



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2449

Appeal PA-050075-1

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

This appeal concerns a request submitted to the Ministry of Community Safety and Correctional Services (the Ministry), pursuant to the *Freedom of Information and Protection of Privacy Act*. The request was for a copy of a police officer's notes with respect to a specified motor vehicle accident (MVA) in which the requester was involved. The request was submitted by the requester's lawyer.

The Ministry, following third party notification, granted access to the responsive record in part, denying access to portions of the record pursuant to section 49(b), read in conjunction with section 21(1) (right of access to one's own personal information/personal privacy of another individual). In raising the application of section 21(1) the Ministry indicated that it is relying on the section 21(3)(b) presumption (investigation into violation of law). The Ministry also stated that portions of the record are non-responsive to the request.

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

During the mediation stage, the mediator made attempts to contact two affected persons (the driver of the other vehicle involved in the MVA and a witness to the accident) to determine whether they would consent to the disclosure of information contained in the record that relates to them. The mediator was able to contact one of the affected parties through his lawyer, who indicated that his client did not consent to the disclosure of any information relating to him. The mediator was unable to contact the second affected party.

During the mediation stage, the appellant stated that he was not interested in the non-responsive portions of the record. As such, the non-responsive portions of the record are not at issue in this inquiry.

Further mediation was unsuccessful and the matter was transferred to the adjudication stage of the appeal process for an inquiry.

I commenced my inquiry by sending a Notice of Inquiry to the Ministry and one affected party, seeking representations on the application of section 49(b), read with section 21, to the information at issue. Efforts to locate the second affected party were unsuccessful and so I was unable to seek representations from this individual. The Ministry submitted representations. The affected party chose not to do so. The Ministry agreed to share its representations in their entirety with the appellant.

I then sought representations from the appellant and included with my Notice of Inquiry a complete copy of the Ministry's representations. The appellant chose not to submit representations.

RECORDS:

There is one record at issue comprised of three pages of a police officer's notes.

DISCUSSION:

PERSONAL INFORMATION

In order to determine whether section 49(b) of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (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 if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if 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 list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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.)].

The Ministry states that the record in question contains the personal information of three identifiable individuals, the appellant, the driver of the other vehicle involved in the MVA and a witness to the accident. With regard to the other driver, the Ministry states that the record contains this individual's "licence plate number, name, address, insurance information, as well as a brief statement." The Ministry also states that the record contains the "name and telephone number" of the witness.

On my review of the Ministry's representations and the record at issue, I am satisfied that the record contains the appellant's personal information, within the meaning of paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*, including his name, address, licence plate number, insurance information and a brief statement. I also find that the record contains the personal information of both the driver of the other vehicle involved in the MVA and a witness to the accident, as described by the Ministry in its representations, pursuant to paragraphs (d) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

In conclusion, I find that the undisclosed information in the record contains the personal information of both the driver of the other vehicle involved in the MVA and a witness to the accident.

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

General principles

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. The Police take the position that the undisclosed portions of the record are exempt under the discretionary exemption in section 49(b). 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.

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

Sections 21(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 49(b) is met. If the presumptions contained in paragraphs (a) to (h) of section 21(3) apply, the disclosure of the information is presumed to

constitute an unjustified invasion of privacy, unless the information falls within the ambit of the exceptions in section 21(4), if or the “public interest override” in section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In the circumstances, it appears that the presumption at section 21(3)(b) may apply. This section states:

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;

Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242].

The Ministry’s representations

The Ministry states that the record at issue relates to an investigation by the Ontario Provincial Police (OPP) into a traffic accident involving the appellant and an affected person to determine whether there were any violations of law under the *Highway Traffic Act* and/or the *Criminal Code*. The Ministry submits that all of the personal information contained in the record was “compiled and is identifiable as part of an OPP investigation into a possible violation of law, in accordance with section 21(3)(b) of the *Act*.” The Ministry states further that none of the circumstances in section 21(4) of the *Act* would operate to rebut the section 21(3)(b) presumption.

Analysis and findings

On my review of the Ministry’s representations and the record at issue, it is clear that the personal information contained in the record was compiled as part of an investigation into a possible violation of law under the *Highway Traffic Act* and/or the *Criminal Code*. Therefore, I find that the section 21(3)(b) presumption applies.

I have considered the application of the exceptions contained in section 21(4) of the *Act* and find that the personal information at issue does not fall within the ambit of this provision. In addition, the application of the “public interest override” at section 23 of the *Act* was not raised, and I find that it has no application in the circumstances of this appeal.

In conclusion, due to the application of section 21(3)(b), I find that the disclosure of the personal information at issue would be an unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, this information is exempt under section 49(b).

Section 10(2) of the Act obliges institutions to disclose as much of any responsive record as can reasonably be released without disclosing material which is exempt.

The key question raised by section 10(2) is one of reasonableness. 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.

The Ministry states that it released the appellant's personal information to him and that the only information withheld was the personal information of the affected persons.

I agree with the Ministry's assessment and find that the Ministry has disclosed all of the information in the record at issue to the appellant with the exception of the exempt information. Therefore, I am satisfied that the Ministry has properly completed the severing exercise.

EXERCISE OF DISCRETION UNDER SECTION 49(b)

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 43(2)].

Relevant considerations

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The Ministry states that it made “every reasonable effort” to contact the affected parties to obtain consent to release their personal information. The Ministry states that “[i]n the absence of consent, [it] exercised its discretion not to release their personal information” as “disclosure would constitute an unjustified invasion of their personal information.” The Ministry submits that “making a determination of whether disclosure would constitute an invasion of privacy involves a weighing of the [appellant’s] right of access to their personal information against the [affected persons’] right to protection of their privacy.”

The Ministry states that in exercising its discretion not to release the information at issue it was satisfied that the information was the personal information of others, in accordance with section 2(1) of the *Act*, and that the personal information fell within the presumption under section 21(3)(b) of the *Act*.

While the Ministry’s representations in this case were of a general nature, I am satisfied that the Ministry considered relevant matters and did not err in the exercise of its discretion by deciding not to release the information at issue to the appellant.

ORDER:

I uphold the decision of the Ministry.

Original Signed By: _____

Bernard Morrow
Adjudicator

February 17, 2006 _____