ORDER PO-2409

Appeal PA-040201-1

Ministry of Community Safety and Correctional Services

NATURE OF THE APPEAL:

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 access to information relating to a motor vehicle accident that occurred on a specific date. The initial request was submitted by a lawyer, who advised that he was retained by an insurance company to represent an individual involved in the accident. The initial request was accompanied by a document signed by the individual authorizing the Ministry to release the information to the lawyer's firm.

The appeal form that commenced this proceeding is signed by this individual as the appellant, and indicates that the lawyer is authorized to act on his behalf and to receive any "personal information" pertaining to him. In light of the manner in which the appeal form was completed, I will treat this as a request and appeal made by the individual, who is represented by the lawyer.

The initial request sought access to copies of the investigating officer's complete field notes relating to the accident as well as copies of any witness statements and information on any charges laid as a result of the accident. Legal proceedings were commenced as a result of the accident.

The Ministry identified records responsive to the request and notified three parties whose interests might be affected by disclosure of the records. One affected party consented to disclosure of information, and information pertaining to that individual was disclosed. The Ministry then granted partial access to the remaining records at issue, severing information it viewed as non-responsive to the request or exempt under the *Act*. The Ministry relied on the exemptions in sections 14(1)(l) (facilitate the commission of an unlawful act) and 21(1) (invasion of privacy) in conjunction with sections 21(2)(f), 21(3)(a) and 21(3)(b) of the *Act* to deny access to the severed information. One of the severed documents was a witness statement provided by the appellant.

The appellant appealed the decision on the basis that all the information in the records (including the information severed as non-responsive) should be disclosed.

Mediation did not resolve the appeal and it moved to the adjudication stage.

I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting it to make written representations. As it was at the time the most recent decision of this office dealing with the withholding of "ten" codes, an issue in the appeal before me, I enclosed a copy of Adjudicator Shirley Senoff's decision in Order PO-2339. The Ministry submitted representations in response to the Notice. In its representations the Ministry advised that it should have claimed the application of the exemptions at sections 49(a) and (b). At the same time, the Ministry issued a new decision, advising that, as it understood that the lawyer represented both the insurance company and the appellant, additional information would be released. Accordingly, the Ministry provided the appellant with an unsevered version of his witness statement. As a result, this information is no longer at issue.

I then sent a Notice of Inquiry to the appellant's representative, together with a copy of the Ministry's representations and Order PO-2339. Because it appeared that the records might

contain the personal information of the appellant and the personal information of other individuals, I decided to add sections 49(a) and (b) (right of access to one's own personal information/personal privacy of another individual) as issues in the appeal. The appellant's representative, in turn, provided representations. In his representations he raises the issue of the adequacy of the Ministry's search for records.

As the appellant's representations raised issues to which I determined that the Ministry should be given an opportunity to reply, I sent the representations accompanied by a covering letter to the Ministry inviting their reply representations. The Ministry filed reply representations. In the Ministry's representations the issue of the adequacy of the search for records is addressed. In its Reply representations the Ministry also referred to a further letter that it sent to the lawyer advising that some information that had been severed from an occurrence summary and an officer's notebook would now be released to the appellant. As a result, these severances are also no longer at issue.

RECORDS

Subject to a determination on the adequacy of the Ministry's search for records, the records at issue are the remaining severed portions of an occurrence summary, witness statements (other than the appellant's, which the Ministry disclosed in full) and an officer's notebook.

DISCUSSION:

PRELIMINARY MATTERS

RESPONSIVENESS OF THE RECORDS

In their representations the Ministry states, in keeping with the rulings of Adjudicator DeVries in Orders PO-2315 and PO-2316, that it withheld administrative information relating to the printing of records and information on the records concerning other law enforcement matters as being unresponsive to the request.

The appellant objects to the Ministry withholding that information and submits that the date, time and badge number of the individual printing a record is potentially relevant should the authenticity of the document (or the chain of custody with respect to the copied document) be called into question at a judicial proceeding. Once the document is copied, the appellant says, the information about the author of the copy of the document becomes responsive and is relevant and germane to the issue of its authenticity. In this regard the appellant disagrees with the decisions of Adjudicator DeVries in Orders PO-2315 and PO-2316. The appellant concedes that non-responsive information about other matters not pertaining to the accident in question ought not to be produced.

In its reply submissions on this point, the Ministry states:

> The appellant submits that the date, time and badge number of the individual printing the page 1 occurrence summary is potentially relevant in the circumstances of his request. The Ministry submits that such information post-dates the date upon which the appellant's request under [the *Act*] was received by the Ministry.
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> There is no correlation between this information and the content of the record. The information regarding date, time and badge number will vary each time the occurrence summary is printed from the computer system. Any potential matters regarding the authenticity or accuracy of the information contained in the occurrence summary would be directed to the listed reporting officer.

Analysis and Findings

In Orders PO-2315 and PO-2316 Adjudicator DeVries addressed the Ministry's submission that administrative information relating to the date, time and by whom the report was printed in that appeal (information that post-dated that request) was not reasonably responsive to that request. He wrote:

> Previous orders have identified that, to be considered responsive to a request, the records must "reasonably relate" to the request [See Order P-880]. I adopt the approach taken in Order P-880 and find that the portions of the records severed by the Ministry as "non-responsive" do not reasonably relate to the request, and are therefore not responsive to the appellant's request.

Although I have the benefit of submissions on this issue from the appellant (the appellant in Orders PO-2315 and PO-2316 made none), I see no reason to depart from the ruling of Adjudicator DeVries. The information that the appellant sought in his request does not include the time and badge number of the individual printing a copy of the record that contains the information that the appellant seeks. I find therefore that the information in the portions of the records severed by the Ministry as non-responsive does not reasonably relate to the request, and is therefore not responsive to it.

ADEQUACY OF THE SEARCH FOR RECORDS

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records within its custody or control. [Orders P-85, P-221, PO-1954-I].

Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

As set out above, in his representations the appellant says that he is not satisfied with the adequacy of the Ministry's search for responsive records. In particular, he states that there are no listed computer records of information that would have presumably been entered by the investigating officer with respect to the individuals involved and the witnesses. The appellant asserts that this information should have been provided in response to the request.

In its reply representations the Ministry states:

> With respect to the appellant's comments regarding the existence of responsive computer records from the Ontario Provincial Police (OPP), the Ministry submits that the OPP occurrence summary (page 1) is a computer generated record. This document has been partly released to the appellant.

> Subsequent to receipt of the appellant's submissions, the OPP was contacted and asked to determine whether any additional computer generated (electronic) records existed. The Ministry has since been advised that there are no other computer records regarding the motor vehicle accident involving the appellant's client. The Ministry has been advised that generally unless a motor vehicle accident involves a fatality or serious injury, only occurrence summary information is entered into the computer system.

Analysis and Findings

In all the circumstances, and based on the representations of the parties, I am satisfied that the Ministry conducted a reasonable search for records within its custody or control.

I now turn to the analysis of the exemptions claimed for the severed portions of the records that are responsive to the request.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (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;

To qualify as "personal information", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as "personal information" if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

I find that severed portions of the individual records fall within paragraphs 2(d), (e) and (h) of the definition of "personal information" in section 2(1) of the *Act*, and contain the "personal information" of the witnesses who provided their statements to the police.

In addition, a number of the severed portions of the records at issue also contain the views and opinions of the witnesses about other individuals involved in the accident, including other drivers, and therefore contain the "personal information" of these individuals under paragraph (g) of the definition. As one of the drivers involved in the motor vehicle accident, the records also contain the appellant's personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 47(1) 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. As I am treating the request and appeal as being commenced by the individual, it is, in effect, a request for his personal information.

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information where the exemption in section 14 would apply to the disclosure of that information.

LAW ENFORCEMENT

Section 14(1)(l)

In its initial decision letter, the Ministry claimed that the police operational codes (which include "ten" codes) severed from the records fall within the scope of section 14(1)(l), which reads:

> 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.

As section 14(1)(l) uses the words "could reasonably be expected to", the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry submits that:

> [It] has applied section 14(1)(l) to withhold the OPP police operational codes contained in the occurrence summary and investigating officer's notes. Examples of such information include the 3rd, 4th, 7th, and 10th severances on page 1, as well as the "ten" codes contained on pages 15 and 16 of the investigating officer's notes.
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> With respect to the 3rd and 4th severances, the exempt police code is used for the purposes of communicating information to police officers. This police code is also used during communication broadcasts to police officers. With respect to the 7th and 10th severances, this type of information reveals identifiable zones from which officers are dispatched for patrol and other law enforcement activities. Although a detachment may cover a large geographic region, the exempt information reveals a specific, identifiable zone and service location. This information is used to dispatch officers to calls for service and could be used to track the activities of police officers carrying out law enforcement activities in the community.
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> With particular reference to police "ten" codes referenced on pages 15 and 16 of the records, these operational [codes] are used by OPP officers in their radio communications with each other and their 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.
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> Release of the exempted operational police codes referenced in the records at issue would leave OPP officers more vulnerable and compromise their ability to provide effective policing services. For example, if individuals engaged in illegal activities were monitoring OPP radio communications and had access to the meanings of the various police codes it would be easier for them to carry out criminal activities and would jeopardize the safety of OPP officers. Intimate knowledge of the whereabouts of a given officer and of the activities that he/she is involved with at any given time would be a powerful aid to individuals involved with criminal activities.

With respect to the "ten" codes, the appellant submits:

> The police communication codes referenced in the Ministry's report are not sensitive in the manner described by the Ministry. They are relevant as they would be helpful (in this case and others) in determining the timing of the police investigation (how soon they arrived on the scene, which in turn goes to the accuracy of the information gathered). The appellant submits that there is no risk that counsel acting for civil litigants will have such information culled from their files by persons seeking to mount a coordinated effort to jeopardize the safety of officers. Furthermore, since the information currently blacked out was routinely produced for many years prior to the advent of privacy legislation, and since no such coordinated effort to jeopardize police safety materialized, the appellant submits that the Ministry's concerns are manufactured for the purpose of creating paranoia for the sole purpose of justifying their various refusals rather than reflecting any bona fide or reasonable potential threat to police officers.
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> It is important to recall that documents produced in a civil action remain resident in the file of the involved lawyers and there is no access to the public for the purpose of building some theoretical information base to track police officers. The Ministry's concerns are absurd in that regard.
>
> In the alternative, the appellant submits that the public already has knowledge of the meaning of police ten-codes and that to suggest that there is some risk in not blacking them out on a document intended for a lawyer's file in a civil suit, is absurd.
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> It is submitted that while officers use ten codes to shorten radio transmissions and standardize radio responses the suggestion that they the use of such codes could reasonably be expected to reduce the ability of those involved in criminal activity from tracking police activity is naive. It is submitted that anyone willing to monitor OPP frequencies very likely is already well acquainted with police 10 codes notwithstanding Officer Fineberg's restatement of the 'official' origin of police ten-codes.
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> The appellant suggest[s] that the Ministry and the Adjudicator peruse the popular web-site…, and consider the likelihood that the ten-codes (many of which became part of pop culture during the CB radio craze 20 years ago) remain a 'secret' to criminals is slim, and that the arguments submitted by the Ministry are speculative and certainly do not justify blacking out pertinent information on accident reports containing important information about when and how officer's investigated the accident is not justified.

In reply, the Ministry submits that with respect to the appellant's comments regarding the exemption of OPP "ten" codes, the release of information in response to an access request is

generally viewed as release to the broader general public. With respect to the possible existence of public sources for "ten" codes, the Ministry notes that this matter was considered by Adjudicator Shirley Senoff in Order PO-2339 and the exemption was upheld.

Analysis and Findings

In my view, the finding of the Divisional Court in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.) that the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context, is applicable here. Saying that nothing has happened so far misses the point, since the test is whether harm could reasonably be expected to result from disclosing the operational codes (including the "ten" codes). In that vein, and without commenting on the accuracy or inaccuracy of the codes the appellant asserts are on a specific website, the fact that they might be publicly available does not mean that the Ministry's submission's on the reasonable expectation of harm resulting from their release are to be ignored. A long line of orders (for example M-393, M-757, M-781, MO-1428, PO-1665, PO-1777, PO-1877, PO-2209, and PO-2339) have found that police codes qualify for exemption under section 14(1)(l), because of the reasonable expectation of harm from their release. In the circumstances of this appeal, I am also satisfied that the police have provided sufficient evidence to establish that disclosure of the operational codes (including the "ten" codes) that were withheld could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

I therefore find that the section 49(a) exemption applies to these operational codes (including the "ten" codes). I must now address the balance of the severed information.

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 of the *Act* provides a number of exemptions from this right of access. Under section 49(b), where a record contains personal information of both the appellant 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. I am treating the request and appeal as being commenced by the individual and because the records remaining at issue contain his personal information and the personal information of other individuals, I will now consider the application of the section 49(b) exemption.

Since the appellant is requesting his own information, his consent to disclose it has little, if any, relevance. In any event, my review of the records indicates that any information that would fall within the scope of section 21(1)(a) has already been provided to the appellant.

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the Ministry may exercise its discretion to disclose the information to the appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

To determine whether the disclosure of another individual's personal information would or would not be an unjustified invasion of the personal privacy of the individual to whom the information relates under 49(b), the factors and presumptions in sections 21(2), (3) and (4) are of assistance.

Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated 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 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 21(4) of the *Act*, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

Section 21(3)

In their representations, the Ministry identified the presumptions in sections 21(3)(a) and 21(3)(b) as applicable to the information in the records at issue in this proceeding.

Those sections read as follows:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
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> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
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> (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;

With respect to the section 21(3)(a) presumption, the Ministry submits that "parts of the personal information remaining at issue contain medical information relating to identifiable individuals." The Ministry submits that release of this personal information would constitute an unjustified invasion of these other individuals' personal privacy.

With respect to the section 21(3)(b) presumption, the Ministry submits that the information was compiled and is identifiable as part of an investigation into a possible violation of law.

The Ministry states:

> The exempt personal information documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident involving the appellant's client and other individuals. 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*.
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> 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:
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> > 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.

The Ministry further submits that the application of section 21(3)(b) of the *Act* is not dependent upon whether charges are actually laid, and relies in that regard on Orders P-223, P-237 and P-1225 for support.

The appellant submits that the presumption in section 21(3)(a) does not apply because the appellant is not seeking any information with respect to "a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation." In any event, the appellant submits, this type of information is not 'sensitive' because the recipients of the information are litigants and lawyers. Such information, the appellant says, is routine in the personal injury context. The appellant states that the information would not be disclosed to any third party, nor would it be likely to cause any reasonable distress to someone to have such information released to the parties to the action in question, or their lawyers.

With respect to section 21(3)(b), the appellant submits that the requirements of that section must be weighed and balanced against the other portions of the *Act*, including section 21(2)(d) (the information is relevant to a fair determination of rights affecting the person who made the request). The appellant makes extensive submissions on why that should be so.

The appellant also submits that although some driving errors could lead to a criminal investigation, the legislature did not intend that investigations into potential violations of the *Highway Traffic Act* (or even *Criminal Code* charges arising from simple driving errors) be included in the protections afforded by section 21(3)(b) of the *Act*. In support, the appellant submits that the section is clearly meant to shield disclosure of an individual's personal

information where disclosure would tend to implicate that individual in some criminal activity, in particular by revealing that they are the subject of a police investigation, which does not apply to an uninvolved bystander. The appellant also submits that a bystander may be compelled to give further evidence about what they observed, that there is nothing sensitive revealed other than the fact they witnessed a 'routine' traffic accident, that this is not the type of information that the witness would want to 'shield' from disclosure and that there is no financial or other risk to the witness nor any stigma attached to revealing their identity. The appellant submits that the statements made at or around the time of the motor vehicle accident are the best and truest evidence of what occurred, and are of greater value than the testimony of witnesses "after they have been prepared by counsel".

Analysis and Findings

I have carefully reviewed the records and the representations and, in my opinion, because of the general nature of the observations, and there being no evidence that the observations were made by individuals who are qualified to assess, diagnose or evaluate medical conditions, I am not satisfied that the exemption in section 21(3)(a) applies to any of the withheld information. [See generally Orders M-396 and P-1014]. I will now consider the application of section 21(3)(b), the other exemption claimed by the Ministry.

In order for section 21(3)(b) to apply, the personal information must have been compiled and must be identifiable as part of an investigation into a possible violation of law.

On their face, all the records clearly relate to an investigation by the OPP into a motor vehicle accident. The Ministry has stated that the exempt personal information documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident and that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. I am therefore satisfied that the information at issue in the records was compiled and is identifiable as part of an investigation into a possible violation of law by an agency performing a law enforcement function, specifically the *Highway Traffic Act*. Nothing in the language of section 21(3)(b), or the way it has been interpreted by the Courts or the decisions of this office, limits it in the way suggested by the appellant.

The fact that charges were not laid does not affect the application of section 21(3)(b), just as would be the case if the investigation had been completed and charges were laid. [Orders P-223, P-237, P-1225, MO-1443, MO-1817].

Furthermore, notwithstanding the lengthy and detailed submission the appellant makes about why the presumption in section 21(3)(b) should be weighed and balanced against other sections of the *Act*, notably 21(2)(d), the Divisional Court has made its position clear in *John Doe* that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2). That being the case, once I determined that the presumption in section 21(3)(b) applies, it is no longer necessary for me to consider the criteria listed in section 21(2) that the parties also addressed in their representations.

As explained in *John Doe*, however, a section 21(3) presumption can be overcome if the personal information at issue is caught by section 21(4), which is not applicable here, or if the "compelling public interest" override at section 23 applies. The appellant made extensive submissions on the "compelling public interest" in disclosing the withheld information, which are addressed below.

I therefore find that the balance of the severed portions of the records (other than the non-responsive portions, the portions which have been disclosed to the appellant and the operational codes (including the "ten" codes) which have been addressed above) are subject to section 21(3)(b) and the disclosure of the information is presumed to be an unjustified invasion of another individual's personal privacy. As a result, the section 49(b) exemption applies.

PUBLIC INTEREST IN DISCLOSURE

In his representations, the appellant raises the possible application of the "public interest override" at section 23 which 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.

It must be noted at the outset that section 14 is not listed in section 23. There is therefore no "public interest override" of section 49(a) when involved in conjunction with section 14(1)(l), which I have found is applicable to the operational codes (including the "ten" codes). Even though section 49(b) is also not listed, because section 23 may override the application of section 21, it may also override the application of section 49(b) in conjunction with section 21 (see for example Order PO-2246). If section 23 were to apply in this case, it would have the effect of overriding the application of section 49(b), and the appellant would have a right of access to the information at issue.

In order for section 23 to apply, two requirements must be met: first, a compelling public interest in disclosure must exist; and secondly, this compelling public interest must clearly outweigh the purpose of the exemption (here, section 49(b) (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)).

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 be balanced against the purpose of any exemptions which 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. 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]

The Ministry submits that section 23 of the *Act* does not apply in the circumstances of this appeal. It submits:

> … that there is a general public interest in regard to law enforcement and public safety matters. However, the Ministry believes that release of the records at issue is not likely to have significant implications for the broader public interest or safety at this point in time. The Ministry submits that the appellant appears to have a private interest in the information remaining at issue and that this does not constitute a compelling public interest within the meaning of section 23.
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> The second requirement for the application of section 23 is that the compelling public interest must clearly outweigh the purpose of the applicable exemption from disclosure. The information remaining at issue documents the investigation into a possible violation of law that was undertaken by the OPP. The personal information at issue is highly sensitive.

The appellant makes extensive representations on this aspect of the appeal. He submits that this appeal is not about a matter involving a private insurance contract dispute but has much broader implications. The appellant submits that his interest in obtaining access to the information relates not to "an insurance matter" which is "private" in nature, but to a public matter, namely a civil prosecution by one citizen against another arising by operation of statute law and rules imposed by the Crown and Government of Canada. The appellant submits that this is not a request by a third party but by someone who could face catastrophic financial consequences if the truth does not come out.

In the body of his representations, the appellant asserts that the severed information is not highly sensitive. The insured was involved in the collision and therefore already has access to the addresses and contact telephone numbers of the parties in the lawsuit. Further, the information that the Ministry disclosed reveals that certain descriptions of vehicles were blocked out. The appellant asserts that the generic description of the blocked out vehicles is not highly sensitive.

The appellant submits that while there may be no public interest in having witness names, contact information, statements, and complete police notes produced where an insurer is simply investigating its private contractual obligations in "a coverage case", there is an overwhelming public interest in full and complete production of such information for the purpose of investigating motor vehicle claims (particularly in the litigation context).

The appellant submits that these are broad issues common to all citizens who may be involved in motor vehicle collisions regardless of whether or not they have insurance policies to cover their defence costs. The appellant states that there is a compelling public interest to ensure that individuals in breach of the law (including torts of negligence) are prosecuted to the full extent of the law civilly. The appellant submits that the lawsuit arising from the accident is brought against the defendant personally and not pursuant to any insurance contract. The appellant says the non-delivery of complete police notes, accident reports and witness information (with all relevant personal and contact information clearly shown) has destroyed the ability of counsel to properly investigate claims. This, the appellant says, leads many claims to be forced on to the discovery stage and beyond due to the fact that critical information that might prompt or result in earlier settlement of the actions (and on a fair and just basis) is hidden (and often never produced).

The appellant submits that it is contrary to any reasonable public policy for the citizens of Ontario to be put at risk of having tort claims settled on the basis of inaccurate, incomplete (or entirely shielded) witness information simply because their counsel were unable to have access to first party statements, or even to learn the identity of important third party independent witnesses. The appellant states that the result of such a 'draconian' application or interpretation of the statute has put many individual litigants at risk of massive and unjust tort awards in order to protect an extremely minor and unimportant privacy interest - arguably a privacy interest that may not even exist given that, he says, the third party witness has remained at the scene with the intention of volunteering the information to the involved persons in the first place.

The appellant submits that the result of the police officer's conduct and the application of the exemption in this case is that persons involved in a collision are lulled into a false sense of security that the information pertinent to their defence is being gathered by a responsible third party (i.e., a police officer), when in fact the information may be irretrievably lost (i.e. shielded by privacy laws). The appellant asserts that the historical role played by officials who arrive and assist people at an accident scene as gatherers and keepers of information about the potential violation of civil tort law should be recognized, or alternatively if such a role is not recognized, then such officers should be required to take clear and vigorous steps to identify to all parties that any witness information they gather will, in fact, be deliberately and systematically shielded from other involved persons. The appellant asserts that police officers should offer the witnesses and the other involved persons a clear opportunity to consent to the release of all police information to third parties (i.e., sign a blanket authorization at the scene releasing the police/institution from all future privacy obligations), or in the alternative invite them to make an exchange of information (i.e., with involved persons) regarding their identity, contact particulars, and or their knowledge of the accident before the officers depart the scene. The procedure currently in place, the appellant says, results in good Samaritan witnesses being lulled into thinking they have helped their fellow citizens to clarify their rights (i.e. rights with potentially massive impact on the lives and recovery of injured persons and/or the exposure of insurance companies or individuals), when in fact they have merely helped streamline the police force's investigation into some relatively inconsequential traffic violation. There is no evidence in this case, the appellant says, that the third party witnesses understood that their information would be used only for the latter purpose and excluded from facilitating the former.

The appellant states that the personal information contained in the investigating officer's notes and the witness statements are necessary to the insured's defence which relies on whether he could rebut the plaintiff's allegations of liability against him. The appellant says a successful defence cannot be advanced without obtaining access to the officer's complete notes and the complete witness statements. Denying access to the complete record, the appellant says, is patently unfair and constitutes a violation of the fundamental principles of justice.

The appellant submits that the severing of such information by institutions is now chronic and that it is routinely done by many front line service providers who err on the side of caution in the absence of a direction or order from this office to guide them. The appellant asserts that it is not overstating it to say that this has caused huge disruptions in the entire motor vehicle litigation bar (which is a large proportion of all litigation in Ontario). The appellant submits that in Orders M-249 and M-317 a "compelling public interest" was found not to exist when a court process provides an "alternative disclosure mechanism" and the reason for the request is to obtain records for a civil or criminal proceeding, but that this is not a private civil contract dispute, rather it is litigation over the negligent conduct by one citizen against another in a forum and system imposed by the state.

The appellant says that in the absence of an order under the *Act*, the only way to obtain the information is to bring a motion for production in the litigation which, although often successful, is costly. The appellant asserts that this is not even remotely a reasonable alternative disclosure mechanism and this interpretation results in nearly all litigation proceeding in the absence of such disclosure because it is `prohibitively expensive'. A prohibitively expensive alternative, the appellant says, is no alternative at all.

Analysis and Findings

I am not swayed by the appellant's representations that this is anything but a private matter between individuals. In my view, therefore no "public interest" in disclosure exists in these circumstances, let alone a "compelling" one.

Section 64 states that the "*Act* does not impose any limitation on the information that is otherwise available by law to a party to litigation." The *Act* has its own unique scheme and procedures for disclosure of information that exist separate and apart from those available in a civil proceeding, like a motor vehicle action.

In my view, disclosure of the severed portions of personal information in the records would not "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", as required in Order P-984. Rather, the appellant seeks access to the severed portions of the records in order to pursue his own interests, namely his defense to a motor vehicle litigation claim which, while of importance to the insured, the insurer and the appellant, is, in my view, in the nature of a private rather than a public interest.

The appellant recognizes himself that the *Act* was drafted to balance the rights of access with the right to privacy, and in my opinion the submissions of the appellant with respect to section 23, simply lack the cogency, factual and legal foundation to override the application of the section 49(b) exemption.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because sections 49(a) and (b) are discretionary exemptions, I must also review the Ministry's exercise of discretion in deciding to deny access to the severed portions of the records.

On appeal, this office may review the institution'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).

I may find that the Ministry 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 these cases, I may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573].

The Ministry's representations identify the considerations it took into account in deciding to exercise its discretion not to disclose the severed portions of the documents that remain at issue.

The Ministry submits:

> The Ministry is mindful of the major purposes and objects of [the *Act*]. The Ministry considers each request for access to information on an individual, case-by-case basis. In the circumstances of the appellant's request, the Ministry decided to exercise its discretion to release a substantial portion of the requested information to the appellant.
>
> …
>
> With respect to the non-disclosure of operational police codes, the Ministry carefully considered the potential harm to future law enforcement activities and the safety of OPP officers should police codes be publicly available. The Ministry is of the view that this potential harm is a significant factor.

> 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 motor vehicle accident occurred less than 2 years ago.
>
> In its exercise of discretion, the Ministry carefully considered the potential benefits to the appellant should additional information be disclosed. The Ministry took into consideration the fact that the appellant's client is a defendant in a civil action relating to the circumstances of the motor vehicle accident. The historic practice of the Ministry in regard to such requests is to release as much information as possible.

The appellant denies that the Ministry exercised any discretion in deciding to sever the records and that it is the routine practice of the Ministry to sever the names, addresses and contact information from witnesses and statements. The appellant asserts that this is done by the Ministry without any meaningful investigation of the circumstances of the accident.

In reply, the Ministry submits:

> With respect to the Ministry's exercise of discretion, the Ministry has issued three separate decision letters to the appellant. The Ministry has undertaken consultations with three affected parties. As noted in the Ministry's submission dated December 7, 2004, the Ministry took into consideration the fact that the [lawyer's] client is a defendant in a civil action relating to the circumstances of the motor vehicle accident.

Analysis and Findings

In my view, the Ministry considered the relevant factors in their exercise of discretion and did not consider irrelevant ones. This was not a case where access to information was refused automatically, as alleged by the appellant. Rather, the Ministry took special care to ensure that only the information that should have been withheld was not released and readily provided non-exempt information to the appellant. For example, when the Ministry confirmed that the lawyer who requested the information represented the appellant, the severed portion of the appellant's witness statement was promptly disclosed. I find that in all the circumstances the Ministry's exercise of discretion was proper.

ORDER:

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

Original Signed By: July 26, 2005
Steven Faughnan
Adjudicator