

**ORDER PO-2276**

**Appeal PA-030257-1**

**Ministry of Public Safety and Security**

## **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 held by the Ontario Provincial Police (OPP) relating to injuries he sustained in a motor vehicle accident, and in which another individual was killed.

The Ministry identified several records responsive to the request, including witness statements, police officers' notes and photographs, and denied access to them on the basis of the personal privacy (section 49(b)/21), law enforcement (section 49(a)/14) and solicitor-client privilege (section 49(a)/19) exemptions in the *Act*. The Ministry also stated that it was withholding 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 Ministry issued a revised decision letter. In this decision, the Ministry stated that it was granting partial access to the witness statements and police officers' notes. The Ministry included copies of those records, with some information severed, with its decision letter.

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.

Prior to responding to the Notice, the Ministry, after consulting with members of the appellant's family and receiving consent to disclosure of some records, decided to disclose additional records to the appellant.

The Ministry then sent representations in response to the Notice. I then sent the non-confidential representations of the Ministry to the appellant, together with the Notice, and the appellant in turn provided representations.

## **RECORDS:**

The information remaining at issue is contained in police officers' notes (pages 1-46) and witness statements (pages 47-64).

## **DISCUSSION:**

### **PERSONAL INFORMATION**

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

The Ministry submits:

Personal information is further defined in section 2(1) to include:

- (a) information relating to the ... age, sex ... of the individual,
- (b) information relating to-the medical .... criminal ...history of the individual...
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number,...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;

. . . [T]he information remaining at issue contains the types of personal information listed above with respect to a number of identifiable individuals.

The appellant does not take issue with the Ministry's submission that the records contain personal information.

I accept the Ministry's submission that the records contain personal information, relating to the appellant and other individuals involved in the accident, as described in the provisions of section 2(1) above.

#### **RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/PERSONAL PRIVACY OF OTHER INDIVIDUALS**

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 possible violations of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario . . .

The exempt personal information in part documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident involving the [appellant] and two other law enforcement matters . . . [T]he exempt personal information was compiled and is identifiable as part of an investigation into possible violations 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*.

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 application of section 21(3)(b) of the [Act] is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

The other two law enforcement matters reflected in the records remaining at issue have resulted in the laying of criminal charges against an individual other than the appellant's client. The Ministry refers to the content of the records and the attached e-mail dated January 16, 2004 in this regard.

The appellant submits:

. . . [A]lthough certain information was compiled and is identifiable as part of an investigation into a possible violation of law, including pursuant to the terms of the *Criminal Code*, and/or the *Highway Traffic Act*, said information is also directly relevant to determinations of negligence pertaining to this motor vehicle accident, to which the [appellant] should be entitled.

The information the Ministry withheld from the records is personal information that clearly was compiled and is identifiable as part of an investigation into a possible violation of law, specifically possible violations of the *Criminal Code* and 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 persons' privacy under section 49(b) of the *Act*.

## **SEVERANCE**

Where a record contains exempt information, section 10(2) requires a head to disclose as much of the record as can reasonably be severed without disclosing the exempt information. An institution will not be required to sever the record and disclose portions where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

The appellant submits that more information in the records could be severed and disclosed to him:

. . . [F]urther severing of records should be possible, in the circumstances, without depriving a person of the right to a fair trial, without hampering criminal and/or other investigations ongoing by the police, without causing excessive personal distress, and without unduly invading a person's privacy . . . [T]he intent and purpose of the [*Act*] are not being served, insofar as records pertaining to the above specified portions of the motor vehicle accident investigation.

Based on my review of the records and the severances made by the Ministry, I am satisfied that the Ministry did a reasonable job in severing the records and disclosing information to the

appellant, while at the same time avoiding disclosing personal information of other individuals and avoiding disclosure of worthless information.

## **EXERCISE OF DISCRETION**

The section 49(b) exemption is discretionary, and permits 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 objects of the [Act]. It should be noted that the Ministry has released a substantial amount of the requested information to the appellant. The Ministry has issued three decision letters to the appellant.

The Ministry has carefully weighed the appellant's right of access to records that contain his . . . personal information against other identified individuals' rights to privacy protection. The Ministry considered the potential benefits to the [appellant] should the withheld information be released. The Ministry considered releasing the information to the appellant notwithstanding that discretionary law enforcement, solicitor-client privilege and personal privacy exemptions from disclosure apply.

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 other identifiable individuals involved in the motor vehicle accident. The Ministry was also satisfied that the personal information remaining at issue was subject to the presumptions contained in section 21(3)(a) for medical information and 21(3)(b) for personal

information compiled and identifiable as part of an investigation into potential violations of law.

The Ministry is aware that parts of the withheld information concern two law enforcement matters that are still under investigation by the OPP and currently before the court. This circumstance was taken into consideration by the Ministry.

. . . . .

The Ministry is aware that the appellant's access request is in connection with a claim for damages for injuries suffered by the [appellant] in the motor vehicle accident. The Ministry took this circumstance into consideration in its exercise of discretion. The historic practice of the Ministry in regard to such requests is to release as much information as possible.

The Ministry carefully 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 Ministry ultimately came to the conclusion in its exercise of discretion that the release of additional information in the circumstances of the appellant's request is not appropriate.

The appellant submits:

. . . [T]he purposes of [the *Act*] are not being met in this case, by failure to disclose certain withheld information, including that specifically pertaining to witnesses to this accident, officers' notes taken at the accident, related traffic reports, and any statements related to the foregoing. Generally speaking, from the Appellant's view, those records collected in the normal course of investigating an accident differ from subsequent investigations undertaken in connection with pursuing criminal matters. The former represent the [appellant's] only reasonable opportunity of obtaining appropriate compensation for the grievous act which has been visited upon [him]. Specifically in this respect, it is reasonable to expect that lack of this information will interfere with the fair trial rights of the [appellant]. In the context of this matter, the balance of discretion should dictate disclosure of those records.

I am satisfied that the Ministry took into account the relevant circumstances in this case and did not err in exercising its discretion to withhold the information at issue. The appellant has not persuaded me that the Ministry has committed any reviewable error in exercising its discretion.

**ORDER:**

I uphold the Ministry's decision.

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David Goodis  
Senior Adjudicator

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May 3, 2004