only those persons who demonstrate that they are likely to drive safely (see section 31, HTA). In this capacity, the Registrar routinely receives reports and correspondence from physicians and members of the public concerning a person's ability to operate a motor vehicle safely, or concerning a medical condition that may make it dangerous for a person to operate a motor vehicle. Accordingly, the Registrar reviews and investigates such concerns brought to its attention. In this context, information about the identity of the individual who brought the concern to the Ministry's attention is considered highly sensitive.

In considering the circumstances under which the Ministry tends to receive communications from members of the public about drivers and the potential impact on a driver of verification of any information received by the Registrar, I accept that such correspondence would be submitted with a reasonably held expectation that the source of the information would be maintained in confidence. Therefore, I find that the factor in section 21(2)(h) is relevant with respect to the type of record requested, if such a record exists.

Moreover, in my view, it is important to the safety of other drivers and pedestrians that the Registrar be able to ensure that only drivers that are "likely to drive safely" be given and/or maintain their licences to drive. The receipt of information from members of the public is a valuable tool for the Registrar to fulfill its mandate, hopefully before someone is injured by an unsafe driver. In my view, the confidentiality of this process is an essential element in the Registrar being able to avail itself of this type of information. On this basis, I find that the factor in section 21(2)(h) (supplied in confidence) holds considerable weight in the balance.

It is also reasonable to expect that at least one source of information about drivers would be from individuals who know or have some personal relationship or connection with the driver. Given the nature of the information that would be provided to the Registrar (that there is some concern about an individual's driving ability), disclosure of the source of the information could reasonably be expected to cause extreme distress to that person (Order P-434). Therefore, I find that the factor in section 21(2)(f) (highly sensitive) is also relevant to the type of records requested, if they exist.

In my view, the nature of the relationship between the parties would likely impact on the degree of distress. In this case, the appellant is clearly seeking information that would confirm that the affected person has written such a letter (or otherwise provided similar information) to the Registrar. She also believes that she has been harmed as a result. Based on the nature of their relationship (as described in considerable detail by the appellant), I find that disclosure of records of the type requested, if they exist, in these circumstances could reasonably be expected to distress the affected person to such a degree as to give this factor considerable weight.

The appellant indicates that she believes that she has been harmed as a result of correspondence sent to the Registrar about her. She alleges further that the affected person is motivated by malice. In Order MO-1435-I, I noted the potential impact on an individual of information provided by third parties:

> I understand the appellant's concerns about decisions being made which impact on it based on "unknown" information from "unknown" sources. Within the regulatory context, it is not unreasonable to expect that decisions affecting parties under a particular legislative scheme will reflect a certain degree of transparency. There is a danger that when outside sources provide information to the government about another party in confidence, the rights of that party may be compromised, perhaps unfairly, particularly when such action is gratuitous and is motivated by private disputes or personal vendettas.

A number of previous orders have considered appeals relating to requests for personal information in cases where the requester's personal information has been provided to a government institution by another individual.

In Order PO-1731, I commented on this issue in circumstances where information about the requesters was provided to the Adoption Unit of the Ministry of Community and Social Services by "two concerned individuals":

Further, if that inaccurate information is used against the interests of the appellants, in my view, fairness would require that the appellant be apprised of the nature of the information. Fairness in the Ministry's application process is a relevant circumstance weighing in favour of disclosure.

In a similar vein, I accept that the ability to know and understand the nature of any comments made to a government organization about an individual by another individual is a relevant consideration weighing in favour of disclosure. In my view, the significance of this consideration is reflected in the definition of personal information in sections 2(1)(e) and (g), which state:

> "personal information" means recorded information about an identifiable individual, including,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> ...
>
> (g) the views or opinions of another individual about the individual.

Recently, Senior Adjudicator David Goodis had occasion to address this issue with respect to information provided to the Public Guardian and Trustee about the requester by certain family members (Order PO-1910). I noted and adopted his comments in Order MO-1435, which dealt with correspondence sent to a Township about the requester by another individual, as follows:

> Finally, in Order PO-1910, Senior Adjudicator David Goodis commented on the privacy expectations of individuals who provide information to a government institution about another individual. He stated:
>
> > As I found above, the names of these individuals in the context of these records is personal information, because it reveals other personal information about these individuals, specifically that they provided information to the PGT about the appellant's guardianship application. In my view, on an objective assessment, neither the PGT nor the primary affected persons had a reasonable expectation that the names of the primary affected persons would be treated confidentially. This finding is supported by paragraphs (e) and (g) of the definition of personal information which read:
> >
> > "personal information" means recorded information about an identifiable individual, including,
> >
> > (e) the personal opinions or views of the individual,

> except where they relate to another individual,
>
> (g) the views or opinions of another individual about the individual,
>
> In my view, these provisions suggest that there is a diminished privacy interest in the identity of an individual who provides a view or opinion about another individual. If the views or opinions of an identifiable individual about another person are not the opinion-holder's personal information, and can be disclosed, it is reasonable to expect that the opinion-holder's identity, standing alone, could attract only a minimal privacy expectation at best, barring exceptional circumstances.

In that case, the Senior Adjudicator was only addressing the disclosure of the identities of individuals who had provided information. In my view, however, the principle he applies is similarly applicable in the circumstances of this appeal. In this case, the appellant knows the identity of the affected person and has, in fact, read the letter, thus she knows the views and opinions that were expressed. As I indicated above, although the letter contains some personal information of the affected person, it primarily consists of her views and opinions of the appellant. Pursuant to the *Act*, this information is only the personal information of the appellant. Although the personal information of the affected person is intertwined with her views and opinions of the appellant, I find that there are no exceptional circumstances that would support a finding that the affected person had a reasonably held privacy expectation with respect to her personal information contained in the letter.

This line of orders recognizes that when one individual provides their views and opinions about another individual, it is not unreasonable to expect that the corresponding interests of the parties may be either heightened (in the case of the individual about whom the information relates) or diminished (in the case of the provider of the information). In my view, the considerations discussed in the above orders are also relevant to the personal information contained in records of the type requested by the appellant in the circumstances of this appeal.

However, a determination of the weight to be given to these considerations must take into account the context in which the information is provided and the overall circumstances. I commented on the circumstantial impact of disclosure in Order PO-1750, which concerned a request for information provided about a support payor to the Family Responsibility Office by a support recipient:

> However, in the circumstances of this appeal, the fact that the information is actually about the appellant is a relevant consideration. In this regard, I find that there is an inherent fairness issue in circumstances where one individual provides detailed personal information about another individual to a government body. In

my view, this goes to the autonomy of the individual and his ability to control the dissemination and use of his own personal information, and is reflected in section 1(b) of the *Act* as one of the fundamental purposes of the *Act*. This section states:

> The purposes of this *Act* are,
>
> > (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

In determining what weight to give to this consideration, I refer back to my discussion about the reasons for the creation of the Family Responsibility Office in the first place and the nature of the support enforcement process. In my view, this process was designed to meet a serious social need and because of the reluctance of support payors to participate in its information gathering, the Family Responsibility Office has had to take other steps to facilitate its objectives which include obtaining personal information about the support payor from the support recipient. It is apparent, however, that this is a very controlled process with safeguards built into it to minimize any prejudice to the support payor while enabling the Director to fulfill her duties as required by the *FRSAEA*. In this context, I find that the weight to be given to the issues of fairness are significantly diminished.

Similarly, in Order PO-1731 (quoted above), I considered the policy reasons for maintaining the confidentiality of information provided by others about the requester in balancing the rights of the requester to access against the rights of the affected person to privacy:

> In Order P-1436, I commented on the significance of confidentiality in the adoption home study process:
>
> > I find that, in order to protect the interests of children to be placed in prospective adoptive families, the process of assessing the home environment must provide for a degree of confidentiality for individuals providing references pertaining to the prospective adoptive parents.
>
> In my view, regardless of the fact that the affected persons' comments were unsolicited and not originally intended to be a part of the home study process, they are directly related to the Ministry's obligation to assess the home environment. The Ministry maintains, and I agree, that there must also be a degree of confidentiality in the current case, in order to ensure the integrity of the adoption application process and the Ministry's ability to respond responsibly and effectively to community concerns, and ultimately for the protection of adoptive children.

In my view, these comments are relevant in the circumstances of this appeal. I note, as the Ministry indicates above, that the Registrar investigates any allegations or concerns that are brought to its attention regarding a driver. I would assume from this that any decision made against a driver would be based on the Registrar's conclusions made after its own investigation. As a result of the independent investigation by the Registrar into this type of information, I find that the weight of the considerations favouring disclosure is diminished somewhat in the balance.

There is clearly a great deal of animosity between the appellant and the affected person. It is possible that either one of these two parties could be sufficiently motivated by their own personal agendas to make comments about the other to "outsiders" or to otherwise "interfere" in the other's personal affairs. However, based on the totality of the evidence before me, I am not persuaded that the appellant's perception of the affected person's motivation in interfering with her life should be taken into consideration in the circumstances. Even if motivation does have some relevance, in my view, the independent investigation of the Registrar into allegations brought to its attention, if they exist in this case, effectively reduces their impact.

In balancing the appellant's right to information about herself that would be contained in records such as those requested by her against the right of the alleged source of such information to privacy, I find that, in the circumstances of this appeal, the factors which favour privacy significantly outweigh the appellant's right to access. The role of the Registrar in ensuring the safety of the public and the importance of maintaining the confidentiality with respect to sources of information in this regard are of particular significance in balancing the competing interests of the parties, as is the independent verification process that the Registrar follows upon receipt of any concerns about a driver. Therefore, I find that records of the type requested, if they exist, would be exempt under section 49(b) of the *Act* and the first part of the test for the application of section 21(5) has been satisfied.

With respect to the application of section 21(5), the Ministry submits that the disclosure of the mere existence or non-existence of the requested record would communicate to the appellant exactly the information that she was seeking - namely the identity of the person who reported her medical condition. The Ministry notes that the appellant's request under the *Act* was for any and all correspondence from [a named doctor] submitted to the Ministry regarding her.

The Ministry submits that confirming the existence or non-existence of a letter from the named doctor in the Ministry's file would be to confirm the identity of the author as well as the content of such a record, if it exists.

Finally, the Ministry comments on the appellant's allegation that it has already confirmed that the requested record exists. In doing so, the Ministry acknowledges that it sent the above-noted letter to the appellant on February 27, 2001 in response to her verbal access request. The Ministry states that it interpreted her request broadly as a request for all of the records in her file. The Ministry asserts that its response "[w]e have reviewed your file and the records appear to fall under two categories ..." only confirms that there were records in the appellant's medical file. The Ministry takes the position that this letter did not confirm that it had a record from the affected person and should not be interpreted as doing so. Moreover, the Ministry denies the appellant's allegation that it confirmed to her that there is a letter on file from the affected person.

The appellant does not address this issue directly. Rather, she attached a number of letters to her representations which tend to confirm that she has knowledge of a letter sent by the affected person to the Ministry regarding her medical condition. It is apparent, however, that any information relating to this issue was provided by the appellant to the various individuals writing the letters. I find this information to be of little value in assessing whether the Ministry has indeed already told the appellant that such correspondence exists.

The Ministry denies confirming that there is a letter on file from the affected person. The appellant has provided no credible evidence to support her assertion that she was told by the Ministry that such a letter exists. In my view, the Ministry's explanation of the intent of the February 27th letter is consistent with its expanded approach to the appellant's request. That is, rather than restrict its search to the particular information the appellant was seeking, the Ministry advised her that there were a number of records in her file and that access would be granted to some immediately but that the disclosure of others must be considered under the access provisions of the *Act*. Such an approach can not reasonably be taken as confirmation that a particular record exists. Accordingly, I am satisfied that the Ministry did not previously disclose to the appellant that correspondence from the affected person regarding her existed in its files.

In essence, the appellant is seeking confirmation that the affected person has not only written to the Ministry about her, but that she has provided information about the appellant which has resulted in the revocation of her licence. Based on the above, I am satisfied that disclosure of the fact that the record exists (or does not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy, which satisfies the second part of the section 21(5) test.

As both parts of the section 21(5) test have been met, the Ministry may refuse to confirm or deny the existence of the requested information.

Because of these findings it is not necessary for me to address the possible application of the exemption in section 20 of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original signed by: July 17, 2001
Laurel Cropley
Adjudicator