



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2185**

**Appeal PA-020357-1**

**Ministry of Public Safety and Security**



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## **NATURE OF THE APPEAL:**

The requesters were injured in a motor-vehicle accident while riding as passengers in a taxi. Through their lawyer, they made a request to the Ministry of Public Safety and Security (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of any witness statements and police officers' notes relating to the accident.

The Ministry located a number of responsive records consisting of police officers' notes and two witness statements. The Ministry notified one of the witnesses of the request, and the witness consented to the disclosure of his personal information. The Ministry was unable to contact the second witness.

The Ministry then issued a decision letter to the requesters granting partial access to the records. The Ministry denied access to portions of the records, relying on the following discretionary exemptions in the *Act*:

- section 49(a) (discretion to refuse requester's own information) in conjunction with section 14(1)(l) (facilitate commission of unlawful act); and
- section 49(b) (invasion of privacy) in conjunction with sections 21(2)(f) (highly sensitive), 21(3)(a) (medical, psychiatric or psychological information) and 21(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law).

The Ministry also withheld certain information on the basis that it was not responsive to the request.

The requesters (now the appellants) appealed the Ministry's decision to deny access. They are represented by their lawyer in this appeal.

During mediation, the appellants clarified that they are not pursuing access to the non-responsive portions of the records or the remaining portions of the police officers' notes. They are only interested in obtaining access to the remaining witness statement. As a result, section 49(a) is no longer at issue.

The appellants provided the Mediator with contact information for the second witness. The Mediator contacted this individual, and he advised that he did not consent to the disclosure of his statement.

Mediation did not resolve this appeal, and the file was transferred to adjudication. This office sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting the Ministry to make written representations. The Ministry submitted representations in response to the Notice. I then sent a Notice of Inquiry to the appellants, together with a copy of the Ministry's representations. The appellants advised this office that they would not be making representations. I decided to seek further representations from the Ministry on its exercise of discretion under section 49(b), and the Ministry provided me with additional representations on this issue.

In this appeal I must decide whether the section 49(b) exemption applies to the record and, if so, whether the Ministry properly exercised its discretion in withholding the record.

**RECORD:**

The record at issue is a two-page witness statement.

**BRIEF CONCLUSION:**

For the reasons set out in this order, I find that the record is exempt from disclosure under section 49(b) of the *Act*.

**DISCUSSION:**

**PERSONAL INFORMATION**

The first issue I must decide is whether the record contains personal information, and if so, whose.

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual.

The Ministry submits:

The record in question contains the personal information of an identifiable individual who was involved in a motor vehicle accident and was a subject of the police investigation into this matter. As indicated previously, the record is a statement from this individual. The statement contains the individual's name and driver's licence, and details the views, opinions and actions of this individual, as well as the injuries sustained by this individual.

In claiming section 49(b) of the *Act*, which applies to information relating to requesters, the Ministry also raises as an issue whether the record contains the appellants' personal information.

I have reviewed the record and I agree that it contains the second witness's personal information. I also find that it contains the personal information of the appellants and another individual. Even though they are not identified by name in the record, these individuals are identifiable by the record's context and the surrounding circumstances.

## INVASION OF PRIVACY

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 exemptions from disclosure that limit this general right.

The Ministry relies on section 49(b) in conjunction with section 21 to support its denial of access to the record. More specifically, the Ministry relies on the “presumed unjustified invasion of personal privacy” at sections 21(3)(a) and 21(3)(b) and the factor favouring privacy protection at section 21(2)(f). These sections read:

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

- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

21 (2) 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,

- (f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) 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;

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the Ministry to exercise its discretion in this regard by balancing the appellants' right of access to their own personal information against other individuals' right to the protection of their privacy.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

I have reviewed the record and I have concluded that none of the exceptions at sections 21(1)(a) through (e) applies in this case.

With respect to the section 21(3)(a) presumption, the Ministry submits:

... some of the information in the record at issue is medical information in that it relates to the injuries sustained by [the second witness] as a result of the motor vehicle collision, for which medical treatment was necessary.

With respect to the section 21(3)(b) presumption, the Ministry submits, among other things:

The record at issue in this appeal relates to a traffic-related investigation, which was undertaken by two OPP officers. In the course of investigating such law enforcement matters, the OPP collects relevant personal information about the parties involved. This is necessary in order to reach specific conclusions as to whether there have been any violations of the law. In this case, no charges were laid by the OPP under the *Highway Traffic Act*.

... all the personal information contained in the record was compiled and is identifiable as part of an OPP investigation into a possible violation of law, in accordance with [section] 21(3)(b) of the *Act*.

As noted above, the record consists of a witness statement relating to a motor-vehicle accident. I find that portions of the record relate to the medical condition of the second witness, whose

statement is at issue. I also find that the entire record was compiled and is identifiable as part of an investigation into a possible violation of law. Accordingly, disclosing the record is presumed to constitute an unjustified invasion of this individual's privacy under sections 21(3)(a) (part of the record) and 21(3)(b) (the entire record). These presumptions are not rebutted by section 21(4) or the "compelling public interest" override at section 23, which was not raised in this case. I therefore find that disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b).

### **SEVERANCE**

Section 10(2) of the *Act* requires institutions to disclose as much of any responsive record as can reasonably be severed without disclosing information that is exempt from disclosure. I am satisfied that the record at issue does not contain any information that could reasonably be severed and disclosed to the appellants.

### **MINISTRY'S EXERCISE OF DISCRETION**

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under any of the *Act's* discretionary exemptions. Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the record.

The Ministry's initial representations on its exercise of discretion did not directly address section 49(b), but referred only to the mandatory exemption at section 21. Consequently, I decided to ask the Ministry to provide me with additional representations on this issue.

I am satisfied, based on its supplementary representations, that the Ministry properly exercised its discretion in refusing to disclose the record under section 49(b).

### **ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_  
Shirley Senoff  
Adjudicator

October 2, 2003 \_\_\_\_\_