

**ORDER PO-2239**

**Appeal PA-030188-1**

**Ministry of Public Safety and Security**

## **NATURE OF THE APPEAL:**

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information in relation to an identified motor vehicle accident. Specifically, the request was for a detailed, complete accident report including all handwritten notes and records. The requester, who was represented by counsel, was involved in the accident.

The Ministry responded to the request by granting partial access to a copy of the accident report and officer's notes. The Ministry stated that access to some of the responsive information was denied pursuant to sections 49(a) (discretion to refuse requester's own information), 14(1)(l) (facilitate commission of unlawful act), and 21 and 49(b) (invasion of privacy) with reference to section 21(2)(f) and 21(3)(b) of the *Act*. The Ministry also advised that access to some information was denied as it was not responsive to the request.

The requester (now the appellant) appealed the Ministry's decision.

In mediation, the appellant confirmed that he was not pursuing access to the information denied on the basis of sections 49(a) and 14(1)(l), nor to the portions of the records identified by the Ministry as non-responsive. Accordingly, the only issue in this appeal is access to the portions of the records for which sections 21 and 49(b) are claimed. Also during mediation, the mediator attempted to notify two affected parties, but was unable to obtain their consent to the disclosure of their personal information.

Mediation did not resolve this appeal and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, inviting representations on the issues raised in this appeal. I received representations from the Ministry, and then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant. The appellant provided representations, which I shared with the Ministry. The Ministry responded with reply representations, and these representations raised an issue which I decided the appellant should be given an opportunity to respond to. Accordingly, I sent a copy of the Ministry's reply representations to the appellant, who provided additional representations in response.

## **RECORDS:**

The records at issue in this appeal consist of one witness statement, and the withheld portions of a police officer's hand-written notes.

## **DISCUSSION:**

### **PERSONAL INFORMATION/INVASION OF PRIVACY**

The personal privacy exemption in section 49(b) applies only to information which qualifies as "personal information" as defined in 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 contain the personal information of the appellant and two affected parties. It submits that the records include information relating to the age of these individuals (paragraph a), an identifying number, symbol, or other particular assigned to the individuals (paragraph c), the addresses of the individuals (paragraph d), the personal opinions or views of an individual (paragraph e), the views or opinions of another person about an individual (paragraph g) and the individuals' names along with other information about them (paragraph h).

The Ministry's representations were shared with the appellant, and the appellant's representations in response state:

Clearly the two affected parties' names and addresses and ages meet the definition of personal information. If this information were to be removed, there would be no way to identify the individual providing the statements.

...

Further, any opinions or views provided by the witness would most likely be about other individuals involved in the accident, most likely [the appellant]. Therefore these opinions would fall outside of section 2(1)(e) and 2(1)(g) would not apply ... The information requested for release has no significant relevance to the individual giving it and so is not in our submission "personal information".

I shared the appellant's representations with the Ministry and invited the Ministry to address them. The Ministry provided reply representations concerning the possible severing of information which may identify the affected parties. The Ministry's representations state:

The Ministry submits that the remaining exempt information, either alone or in conjunction with information previously released to the appellant, consists of personal information about identifiable individuals.

Due to the small number of individuals involved and the fact that the appellant possesses a copy of the relevant motor vehicle report which names the involved parties, the Ministry submits that it is not possible to sever the records in such a manner as to protect the identifies of the affected parties.

I then shared the Ministry's reply representations with the appellant. In response, the appellant identifies the reasons why he is interested in obtaining the information, and that it would provide a more convenient method of accessing the information, as opposed to seeking access through other processes.

Based on the representations and on my review of the contents of the records, I am satisfied that the records contain the personal information of the appellant. I am also satisfied that they contain the personal information of other identifiable individuals within the meaning of the definition of that term in section 2(1). Furthermore, on the basis of the Ministry's reply representations, it is my view that severing the records as suggested by the appellant will not

result in the remaining information no longer being considered the "personal information" of the other identifiable individuals. The information would still be referable to identifiable individuals, and would be their personal information as it would contain other information about them (as defined in paragraph 2(1)(h)).

### **Invasion of Privacy**

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

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.

In deciding whether the exemption in section 49(b) applies, 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 institution 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 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 application of the factors listed in section 21(2), as well as all other relevant considerations.

In his request letter and representations, the appellant suggests that he is seeking access to the records to assist in possible civil proceedings. This raises the possible application of the consideration listed in section 21(2)(d) of the *Act*.

The Ministry submits that the undisclosed portions of the records contain information which falls within the presumption in section 21(3)(b) of the *Act*, and also that the consideration listed in section 21(2)(f) applies to this information. These sections state:

(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,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

(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,

(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;

#### **Application of Section 21(3)(b) to the Records**

With respect to section 21(3)(b), the Ministry submits that:

... the personal information remaining at issue consists of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law.

...

The exempt information in part documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident involving the appellant's client. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The circumstances of motor vehicle accidents in some instances can result in charges being laid under the *Criminal Code* or the *Highway Traffic Act*.

The Ministry then refers to Order PO-1728 issued by Senior Adjudicator Goodis in which the presumption in section 21(3)(b) was applied to personal information collected by the police during the course of a motor vehicle accident investigation.

Finally, the Ministry identifies that the application of section 21(3)(b) is not dependent on whether charges are actually laid (based on Orders P-223, P-237 and P-1225), and that neither section 21(4) nor section 23 of the *Act* operate to overcome the presumption in these circumstances.

The Ministry's representations were shared with the appellant. The appellant's representations do not address the issue of whether or not the presumption in section 21(3)(b) applies; rather, they focus on the reasons why the appellant requires this information, and that failure to obtain this information will hinder the appellant from pursuing certain possible civil actions.

In the Ministry's reply representations, the Ministry refers to alternative processes which the appellant may wish to consider in order to access the requested information and to aid him in pursuing possible civil actions as a result of the accident. In response, the appellant refers to the convenience of possibly obtaining the information through this process.

Based on my review of the undisclosed portions of the records, I am satisfied that the Ministry has provided an evidentiary basis for the application of the presumption in section 21(3)(b) to these records. I find, accordingly, that the disclosure of the remaining records is presumed to constitute an unjustified invasion of the personal privacy of individuals other than the appellant.

As noted above, the application of the presumptions in section 21(3) cannot be overcome by a factor or combination of factors under section 21(2). In the present appeal, the exceptions in section 21(4) do not apply and the appellant has not raised the possible application of section 23 to the records. Accordingly, I find that the undisclosed information in the records at issue is exempt from disclosure under section 49(b).

### **Exercise of Discretion**

The section 49(b) exemption is discretionary and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

Upon review of all of the circumstances surrounding this appeal and the Ministry's representations on the manner in which it exercised its discretion, I am satisfied that the Ministry has not erred in the exercise of its discretion not to disclose the remaining portions of the records under section 49(b).

### **ORDER:**

I uphold the Ministry's decision to deny access to the undisclosed portions of the records.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

February 9, 2004  
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