



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

ORDER PO-2245

Appeal PA-030215-1

Ministry of Public Safety and Security



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/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 all documents relating to a motor vehicle accident in which the requester was involved.

The Ministry located a number of responsive records consisting of police officers' notes, the requester's statement, and two witness statements. The Ministry granted partial access to the responsive records, and denied access to portions of the police officers' notes and the two witness statements. Access to the undisclosed portions of the records was denied under the exemptions found in section 49(a) of the *Act* (discretion to refuse requester's own information) with reference to section 14(1)(l) (facilitate commission of unlawful act) and section 49(b) (invasion of privacy) with reference to the factor in section 21(2)(f) (highly sensitive) and the presumption in section 21(3)(b) (compiled as part of an investigation into a possible violation of law).

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

During mediation of this appeal, one of the witnesses (Witness A) consented to disclosing her personal information to the appellant. On the basis of that consent, the Ministry disclosed to the appellant additional portions of the police officers' notes relating to that witness, as well as most of her witness statement. Furthermore, the Ministry attempted to contact the other witness (Witness B), but was unable to contact this individual to obtain this individual's consent to disclosure.

Mediation did not resolve the remaining issues and the file was transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues to the Ministry, and the Ministry provided representations to me. I then sent the Notice of Inquiry, along with a copy of the Ministry's representations, to the appellant. The appellant, through his lawyer, provided brief representations in response.

In this appeal I must decide whether the exemptions claimed by the Ministry apply to the records.

RECORDS:

The records remaining at issue are the undisclosed portions of the police officers' notes, Witness B's statement in its entirety, and the withheld portions of Witness A's statement.

DISCUSSION:

PERSONAL INFORMATION

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

age (section 2(1)(a)), medical history (section 2(1)(b)), address (section 2(1)(d)), the personal opinions or views of that individual except where they relate to another individual (section 2(1)(e)), the views or opinions of another individual about the individual (section 2(1)(g)) or 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 (section 2(1)(h)).

The Ministry submits that the information remaining at issue contains the types of personal information set out in sections 2(1)(a), (d), (e), (g) and (h), and that it relates to the appellant and other identifiable individuals.

The appellant does not address this issue directly, but does refer to the fact that the information relates to him.

I have reviewed the records remaining at issue and find that they contain information relating to the accident involving the appellant, and therefore contain the personal information of the appellant. I also find that the undisclosed portions of the police officer's notes on pages 2 and 3, and the brief severances from Witness A's statement, also contain the personal information of identifiable individuals, including Witness B. I also find that Witness B's statement contains that individual's personal information, as well as the personal information of other individuals.

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 records. More specifically, the Ministry relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b) and the factor favouring privacy protection at section 21(2)(f). Furthermore, the presumption in section 21(3)(a) may also be relevant in the circumstances. These sections read:

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 appellant's right of access to his 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.

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

The Ministry is of the opinion that the personal information remaining at issue ... was compiled and is identifiable as part of an OPP investigation into a possible violation of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. ... Some of the duties of a police officer include investigating possible law violations, crime prevention and apprehending criminals and others who may lawfully be taken into custody.

The exempt information in part documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident involving the [appellant]. 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. The Ministry also 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 directly 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

As noted above, the records consist of portions of police officers' notebooks, one witness statement in its entirety, and the undisclosed portions of another witness statement.

I find that portions of the records (specifically, portions of pages 2 and 3 of the police officers' notes, and a portion of Witness B's statement) contain information about the medical condition of identifiable individuals. As a result, disclosing these portions of the records is presumed to constitute an unjustified invasion of privacy under section 21(3)(a). I also find that all of the records were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, disclosing the records is presumed to constitute an unjustified invasion of privacy under section 21(3)(b). 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).

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).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/FACILITATE COMMISSION OF AN UNLAWFUL ACT

As set out above, 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.

The Ministry has relied on section 49(a) to deny access to two undisclosed portions of the records (the severances found on pages 5 and 6 of the police officers' notes). Under section 49(a), an institution has the discretion to deny access to an individual's own personal information in instances where the exemption in section 14 would apply to the disclosure of that personal information.

The Ministry claims that section 14(1)(l) applies to the "ten-codes" in the OPP officers' notes. Section 14(1)(l) states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry states that "ten-codes" are used by OPP officers in their radio communications with each other and the Detachments and Communications Centres. The Ministry submits that release of the "ten-codes" would compromise the effectiveness of police communications and possibly jeopardize the safety and security of OPP officers. The Ministry relies on previous orders of this office which have upheld the application of section 14(1)(l) or its municipal equivalent to "ten-codes", including Orders M-393 and M-757.

The appellant does not address this issue in his representations.

Having reviewed the Ministry's representations and the previous orders, I find that the "ten-codes" are properly exempt under section 14(1)(l). As Adjudicator Laurel Cropley stated in Order PO-1665:

... disclosure of the "ten-codes" would leave OPP officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

Therefore, I find that the Ministry has properly applied section 14(1)(l) to this information. I am also satisfied that the Ministry has not erred in the exercise of its discretion not to disclose these portions of the records under section 49(a) of the *Act*.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____

Frank DeVries
Adjudicator

February 25, 2004 _____