

ORDER PO-2167

Appeal PA-020281-1

Ministry of Public Safety and Security

NATURE OF THE APPEAL:

This appeal concerns a decision of the Ministry of Public Safety and Security (the Ministry) made pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to all information related to a specified motor vehicle accident. The request included access to a named police constable's notes, the motor vehicle accident report, photographs, and any other information related to the accident. By way of background, the appellant is a private investigator retained by legal counsel for the surviving spouse (the spouse) and child of the deceased who was killed in the accident. In these circumstances, I will treat the appellant as standing in the shoes of the spouse.

The Ministry identified responsive records and determined that disclosure of some of these records may affect the interests of three witnesses referred to in the records (the affected persons). Prior to issuing its decision letter, the Ministry notified the affected persons and sought their position on the disclosure of the information to the appellant. One of the affected persons consented to the disclosure of his personal information to the appellant. The remaining two affected persons did not respond.

The Ministry then issued a decision letter in which it granted the appellant partial access to the records. The Ministry denied access to the remaining records on the basis of section 14(1)(l) (law enforcement) and section 49(b), with reference to section 21 (invasion of privacy).

The appellant appealed the Ministry's decision.

During the mediation stage of the appeal, the Ministry issued a supplementary decision letter in which it claimed the application of section 49(a) of the *Act* in regards to the records being withheld.

Also during mediation, the Ministry identified additional police officers' notes responsive to the request and issued a second supplementary decision letter. In this decision letter, the Ministry granted partial access to the record, comprised of pages 28-31. The Ministry denied access to the withheld parts of the record under section 49(a), in conjunction with section 14(1)(l) and section 49(b), in conjunction with section 21 of the *Act*.

During the course of mediation the Ministry again notified the two affected persons who had not responded. One of these affected persons consented to the disclosure of his information to the appellant.

The Ministry then issued a third supplementary decision letter in which it granted access in full to the statement of the second affected person who had consented to the disclosure of his personal information. The Ministry denied access to the witness statement of the third affected person under section 49(b), in conjunction with section 21 of the *Act*. The Ministry also granted access in part to a named police constable's notes. The Ministry withheld access to portions of this officer's notes on the basis that they were not responsive to the request. In this decision letter, the Ministry explained that notes did not exist for another police constable. The Ministry also explained that additional responsive records (photographs), to which the appellant sought access, could not be obtained through the Ministry since it did not have the actual photographs.

However, the Ministry provided the appellant with specific directions for obtaining the photographs from the Forensic Identification and Photographic Services at OPP Headquarters.

Also during mediation, the Ministry confirmed to the mediator that there were no additional notes taken by another named police officer and that notes or a witness statement did not exist for the driver of a truck. The mediator conveyed this to the appellant who accepted the Ministry's explanation.

In further discussions with the mediator, the appellant agreed that the Ministry's application of section 14(1)(l) and the non-responsive parts of the record were no longer at issue.

After the conclusion of the mediation stage and the issuance of the Mediator's Report, the Ministry issued a fourth decision letter. In its decision, the Ministry advised that it would be releasing further information regarding the deceased and information in a named police constable's notes concerning an affected person.

The portions of the record that remain at issue consist of the parts withheld under section 49(b), read in conjunction with section 21.

I first sought representations from the Ministry, which submitted representations. The Ministry states in its representations that it has reconsidered its position with respect to the severed portion of page 5 of the record (a media release) and that it has released this information to the appellant. This information is, therefore, no longer at issue in this appeal. The Ministry also indicated that it was relying on sections 21(1), 21(2)(f) and 21(3)(b) of the *Act* to support its discretionary exemption claim under section 49(b).

I then sought representations from the appellant. I included with my Notice of Inquiry a copy of the Ministry's representations, which it had agreed to share in their entirety with the appellant. The appellant submitted representations in response. In his representations, the appellant addresses the application of section 14(1)(l) and section 49(b), read in conjunction with section 21. However, as stated above, the parties agreed during the mediation stage that the application of section 14(1)(l) is no longer at issue. Therefore, I do not address section 14(1)(l) in this decision.

In his representations, the appellant has raised an issue regarding photographs taken of the accident. The appellant states that the Ministry has demonstrated control of these images by providing the address of an OPP office from which to obtain them. This point does not appear to be in dispute. However, as stated above, the Ministry has indicated that it is prepared to release the photographs to the appellant and has provided the appellant with directions for obtaining the photographs from the Forensic Identification and Photographic Services at OPP Headquarters. In addition, the Mediator's Report does not list the photographs as being at issue. The appellant had twenty days to raise any errors or omissions in the Report and did not do so. Accordingly, I will not address the photographs in this inquiry. The appellant is free to make another request for this information.

RECORD:

The information remaining at issue is contained in twelve pages of documents comprised of a Fatal Motor Vehicle Collision Preliminary Report, the notes of two police constables, an OPP Occurrence Summary, a Homicide/Sudden Death Report, and a witness statement of an affected person. The information at issue corresponds with pages 2, 3, 6, 8, 9, 19, 23, 24, 25, 30, 32 and 33 of the Ministry's original record.

DISCUSSION:

PERSONAL INFORMATION

As I have indicated, the Ministry relies on section 49(b) in conjunction with sections 21(2)(f) and 21(3)(b) to deny access. In order to assess whether these provisions apply to these records it is, first, necessary to determine whether the records contain personal information, and to whom that personal information relates.

Under section 2(1) of the *Act*, "personal information" is defined, in part, as recorded information about an identifiable individual, including information relating to the age of the individual [paragraph (a) of the definition], any identifying number, symbol, or other particular assigned to the individual [paragraph (c)], the address and/or telephone number of the individual [paragraph (d)], 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 [paragraph (h)].

The Ministry submits:

[T]he records in question contain the personal information of identifiable individuals who were either the subject of this investigation or a witness to this accident and consist of the following:

- Page 2, 6, 19, 23, 24, 25, 30, 32 - contain the names, addresses, dates of birth, telephone numbers and/or other personal identifiers of individuals, as well as a synopsis of an individual's statement;
- Page 3 - contains personal information relating to an individual;
- Page 8, 9 - contain the name, address, date of birth, telephone number and statement of an individual;
- Page 33 - witness statement

[T]he information contained in the records is recorded information about identifiable individuals, other than the requester, as defined under section 2(1) of the *Act*.

The appellant does not make representation on this issue.

Based on my review of the record and the Ministry's representations, I draw the following conclusions:

- five pages (pages 3, 8, 19, 23 and 25) contain the spouse's personal information, including her name and in some cases her address and telephone number
- eleven pages (pages 2, 3, 6, 8, 9, 19, 23, 24, 25, 30 and 33) contain the personal information of the deceased including his name, information relating to his involvement in the accident and his address
- twelve pages (pages 2, 3, 6, 8, 9, 19, 23, 24, 25, 30, 32 and 33) contain the personal information of seven affected persons comprised of
 - the names, addresses, telephone numbers and observations of the three affected persons mentioned above who were witnesses to the accident
 - the name, address, telephone number and observations of the driver of a truck who was involved in the accident
 - the names, addresses and telephone numbers of two doctors and
 - the name of another individual who is the girlfriend of the driver of the truck

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/INVASION OF OTHER INDIVIDUALS' PRIVACY

Introduction

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

Section 49(b) of the *Act* provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester 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.

In this case I have determined that portions of the record contain the personal information of the spouse, the deceased and affected persons. Significant portions of the record containing both the personal information of the spouse and deceased have been released to the appellant. Therefore, I will consider whether the disclosure of the remaining personal information would be an unjustified invasion of the personal privacy of these affected persons and is exempt from disclosure under section 49(b).

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester. On appeal, I must be satisfied that disclosure *would* constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In situations where the record contains the personal information of the requester (in this case the spouse) and of others, as is the case here, 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 a determination as to 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(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.

With respect to section 21(3), 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 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In other words, once section 21(3) is found to apply, the factors in section 21(2) cannot be resorted to argue in favour of disclosure.

Unjustified invasion of another individual's personal privacy

Introduction

For portions of the record under consideration, the Ministry has submitted that the presumption in section 21(3)(b) applies.

Section 21(3)(b) 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;

Representations

The Ministry submits that the personal information in the record was compiled by the OPP as part of an investigation into a possible violation of law as a result of a motor vehicle accident. The Ministry submits that in the course of investigating such law enforcement matters the OPP collects relevant personal information about the parties involved in order to reach a conclusion about whether there have been any violations of law. In this case the Ministry indicates that no charges were laid by the OPP under the *Highway Traffic Act*.

In his representations the appellant does not expressly address the Ministry's representations under section 21(3)(b) in explaining its decision to deny access to personal information obtained during the course of an investigation into a possible violation of law. However, the appellant's representations do address the section. The appellant states that he has concerns with the manner in which the OPP conducted its investigation, including the gathering of evidence and the failure to lay charges under the *Highway Traffic Act*. The appellant states that he requires this information to complete his own investigation and to determine whether there were any violations of law arising from the accident.

The appellant also argues that the section 21 exemption was waived when the affected parties agreed to give statements in a matter that they should have known or been made aware may result in public court proceedings.

Findings

Based on the submissions of the Ministry and my review of the record, I find that the personal information contained in the record was compiled and is identifiable as part of an investigation into a possible violation of law, specifically the *Highway Traffic Act*. The fact that quasi-criminal proceedings were not commenced does not have a bearing on the issue, since section 21(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

I acknowledge the appellant's concerns that he requires this information in order to complete his own investigation. However, in my view, the drafters of the *Act* did not intend to justify the rebutting of the presumption against disclosure under section 21(3)(b) in circumstances where a private individual or organization wished to pursue *their own* investigation. The phrase

“continue the investigation” refers to the investigation in which the information at issue was compiled. This view has been followed in previous orders of this office (Orders MO-1356, M-718 and M-249).

In Order MO-1356, former Adjudicator Laurel Cropley considered the meaning of the phrase “continue the investigation” in section 21(3)(b). She reached the following conclusion:

There is nothing in the appellant’s submissions that would lead me to conclude that the personal information is required to continue the investigation for which the personal information was compiled. Rather, the appellant seeks the information for his own personal purposes in challenging the motivations and actions of the Police and others in instigating and conducting the investigations in the first place.

I agree with former Adjudicator Cropley’s conclusion and find that it applies here. In this case, the investigation was conducted by the OPP and the information contained in the record was gathered as a result of that investigation. It is clear on the evidence that their investigation has been completed. The fact that the appellant now wishes to acquire that information to complete his own investigation is not relevant to a determination of section 21(3)(b). Therefore, I find no justification for rebutting the presumption in section 21(3)(b).

Secondly, I do not agree with the appellant’s assertion that by cooperating with the OPP and providing information and/or statements the affected parties intended to waive their right to protect their personal information. I concur with the Ministry that in order to encourage witnesses to come forward in these circumstances the section 21(3)(b) presumption must safeguard the personal privacy of those who do so.

Therefore, I find that the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies. The disclosure of this personal information is, therefore, deemed to constitute an unjustified invasion of the personal privacy of the individuals to whom that information relates. As a result, these records qualify for exemption under section 49(b) of the *Act*.

In my discussion above, I referred to the decision in *John Doe*. While the appellant has not specifically raised the application of any of the factors in section 21(2), his representations strongly hint at the application of section 21(2)(d), suggesting that the information is relevant to a fair determination of the rights of the spouse of the deceased. The appellant’s representations also hint at the application of section 21(2)(a), that disclosure is desirable for the purpose of subjecting the activities of the OPP to public scrutiny. However, having found that section 21(3)(b) applies I am precluded from considering any of the factors weighing for or against disclosure under section 21(2), because of the *John Doe* decision.

Exercise of discretion

As indicated above, section 49(b) is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under section 49(b), the Ministry must exercise its discretion in deciding whether or not to disclose it.

The Ministry submits that it has properly exercised its discretion in respect of the appellant's request. The Ministry states that in the circumstances of this request it has fulfilled its responsibilities and obligations under the *Act* and took into account the nature of the information, its sensitivity and the fact that the information was compiled as part of an investigation into a possible violation of law.

The appellant does not offer any submissions on this issue.

In the circumstances, I am not persuaded that the Ministry has erred in exercising its discretion.

Severance

Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt.

The Ministry submits that it is mindful of the right of persons to seek access to records held by institutions and the requirements of section 10(2) of the *Act*.

The appellant did not submit representations on severance.

The key question raised by section 10(2) is one of reasonableness. Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. In my view, the Ministry has been fair and extremely generous with the disclosure of information in this case. It went to considerable lengths to successfully gain the consent of three affected persons to the release of their personal information. It has provided the appellant with full disclosure of the spouse's personal information. It has also provided the appellant with full disclosure of the deceased's personal information, which is highly unusual given the restrictions of the *Act* about providing the personal information of deceased individuals to representatives and the next-of-kin (see section 66(a) of the *Act*). The remaining information relates to four affected parties, which I have found is exempt from disclosure. In my view, the Ministry has acted reasonably in severing the record.

ORDER:

I uphold the Ministry's decision to withhold the severed portions of the record.

Original Signed By: _____

Bernard Morrow
Adjudicator

_____ July 25, 2003