



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2236

Appeal PA-030091-1

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

NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) for access to records relating to an investigation by the Ontario Provincial Police (OPP) into a motor vehicle accident in which the appellant's wife and another individual were killed.

The Ministry identified responsive records, and notified four affected parties of the request, seeking their views on disclosure of information relating to them. One affected party consented to disclosure, two objected, and a third apparently had passed away.

The Ministry then issued its decision to the appellant, in which it advised that it was granting partial access to the records. The Ministry stated that it was withholding portions of the records on the basis of the exemptions for law enforcement (sections 49(a)/14) and other individuals' personal privacy (sections 49(b)/21). The Ministry also withheld portions of the records on the basis that they were not responsive to the request.

The appellant then appealed the Ministry's decision to this office.

During the mediation stage of the appeal, the appellant advised that:

- he is only seeking access to two witness statements
- he is not making his request on behalf of his wife's estate pursuant to section 66(a)
- he believes the section 23 "public interest override" applies

Also during mediation, the mediator contacted the two affected parties who provided the two witness statements, seeking their views on disclosure. Both affected parties indicated that they still did not consent to disclosure of their personal information, and that they did not want this office to contact them again about this matter.

In addition, the Ministry advised that, given the narrowing of the appellant's request, it was no longer relying on section 49(a) or (b), but was maintaining its claim that the records are exempt pursuant to sections 14 and 21.

Mediation was not successful in resolving all of the issues in the appeal, so the matter was streamed to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the issues in the appeal to the Ministry, and I received representations in response. I then sent the Notice, together with a copy of the Ministry's representations to the appellant, who in turn provided representations.

RECORDS:

The information at issue is contained in eight pages of records, consisting of a three-page interview report from the first affected party (pages 16-18), a one-page interview report from the second affected party (page 19), and a four-page interview report from the second affected party (pages 20-23).

DISCUSSION:

PERSONAL INFORMATION

The section 21 personal privacy exemption can apply only to personal information. Therefore, first issue for me to decide is whether the records contain personal information and, if so, to whom it relates.

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 records in question contain 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 well as the statement of an individual who witnessed the accident. The records contain the names, addresses, ages, date of birth, telephone numbers and driver’s licence number of these two individuals. In addition, the records contain the views, opinions and actions of these individuals.

The appellant makes no submissions on this specific issue.

I agree with the Ministry that the records contain personal information relating to the two witnesses and the deceased individuals as described above in the Ministry’s representations.

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. The only exception that could apply in these circumstances is section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) provide guidance in determining whether disclosure of information would constitute an unjustified invasion of personal privacy. Here, the Ministry claims that the section 21(3)(b) presumption of an unjustified invasion of privacy applies. That section reads:

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;

The Ministry submits:

The *Police Services Act* (the *PSA*) . . . establishes the OPP and provides for its composition, authority and jurisdiction. Section 19 sets out the responsibilities of the OPP which in part include:

- Providing police services in respect of the parts of Ontario that do not have municipal police forces other than by-law enforcement officers.
- Maintaining a traffic patrol in the King's Highway, except the parts designated by the Solicitor General.

Section 42 of the *PSA* also lists the duties of a police officer and in part include:

- Preserving the peace;
- Apprehending criminals and other offenders and others who may lawfully be taken into custody;
- Laying charges and participating in prosecutions;

The records at issue in this appeal relate to a traffic-related investigation, which was undertaken by an OPP officer. 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.

. . . [A]ll of 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*.

. . . [N]one of the circumstances as outlined in section 21(4) of the *Act* would operate to rebut the presumption of an unjustified invasion of personal privacy as has been established under section 21(3)(b) of the *Act*.

The appellant takes the position that the words “except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation” in section 21(3)(b) apply. He submits:

It is my intention to use, in part, the information contained in the witness statement to construct a different explanation from that which is contained in the [OPP Technical Traffic Collision Investigation Report (TTCIR)]. This new report will be the basis for an argument to either reopen the investigation or call for a public inquest into the accident or both. The “new information” will be based on the contents of the witness statements. Even though the statements are not “new”, it is my expectation that a *new* interpretation of their contents or an introduction of evidence not previously considered, may contribute significantly to the altering of the conclusions which have been drawn in the TTCIR.

In the matter of violation of law, I was told by the [OPP] that, had my wife lived, she would have been charged, under the *Highway Traffic Act*, with making an improper left turn. As it stands, due to a premature release of a speculative police report by the media, there is a public perception that my wife committed a traffic violation which caused two deaths.

It is clear from the circumstances that the personal information at issue was compiled and is identifiable as part of the OPP’s investigation into a possible violation of law, namely the *Highway Traffic Act* and/or the federal *Criminal Code*.

In addition, I do not accept the appellant’s argument that his investigation of the circumstances of the incident triggers the application of the section 21(3)(b) exception for disclosures necessary to continue the investigation. In analogous circumstances in Order MO-1727 under the municipal equivalent to the *Act*, Adjudicator Sherry Liang stated:

The appellant does not dispute that the information in the notes of the police officers was compiled and is identifiable as part of an investigation into a possible violation of law. He submits, however, that he requires the information in order “to continue an investigation into the incident to determine what, if any, further steps should be taken to pursue his legal rights.” He states that this information falls, therefore, within the exception contained in section 14(3)(b), and its disclosure is not presumed to constitute an unjustified invasion of personal privacy.

I do not accept the submission of the appellant. Prior orders have clearly established that an appellant's own “investigation” does not constitute the continuation of the “investigation into a possible violation of law” referred to in section 14(3)(b). In Order PO-2167, for instance, dealing with the provincial equivalent to section 14(3)(b), the requester was a private investigator representing the surviving spouse of an individual killed in a motor vehicle accident. Access to police records surrounding the accident was sought in order for the spouse to determine independently whether the police investigation was

adequate, and whether any violations of law arose from the accident. Adjudicator Bernard Morrow did not accept the submission that these circumstances fell within the exception to this presumption, stating:

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 [14(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).

I agree with the above analysis, and find that the section 14(3)(b) presumption applies to the personal information of individuals other than the appellant, since this information was gathered during the course of a police investigation into an incident at Pearson International Airport. Whether or not any criminal or quasi-criminal proceedings were commenced does not have a bearing on the issue, since section 14(3)(b) only requires that there be an investigation into a possible violation of law (Order PO-1849).

In my view, the approach taken by Adjudicators Liang and Morrow is applicable here. Therefore, the section 21(3)(b) presumption applies, and the records are exempt under section 21 of the *Act*. As a result, the Ministry cannot disclose the records unless the section 23 "public interest override" applies.

PUBLIC INTEREST OVERRIDE

General principles

Section 23 reads:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [see Order P-1398].

Under section 1 of the *Act*, the protection of personal privacy is identified as one of the central purposes of the *Act*. Section 21 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified.

Commenting generally on the personal privacy exemption under the Freedom of Information scheme, the drafters of *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen’s Printer, 1980) (the Williams Commission Report) indicated that the legislation must take into account situations where there is an undeniably compelling interest in access, situations where there should be a balancing of privacy interests, and situations which would generally be regarded as particularly sensitive in which case the information should be made the subject of a presumption of confidentiality. In this regard, the Williams Commission Report recommended that “[a]s the personal information subject to the request becomes more sensitive in nature . . . the effect of the proposed exemption is to tip the scale in favour of non-disclosure” [see Order MO-1254].

Representations

The appellant submits that his deceased spouse was a very well-known and highly respected member of her community, and that her passing as well as that of her colleague received a great deal of local media attention. He also submits that their deaths “were also considered in the larger context of the public concern over the number of fatalities” on a particular stretch of Highway 69. The appellant provides copies of media reports in support of these submissions.

The appellant further submits:

There is a private dimension to every public concern. It is unlikely that Section 10(5) of the *Coroner's Act*, governing the compulsory inquest in the event of death at construction or mining sites would be in place without consideration of the personal and "private" tragedies of the families of the deceased. It is expected that I will have a personal interest in making the request for information, but my personal interest is not the *sole* interest, nor is it *my* sole interest. This personal interest should be no more a deterrent to the release of information now than it would have been under similar circumstances, had that been the case, in the drafting of Section 10(5).

In the measuring of the public interest in terms of the relationship of the record's central purpose of shedding light on the operation of government and weighing it against the purpose of the exemption.

Accessing the witness statements is the first step in preparing an alternative perspective of the fatal accident. Once this is done it will provide a basis for reopening the accident investigation or calling an inquest or both. At this point the matter will become public and once public it will allow for questions to be asked about the role of government in maintaining public safety through its involvement in this case. Not only will it serve the purpose of informing the citizenry about the activities of government so that the public can effectively express public opinion or make political choices, it will provide the *opportunity to effect change*.

As part of his submissions, the appellant included a letter to him from a regional supervising coroner dated November 18, 2002, stating that the accident in question, as well as a number of other crashes on Highway 69, are the subject of an "ongoing review by the Coroner's Office." The letter also states:

In the near future, I will be meeting with senior traffic officers from the [OPP] in an effort to identify common crash factors that might pose a risk to public safety for the motoring public . . .

The Ministry submits:

. . . The appellant has not provided the Ministry with any information, which would demonstrate that the disclosure of the records would satisfy a public interest. The interest with respect to this matter appears to be a private interest and not a public interest. There is no rousing public interest or attention to this matter. Even if there was some public interest with respect to this matter, any public interest would be insufficient to outweigh the privacy rights of the other individuals identified in the records.

In my view, the appellant's interest in obtaining access to the records is largely private, although I accept that there is also a significant public safety component to his interest. However, the accident in question has already been extensively investigated by the OPP, and a separate and broader investigation of the circumstances surrounding a series of accidents on Highway 69, including the accident to which the records relate appears to have been undertaken by the Coroner's Office. In my view, given that the public interest concerns have been or are being addressed to a significant degree by the OPP and the Coroner's Office, the material before me does not establish that there is a compelling public interest in disclosing the witness statements to the appellant. Accordingly, I find that section 23 cannot apply to override the section 21 personal privacy exemption.

ORDER:

I uphold the Ministry's decision to withhold the records.

Original Signed By: _____

David Goodis

Senior Adjudicator

February 3, 2004 _____