



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2209

Appeal PA-030130-1

Ministry of Public Safety and Security



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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 charges laid against him by the Ontario Provincial Police for careless driving under the *Highway Traffic Act*.

The Ministry identified seven pages of records responsive to the request and granted the appellant partial access to each of them. The Ministry advised that it was withholding portions of the records on the basis of the exemptions for law enforcement (sections 49(a)/14) and personal privacy (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 does not take issue with the Ministry's decision to withhold information on the ground that it is not responsive.

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, which provided 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 seven pages of records, consisting of five pages of police officer's notes (pages 1-5) and a two-page interview report (pages 6-7). The Police disclosed portions of the notes, and withheld all of the interview report.

DISCUSSION:

PERSONAL INFORMATION

The first issue for me to determine is whether the records contain personal information and, if so, to whom that information 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 that the information at issue qualifies as personal information because it fits within the following paragraphs under the personal information definition:

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (g) the views or opinions of another individual about the individual, and
- (h) 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;

The Ministry also submits that this personal information relates to both the appellant and another identifiable individual.

The appellant submits:

. . . [W]here personal information exists in the records (eg. In the interview report, possibly a name, age, sex or address), that these particular references could be severed from the rest of the report with the remainder being disclosed. The definition of personal information under section 2(1)(e) excludes opinions or views where they relate to another individual . . . [T]his individual telephoned police (from his cell phone) to allege that I was driving improperly. We believe that the contents of the interview report constitute this individual's opinions or views about *myself* and hence does not fall under section 2(1)(e).

The records clearly contain the personal information of the appellant, including his name, address, age and other information regarding the incident that was investigated by the police. In addition, the records contain similar personal information of the affected person who, in the circumstances, is an identifiable individual. While the records contain some information that could be considered the affected person's views or opinions of the appellant, this information is not reasonably severable from the information that clearly qualifies as the affected person's personal information.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF ANOTHER INDIVIDUAL'S PRIVACY

The Ministry relies on the personal privacy provisions of the *Act* to withhold portions of the records.

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 this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

Sections 21(1) to (4) provide guidance in determining whether the “unjustified invasion of personal privacy” threshold under section 49(b) is met. In this case, the Ministry relies on the presumption of an unjustified invasion of privacy in section 21(3)(b) which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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:

. . . [T]he 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 OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. The *Police Services Act* provides for the composition, authority and jurisdiction of the OPP. 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 documents the law enforcement investigation undertaken by the OPP in response to an incident involving the appellant and another identifiable individual . . . As a result of this incident, the OPP laid charges of Careless Driving under section 130 of the *Highway Traffic Act* against the appellant.

In Order PO-1728, Senior Adjudicator David Goodis considered whether certain personal information collected by the police during the course of a motor vehicle accident investigation was subject to the presumption contained in section 21(3)(b). Senior Adjudicator Goodis commented:

Although the appellants seek only the affected person’s name, in the circumstances, that information clearly was compiled and is identifiable as part of an investigation into a possible violation of

law, in this case section 128 of the *Highway Traffic Act*. Therefore, the section 21(3)(b) presumption of an unjustified invasion of personal privacy applies to the requested information.

. . . [T]he fact that the charges against the appellant were ultimately stayed does not negate the applicability of section 21(3)(b).

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

The appellant submits:

. . . Regarding section 21(2)(f), the Ministry failed to establish that disclosure of the information would cause excessive personal distress (Order P-434). There is also no indication that the Ministry attempted to contact the other individual in order to obtain his consent (section 21(1)(a)).

The Ministry can also not rely on section 21(3)(b) in respect of the two-page interview report or any of the officer's notes because the records were created after the completion of the investigation. The sequence of events which supports this position is that after I was stopped by the police officer, the police officer came to my car, he had a brief discussion with me. He then returned to his vehicle where from my rear-view mirror I saw him write out a ticket, he then immediately returned to my car with the ticket. I then drove away. The other individual had parked behind the officer's car and the officer did not approach the other individual prior to me driving away.

I submit that the issuance of a ticket resulted from the completion of an investigation and that any records completed after that time cannot be protected under section 21(3)(b).

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Section 21(2)(a) allows for disclosure where it is desirable to subject the activities to public scrutiny. I believe that full accountability for the charge should be disclosed, in order to increase public confidence in the police. I am also aware of a full page article in the local media where another driver also seriously questioned the basis for this same officer laying the same charge.

The information the Police withheld from the records is the personal information of the affected person and clearly was compiled and is identifiable as part of an investigation into a possible violation of law, specifically an alleged violation of section 130 of the *Highway Traffic Act*. Therefore, the section 21(3)(b) presumption applies. Since none of the section 21(4) exceptions applies, disclosure of the information would constitute an unjustified invasion of the affected

person's privacy under section 49(b) of the *Act*.

I do not accept the appellant's submissions on sections 21(2)(a) and (f). Since the Ministry has persuaded me that the section 21(3)(b) presumption applies, whether or not the Ministry has established the application of the section 21(2)(f) "highly sensitive" factor, or whether or not the appellant has established the section 21(2)(a) "public scrutiny" factor, can have no impact on the conclusion that disclosure under section 49(b) would be an unjustified invasion of the affected person's privacy.

Regarding consent under section 21(1)(a), I do not accept the appellant's submission that the Ministry has an obligation to seek the affected person's consent before making its decision. This assertion is unsupported by the wording of section 21 or any other section in the *Act*. In any event, I note that the mediator assigned to this file attempted, unsuccessfully, to contact the appellant for the purpose of seeking his consent.

Finally, the appellant's argument regarding the timing of the investigation cannot succeed. While it may be the case that the OPP took the affected person's statement after he issued a ticket to the appellant, this does not preclude further investigation in support of the *Highway Traffic Act* charge. I am not convinced by the appellant's assertion that a police investigation must, by definition, be terminated upon the laying of a charge.

To conclude, I am satisfied that the portions of the records the Ministry withheld pursuant to section 49(b) qualify for exemption under this provision.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

The Ministry relies on section 49(a) in conjunction with section 8(1)(l) with respect to the "ten codes" withheld from page 5 of the records. Section 8(1)(l) reads:

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

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

The appellant makes no submissions on this point.

In the circumstances, similar to findings made in other orders (for example, my Order PO-1877), I find that the withheld ten code information qualifies for exemption under section 49(a) in conjunction with section 8(1)(l).

EXERCISE OF DISCRETION

The section 49(a) and (b) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry submits:

The Ministry is mindful of the major purposes and objectives of the [Act]. It should be noted that the Ministry has released a substantial amount of the requested information to the appellant.

The Ministry carefully weighed the appellant's right of access to records that contain his personal information against the other identified individual's right to privacy protection. Given the highly sensitive nature of the incident that resulted in the creation of the responsive records, the Ministry was satisfied that release of additional information would cause personal distress to the other identifiable individual. The Ministry was also satisfied that the information remaining at issue was subject to the presumption contained in section 21(3)(b) relating to information compiled and identifiable as part of an investigation into a possible violation of law.

The Ministry is aware that the information remaining at issue relates to a matter that was investigated by the OPP in the relatively recent past. The Ministry understands that the stay of proceedings against the appellant was imposed by the Court in March 2003.

The Ministry considered whether it would be possible to sever any additional information from the records at issue. However, the Ministry concluded that additional severing was not feasible in this instance. The exempt information primarily relates to the other involved individual.

In its exercise of discretion, the Ministry carefully considered the potential benefits to the appellant should additional information be disclosed. The appellant has advised the Ministry that he may pursue some type of future legal remedy in regard to this matter.

The Ministry considered whether release of the type of information requested in the circumstances of the appellant's request could generally discourage members of the public from reporting potential violations of law to the police and undermine public confidence in the ability of the OPP to provide policing services. The Ministry is of the view that release of additional information in the circumstances of the appellant's request is not appropriate.

The appellant does not make submissions on the exercise of discretion issue.

I am satisfied that the Ministry carefully considered all of the relevant circumstances in exercising its discretion to disclose only portions of the records at issue. Accordingly, I see no basis for reversing the Ministry's decision.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
David Goodis
Senior Adjudicator

November 28, 2003