



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2208**

**Appeal PA-020175-1**

**Ministry of Public Safety and Security**



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## **NATURE OF THE APPEAL:**

The requester is a lawyer representing the defendants in a civil action brought by a named police officer involved in a motor-vehicle accident. The former made a request to the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information relating to the accident:

...the names and current detachment location of the officers who were working with [the named officer] on the night of the accident, all of their records with respect to the events that night, and copies of the subsequent investigation into the circumstances of the accident.

The Ministry issued a decision letter to the requester denying access to the responsive records in their entirety on the basis that they qualified for exemption under the following provisions of the *Act*:

- sections 14(1)(a), 14(1)(b), 14(1)(c) and 14(1)(l) (law enforcement); and
- section 21(1) (invasion of privacy) with specific reference to sections 21(3)(a) (medical, psychiatric or psychological information), 21(3)(b) (compiled and identifiable as part of an investigation into a possible violation of law) and 21(3)(d) (employment or educational history).

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

During mediation, the Ministry said that some information in the records is not responsive to the request. The appellant objected to the Ministry's position in this regard, and responsiveness was added as an issue in this appeal.

Also during mediation, the Ministry issued a new decision letter to the appellant, granting him access to the names and current detachment locations of the officers.

Mediation did not resolve this appeal, and the file was transferred to adjudication. The Ministry subsequently issued a third decision letter, identifying six additional pages of responsive records. The Ministry denied access to these pages, relying on the same exemptions it had claimed for the records identified in its first decision. The Ministry also advised the appellant that "some information in the [additional] records is not responsive to your request."

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 appellant, together with a copy of the non-confidential portions of the Ministry's representations. The appellant, in turn, provided representations.

In this appeal I must decide whether the records at issue are responsive to the appellant's request and if so, whether the exemptions claimed by the Ministry apply to the records.

## **RECORDS:**

The records consist of 15 pages of police officers' notebook entries.

## **BRIEF CONCLUSION:**

Some of the information in the records is not responsive to the request. Of the responsive information, some portions are exempt from disclosure, while the remaining portions are not and must be disclosed.

## **DISCUSSION:**

### **RESPONSIVENESS**

In its representations, the Ministry takes the position that only portions of page 8, and all of page 9, are responsive to the appellant's request, and that the remaining information (pages 1-7, some of page 8 and pages 10-15) is not responsive.

Previous orders of this office have established that in order for a record to be responsive, it must be "reasonably related" to the request (for example, Order P-880).

The Ministry submits:

The Ministry has been advised that ... [the accident] occurred late on August 27, 1998, or in the very early morning hours of August 28, 1998. This would engage records about the motor vehicle accident created the evening of August 27 as being responsive.

The Ministry responded by providing the appellant with the address and telephone number of the [named city's] Police Service who investigated the matter to determine if there were any breaches of the *Criminal Code* or other statute. Records related to that investigation would be under the control of that Police Service.

...

The records at issue in this request are not related to the motor vehicle accident. The only reference to the motor vehicle accident is on pages 8 (bottom) and 9. These notations were made after the accident. The remaining police officer's notes relate to other matters recorded by officers during their tour of duty. In this regard, several different matters or incidents may be recorded on the records. The Ministry submits that none of the information in these records, which has been deemed non-responsive, pertains in any way to the motor vehicle accident. Several of the records gathered are dated well before the subject date of this request.

The Ministry also makes certain confidential representations that I am not at liberty to disclose in this order.

The appellant submits, among other things:

We have been given very little information as to the nature of the records that the O.P.P. acknowledge having with respect to the events of the night of the accident and, at minimum, we assume that the following documents exist and should be disclosed:

- a) Notes of all of the officers who were with [the named officer] to the extent that they record when and where [he] was during the course of the evening, who he was with and what he did;
- b) Records with respect to OPP pagers to document when [the named officer] paged his colleagues;
- c) Records with respect to any internal OPP investigation into the events of the night of the accident, and the circumstances of the accident.

...

The request is not just with respect to the accident itself, but with respect to the events of the evening in question in order to establish timelines...

In addition, ... the Ministry's grant of access to the first part of our request for the names and current detachment locations [of the officers] who were working with [the named officer] on the night of the accident is incomplete.

Having regard to the fact that this accident happened in the early morning hours of August 28<sup>th</sup> ..., records in the possession or control of the Ministry relevant to these issues from the evening of August 27<sup>th</sup> will also be responsive and reasonably related to the request.

... the fact that the record was completed after the accident does not alter its relevance and responsiveness if it was created within a reasonable time thereafter and documented the issues referred to above.

I have reviewed the records line by line and I agree with the Ministry that portions of page 8, and page 9 in its entirety, are responsive to the appellant's request. I also agree that many entries in the officer's notebooks relate to matters wholly unconnected with the motor-vehicle accident in question and are therefore not responsive.

At the same time, however, I find that some of the entries that the Ministry claims to be non-responsive are, in fact, “reasonably related” to the appellant’s request because they bear directly upon the accident. The appellant’s request makes it clear that among other things, he is seeking access to “all [the police officers’] records with respect to the events that night.” He clearly intended for his request to be comprehensive in scope and to encompass any information that might shed light on the accident, including timelines.

Accordingly, I find that all entries relating to the motor-vehicle accident, including details of relevant events leading up to and following the accident, are responsive to the appellant’s request. Specifically, I find the following portions of the records to be responsive:

- Page 3: lines 18-38;
- Page 7: lines 1-9 (including the date at the top of the page);
- Page 8: line 8 to the bottom of the page;
- Page 9 in its entirety, except for the fax trailer at the top of the page;
- Page 10: bottom 13 lines;
- Page 11: lines 1-17; and
- Page 13: lines 1-12 and 22-24.

In addition, I find that the date of each responsive notebook entry, the name of the officer who made the entry, and, where indicated on the record, his or her rank, badge number, detachment location and other contact information, are also responsive.

In the remainder of this order, I will review whether the exemptions claimed by the Ministry apply to these responsive portions of the records.

Before doing so, however, I would like to address the appellant’s submission that records relating to “OPP pagers” and “any internal OPP investigation” are also responsive to his request, and that the Ministry’s disclosure to him of officers’ names and current detachment locations is incomplete.

At the conclusion of mediation in this matter, the Mediator issued a Mediator’s Report setting out the issues that had been resolved to date and those remaining in dispute. The parties had an opportunity to report any errors or omissions in the Report, and neither party did so. The Report indicated that the records at issue consisted of nine pages of police officers’ handwritten notes. As noted above, this number increased to fifteen when the Ministry identified six additional pages of records in its third decision letter.

Thus, the only records before me in this appeal are the fifteen pages of police officers' notes. My task is to decide whether any of this information is responsive and if so, whether it must be disclosed. In the circumstances, it would not be reasonable for me to expand the scope of the appeal to include possible additional information relating to OPP pagers or investigation records, or to rule on whether the Ministry's disclosure of officers' names and detachment locations was complete. It is possible that additional information may be available from the municipal police service that investigated this matter, as the Ministry suggests in its representations, but I will make no ruling on this question in this appeal.

## **PERSONAL INFORMATION**

I must now decide whether any of the information I found to be responsive 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, including information relating to the individual's medical history (section 2(1)(b)), 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:

... portions of the information contained in the records are recorded information about identifiable individuals, other than the requester, in accordance with section 2(1) of the *Act*.

...

The record, although compiled by the OPP, does contain the personal information of a named person. The position of the Ministry is that the comments relate to incident circumstances and injuries suffered by the officer and are personal information and clearly distinguishable from records which would depict the normal execution of their duties. It does not constitute the officer's employment responsibilities or position.

The appellant submits:

We concede that some of the information that is sought may contain personal information as defined in the *Act*, however, any privacy interest with respect to it has been waived as the identities of the individuals present have already been disclosed.

To the extent that the records contain personal information with respect to [the named officer], including information with respect to his injuries and the

circumstances of the accident, there can be no privacy concern because [he] has commenced a civil action and thereby has subjected himself to discovery rights under the Ontario *Rules of Civil Procedure*, which include obligations to disclose and produce personal information, including medical and financial records ...

... all of the individuals who created the records were apparently O.P.P. (law enforcement) officers, and if the records were created or maintained pursuant to their duties as such to document the events as part of an O.P.P. investigation into the happening of the accident, then it is difficult for us to appreciate how the records can contain anything other than professional or government capacity information.

I find that the following entries contain the named officer's personal information:

- Page 3: lines 24-38;
- Page 7: lines 1-9 (including the date at the top of the page);
- Page 8: line 8 to the bottom of the page;
- Page 9: lines 1-12;
- Page 10: bottom 13 lines;
- Page 11: lines 1-17; and
- Page 13: lines 1-12 and 22-24.

This personal information includes medical information and other information of a personal nature about the named officer in connection with the accident. Information about the officer's injuries constitutes his personal information (Reconsideration Order PO-2063-R). The fact that the officers who created these notebook entries may have done so as part of their professional responsibilities does not mean that the notes cannot contain personal information. In addition, the fact that an individual has brought a civil action does not mean that he has waived his privacy rights under the *Act*.

I also find that the following entry contains the personal information of another individual:

- Page 9: lines 13-14.

Finally, I find that the following entries do not contain personal information:

- Page 3: lines 18-23; and

- Page 9: lines 15-19.

## INVASION OF PRIVACY

The Ministry initially relied on section 21(1), with specific reference to sections 21(3)(a), 21(3)(b) and 21(3)(d). In its representations, the Ministry relies on sections 21(3)(a), 21(3)(b), 21(2)(e), 21(2)(f) and 21(2)(i) in support of its section 21(1) claim. These sections read:

(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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

(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;

Section 21(1) is a mandatory exemption protecting information whose disclosure constitutes an unjustified invasion of another individual's privacy. Where a requester seeks access to another individual's personal information, section 21(1) prohibits an institution from disclosing this information unless any of the exceptions at sections 21(1)(a) through (f) apply. If any of these exceptions apply, the information cannot be exempt from disclosure under section 21(1). Section 21(1)(f), which is the only exception that might apply in this case, permits disclosure only where it "does not constitute an unjustified invasion of personal privacy."

Sections 21(2) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy. 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)(a) presumption, the Ministry submits:

It is clear the information relates [to] and describes the condition of a named individual.

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

The entire record [sic] at issue was compiled during the course of an ongoing law enforcement investigation.

The appellant submits that because the named officer has brought a civil proceeding, “the *Rules of Civil Procedure* have the effect of waiving any privacy concerns with respect to his information” and section 21(3)(a) cannot apply. He submits that the *Rules* prohibit his client from disclosing or using information obtained through the discovery process for any other purpose. In particular, the appellant refers to Rule 30.1.01(3) of the *Rules of Civil Procedure*, which reads:

All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

The appellant also submits that the *Rules* require very broad disclosure and production. He cites Rules 30.02(1) and (2), which read:

(1) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

(2) Every document relating to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.

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

We concede that to the extent that section 21(3)(b) may have some relevance to the issues on this application, ... we have no interest in the underlying OPP investigation into a possible violation of the law that brought [the named officer] and his colleagues to [the named city] and, similarly, we have no interest in the police methods being used in that investigation. ...

... to the extent that the records deal with [the named officer's] activities on the night of August 27 to 28, 1998 after he completed his shift, and to the extent that they relate to the circumstances of the accident, there cannot be a section 21(3)(b) concern, as [the named officer] was off duty and obviously not investigating a possible violation of the law at the material time.

I will first address the appellant's argument that information that might otherwise be exempt under section 21(1) is protected by an implied undertaking pursuant to Rule 30.1.01(3) of the *Rules of Civil Procedure*, and that the *Rules* require broad disclosure. The civil discovery process and the access scheme under the *Act* are separate and distinct from one another. Information that may be exempt under the *Act* may be available pursuant to civil discovery proceedings, and vice versa (see section 64 of the *Act* and Order PO-1688). Accordingly, whether or not the same or similar information may be disclosed under the *Rules* is irrelevant to whether the Ministry must disclose the information in these records under the *Act*.

The responsive personal information at issue consists of various police officers' notebook entries relating to the motor-vehicle accident. I find that some of these entries relate to the medical condition of the named officer and another individual. I also find that all the responsive personal information was compiled and is identifiable as part of an investigation into a possible violation of law; whether or not the named officer was off duty during the time-period in question does not affect my finding in this regard, as the notes pertain to the circumstances of the accident itself and were made by other officers. Again, an individual who has brought a civil proceeding cannot be taken to have thereby waived his privacy rights under the *Act*. Accordingly, disclosing this information is presumed to constitute an unjustified invasion of these individuals' privacy under sections 21(3)(a) (some of the responsive entries containing personal information) and 21(3)(b) (all the responsive entries containing personal information). 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 this information would constitute an unjustified invasion of personal privacy under section 21(1).

The Ministry and the appellant also make representations on sections 21(2)(e), 21(2)(f) and 21(2)(i). While I have reviewed these representations, it is not necessary for me to address them because of my finding that the section 21(3)(a) and 21(3)(b) presumptions apply.

## LAW ENFORCEMENT

I must now review whether any of the discretionary law enforcement exemptions apply to the responsive notebook entries that I found do not contain personal information, namely:

- Page 3: lines 18-23; and
- Page 9: lines 15-19.

The Ministry initially claimed sections 14(1)(a), 14(1)(b), 14(1)(c) and 14(1)(l). In its representations, the Ministry relies on sections 14(1)(a), 14(1)(b) and 14(1)(c) only. These sections read:

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

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

The term “law enforcement,” which appears in these sections, is defined in section 2(1) of the *Act* as follows:

“law enforcement” means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

Because sections 14(1)(a), 14(1)(b) and 14(1)(c) are discretionary exemptions, even if the information falls within the scope of these sections, the institution must nevertheless consider whether to disclose the information to the requester.

With respect to sections 14(1)(a) and 14(1)(b), the Ministry submits:

The Ministry has been advised that in fact this matter is still subject to ongoing investigation. The release of information in the record would convey ... confidential information about the nature and extent of the evidence that has been compiled by the OPP in connection with the investigation. Release of the information at issue might provide the accused or other involved parties with the opportunity to tamper with evidence, which may exist but may not be known to police at this time and subsequently prejudice a fair trial should charges and court ensue.

... the release of the records at issue would seriously interfere with an ongoing matter. Public dissemination of the information in the records, at this point in time, could lead to the suppression or destruction of evidence and could alert the suspect or others about the extent and nature of the evidence compiled by the OPP and hinder the investigation or eventual prosecution of the suspect.

With respect to section 14(1)(c) the Ministry submits, in addition to its confidential representations, that “on a clear read of the records the unique technique deployed in this circumstance is evident.”

The appellant again submits that he is not seeking access to “the underlying law enforcement issue” that brought the named officer to the city where the accident occurred.

Previous orders of this office have found that for sections 14(1)(a) or 14(1)(b) to apply, the “law enforcement matter” or “investigation” in question must be specific and ongoing. The exemptions do not apply where the matter or investigation is completed, or where the alleged interference is with “potential” law enforcement matters or investigations [Orders PO-2085, MO-1578].

In order to qualify as an “investigative technique or procedure” under section 14(1)(c), the institution must show that disclosing the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The section 14(1)(c) exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487]. In addition, the techniques or procedures must be “investigative.” The exemption will not apply to “enforcement” techniques or procedures [Orders PO-2034, P-1340].

I find that disclosing the entries at issue on page 3 (lines 18-23) could reasonably be expected to reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. These entries therefore qualify for exemption under section 14(1)(c). The confidential nature of the information and the Ministry’s representations preclude me from elaborating on my ruling in this regard. I am also satisfied, based on the Ministry’s representations, that the Ministry has properly exercised its discretion in denying access to this information.

I find that the entry at issue on page 9 (lines 15-19), however, does not qualify for exemption under sections 14(1)(a), 14(1)(b) or 14(1)(c). While I accept that a specific law enforcement matter or investigation may be ongoing, I am not satisfied that disclosing this entry could reasonably be expected to interfere with this law enforcement matter or investigation. I also find that disclosing this entry could not reasonably be expected to reveal any investigative techniques or procedures under section 14(1)(c). Accordingly, I will order the Ministry to disclose this information.

**ORDER:**

I order the Ministry to disclose page 9 (lines 15-19) to the appellant by **December 18, 2003**. For greater certainty, I am attaching a highlighted version of page 9 with the copy of this order being sent to the Ministry, identifying the portions that it must not disclose.

I uphold the Ministry's decision to deny access to the remaining information.

In order to verify compliance with the terms of Provision 1, I reserve the right to require the Ministry to provide me with a copy of page 9 that is disclosed to the appellant, upon request.

Original Signed By: \_\_\_\_\_  
Shirley Senoff  
Adjudicator

\_\_\_\_\_  
November 27, 2003