



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2487

Appeal PA-050147-1

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The requesters are two individuals facing a civil suit arising from a motor vehicle accident that resulted in the death of a young woman (the deceased). The requesters are the driver and owner of the motor vehicle involved in the accident. The requesters' representative submitted a request to the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*), seeking the following information:

...copies of all documentation and/or information generated in connection with this accident, including but not limited to the following:

1. copies of all notes of all investigating officers;
2. copy of occurrence report and/or summary;
3. information as to the disposition of the charge against [one of the requesters];
4. any other documentation and information contained in the police file that was generated as a result of this accident.

The Ministry located the responsive records held by the Ontario Provincial Police (the OPP). The Ministry informed the requesters that the records concern a matter that is currently under investigation by the Office of the Chief Coroner (OCC), and denied access on the basis that the information was exempt from disclosure under section 49(a) (discretion to refuse requester's information), in conjunction with 14(1)(a) (law enforcement). As well, access was denied to those records containing the personal information of the deceased on the basis that it was exempt from disclosure under section 49(b) (invasion of privacy) of the *Act*, taken in conjunction with the presumptions in sections 21(3)(a) and 21(3)(b), as well as section 21(2)(f).

The requesters (now the appellants) appealed the Ministry's decision to this office.

Section 14(1)(a) provides an exemption where disclosure of a record could reasonably be expected to interfere with a law enforcement investigation. Early on in the appeal process, the Ministry provided a copy of an email that the Ministry had sent to the Chief Coroner's Office, asking for an update on the status of the investigation. The Ministry subsequently issued a revised decision letter to the appellants' representative that granted partial access to the 36 pages of responsive records. It denied access to the remaining portions of the records on the basis of the exemptions listed in its original decision letter. In addition, the Ministry denied access on the basis that the information was exempt from disclosure under section 49(a) in conjunction with sections 14(1)(l) and 14(2)(a), as well as section 49(b) in conjunction with section 21(3)(d). Section 14(1)(l) was claimed for police codes. The Ministry also withheld portions of the records on the basis that they are non-responsive to the appellants' request.

The appellants' representative informed the mediator that his clients were no longer seeking access to police codes or information that is non-responsive. Consequently, section 14(1)(l) is no longer applicable in the circumstances of this appeal, and non-responsiveness is not at issue.

In addition, the appellants' representative informed the mediator that his clients would no longer be seeking information which merely identified the name, address and date of birth of any identifiable individuals. However, he stated that his clients wished to continue to pursue access to information in the records at issue that remains otherwise undisclosed.

During mediation, two persons consented to the release of their personal information in the records. One of these persons was a passenger in the vehicle driven by one of the appellants and the other was a witness to the accident. On the basis of this consent, the Ministry released the personal information in the records concerning these two persons. The Ministry also withdrew its reliance on section 21(3)(d) as the result of receiving these consents to disclosure.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. This office sent a Notice of Inquiry to the Ministry, initially, inviting its representations. The Ministry responded with representations, and these were sent in their entirety to the appellant along with the Notice of Inquiry, inviting the appellant to provide representations. At the same time that the Ministry provided its representations to this office, it issued another revised decision letter to the appellants' representative that granted partial access to nine pages of responsive records. The Ministry withdrew its reliance on section 49(a) in conjunction with section 14(2)(a) as the basis for non-disclosure the information from pages 3 to 6, the general occurrence report. The Ministry also obtained from the Office of the Chief Coroner (OCC) the coroner's investigation statement relating to the death of the young woman that resulted from the motor vehicle accident. The Ministry denied access to this investigation statement under the discretionary exemption in section 49(b), in conjunction with the factor in section 21(2)(f) and the presumptions in sections 21(3)(a) and 21(3)(b) of the *Act*.

The appellants did not provide representations in response to the Ministry's representations, other than confirming with this office that they are seeking the coroner's investigation statement, along with the other documents being considered in this appeal.

RECORDS:

The 38 pages of responsive records consist of the undisclosed portions of the general occurrence report and the police officers' notes, along with the entire coroner's investigation statement. The following table summarizes the pages containing undisclosed information that remains at issue in this appeal, and the exemptions claimed by the Ministry:

Page Number	Description	Exemptions
3-6	General occurrence report	Section 49(b) in conjunction with sections 21(2)(f), 21(3)(a) and 21(3)(b)
14-20	Police officer's notes	Section 49(b) in conjunction with sections 21(2)(f), 21(3)(a) and 21(3)(b)

32-33	Police officer's notes	Section 49(b) in conjunction with sections 21(2)(f), 21(3)(a) and 21(3)(b)
34	Police officer's notes	Section 49(b) in conjunction with sections 21(2)(f) and 21(3)(b)
35-36	Police officer's notes	Section 49(b) in conjunction with sections 21(2)(f), 21(3)(a) and 21(3)(b)
(2 pages)	Coroner's Investigation Statement	Section 49(b) in conjunction with sections 21(2)(f), 21(3)(a) and 21(3)(b)

DISCUSSION:

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. 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 where 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 submits that the undisclosed information in the records consists of personal information with respect to a number of identifiable persons, including the deceased.

I find that all the undisclosed records contain "personal information" about the deceased within the meaning of the definition in section 2(1) of the *Act*. Specifically, the records contain information relating to her family status (paragraph (a) of the definition), medical history (paragraph (b)), an identifying number, symbol or other particular assigned to her (paragraph (c)), her address and telephone number (paragraph (d)), the views or opinions of another individual about the deceased (paragraph (g)) and the deceased's name along with other personal information relating to her (paragraph (h)).

I also find that the undisclosed information from the general occurrence report and the police officer's notes contain the personal information of other identifiable individuals. The information concerning these individuals qualifies as their personal information as it includes information about their family status (paragraph (a) of the definition) and their name along with other personal information relating to them or where the disclosure of the name would reveal other personal information about the individual (paragraph (h)).

The portions of the records already disclosed from the general occurrence report and the police officer's notes also contain the personal information of the appellants, in addition to the personal information of the deceased, the witnesses and those individuals who have provided their consent to disclosure to the Ministry or this office, such as these individuals' ages, marital or family status (paragraph (a) of the definition), information relating to their employment (paragraph (b)), address and telephone numbers (paragraph (c)), and their names, along with other personal information relating to them (paragraph (h)).

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 provides a number of exemptions from this right.

Section 49(b) is one of those exceptions to that right. That section reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information, where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

Under section 49(b), where a record contains the 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 has the discretion to refuse to disclose that information to the requester.

The disclosed and undisclosed portions of the general occurrence report and the police officer's notes contain the information of the appellants and other individuals, including the deceased. I will therefore consider whether the disclosure of this personal information would be an unjustified invasion of the personal privacy of these other individuals and is exempt from disclosure under section 49(b).

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.

Under section 21(1), where a record, such as the coroner's investigation statement, contains only the personal information of an individual other than the appellants, the Ministry must refuse to disclose the information unless one of the exceptions to the exemption at sections 21(1)(a) through (f) applies. In the circumstances, only section 21(1)(f) could apply. This section provides an exception to the section 21(1) exemption where disclosure would not constitute an unjustified invasion of personal privacy.

As the coroner's investigation statement does not contain the personal information of the appellants, I will consider whether the disclosure of personal information in this record would be an unjustified invasion of the personal privacy of the deceased, in order to determine whether the information is exempt under section 21(1).

Unlike section 49(b), section 21(1) is a mandatory exemption, and if it is found that disclosure would result in an unjustified invasion of the personal privacy of the individual to whom the information relates, that ends the matter. In that instance, the institution does not have the discretion to disclose the information to the requester.

Accordingly, the analyses under both sections 49(b) or 21(1) require that I determine whether disclosure of the remaining information would result in an unjustified invasion of the personal privacy of the individuals to whom the information relates. In both these situations, sections 21(2), (3) and (4) provide guidance in determining whether “unjustified invasion of privacy” threshold is met.

Section 21(2) lists criteria for the institution to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the “public interest override” at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

Representations of the Ministry

The Ministry submits that sections 21(2)(f), 21(3)(a) and (b) apply in the circumstances of this appeal and weigh in favour of the non-disclosure of the records. Sections 21(3)(a) and (b) state that:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

Section 21(2)(f) states:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (f) the personal information is highly sensitive.

In particular, the Ministry submits that:

...parts of the personal information remaining at issue contain medical information relating to the individual who died as a result of the motor vehicle accident. The Ministry submits that release of this personal information is presumed to constitute an unjustified invasion of this individual's personal privacy.

The Ministry is of the opinion that the 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 personal information forms part of the documentation relating to the law enforcement investigation undertaken by the OPP in response to the fatal motor vehicle accident involving one of the appellant's clients 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*. In this instance, as noted on page 5 of the responsive records, one of the appellant's clients was charged with Careless Driving, an offence pursuant to section 130 of 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.

...The Ministry submits that none of the circumstances outlined in section 21(4) of the *FIPPA* would operate to rebut the presumption of an unjustified invasion of personal privacy that has been established under sections 21(3)(a) and 21(3)(b) of the *FIPPA*. The Ministry also submits that there is no compelling public interest in the disclosure of the exempt personal information.

Findings

I find that coroner's investigation statement, along with certain portions of the remaining records, contain personal information that describes the medical diagnosis and condition of the deceased pursuant to section 21(3)(a). I also find that all of the records were compiled as part of an investigation into a violation of law, specifically, a possible violation of the *Highway Traffic Act*. Accordingly, I find that all of the personal information contained in the records is subject to the presumption in section 21(3)(b). Because some of the personal information is subject to the presumption in section 21(3)(a), and all of it falls under section 21(3)(b), I find that disclosure of the personal information in the records would constitute a presumed unjustified invasion of the deceased's and other identifiable individuals' personal privacy under sections 21(3)(a) and (b).

There are two types of records in issue. One type of record is the coroner's investigation statement. This record does not contain the personal information of the appellants. The appellants have not raised the possible application of the public interest override at section 23 of the *Act* and I find that neither it nor section 21(4) applies. Based on the application of sections 21(3)(a) and (b), I found above that the disclosure of the coroner's investigation statement would constitute a presumed unjustified invasion of the privacy of the deceased and other identifiable individuals whose personal information is contained in this record. Therefore, the mandatory section 21(1) exemption applies to the coroner's investigation statement and the Ministry is precluded from disclosing it to the appellants.

The remaining records, which constitute the undisclosed portions of the general occurrence report and the police officers' notes, contain the personal information of the appellants, along with that of the deceased and other identifiable individuals. Because the undisclosed information in those records is also subject to a presumption under sections 21(3)(a) and (b), and again, neither section 21(4) nor section 16 applies, disclosure of the personal information remaining at issue in these records would be an unjustified invasion of personal privacy, and it qualifies for exemption pursuant to the discretionary exemption in section 49(b). As noted above, the appellants have been granted access to all of the information that relates solely to them or to the individuals who have consented to the release of their personal information.

EXERCISE OF DISCRETION

Section 49(b) allows an institution to disclose to the individual to whom the information relates personal information, if the disclosure would constitute an unjustified invasion of another individual's personal privacy. This 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)].

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

Representations of the Ministry

With respect to the manner in which the Ministry exercised its discretion, it submits that:

(It) has given careful consideration to the appellant's right of access to personal information records held by the Ministry. The Ministry has issued four separate *FIPPA* decisions in relation to the requested OPP records. The Ministry has made every attempt to provide the appellant with access to the maximum amount of information available in the circumstances.

The Ministry considered releasing the remainder of the withheld information to the appellant notwithstanding that the discretionary personal privacy exemption from disclosure contained in section 49(b) of the *FIPPA* applies to the information remaining at issue.

The Ministry has partially released the responsive police report (pages 1 to 6) to the appellant notwithstanding that the discretionary exemption from disclosure for law enforcement reports contained in section 14(2)(a) could have been applied to the report in its entirety.

The Ministry took into account that the records at issue document a sensitive fatal motor vehicle accident that occurred within the last 2 and 1/2 years.

The Ministry is mindful that the appellant represents two individual clients seeking access to sensitive records concerning a fatal motor vehicle accident.

The Ministry is aware that the appellant is seeking access to records, that in part, contain her clients' own personal information. However, given the nature of the records, the Ministry was particularly mindful that the exempt records remaining at issue contain personal information relating primarily to other individuals.

The Ministry considered whether disclosure of the withheld parts of the records at issue in response to the appellant's *FIPPA* request would increase public confidence in the delivery of public services. The Ministry did not find that release of the withheld parts of the records was necessary for this purpose.

The Ministry claims discretionary exemptions from disclosure relating to sensitive law enforcement records only as necessary. The Ministry is of the view that release of the information remaining at issue would not be appropriate in the circumstances of the appellant's request.

The Ministry was mindful of the fact that release of records in response to a *FIPPA* request is, potentially, release to the world at large. This was a factor for the Ministry in its exercise of discretion in relation to information concerning the individual who died as a result of the motor vehicle accident.

In its exercise of discretion, the Ministry carefully considered the potential benefits to the appellant's clients should additional information be disclosed. The Ministry took into consideration the fact that the appellant's clients are defendants in a civil action relating to the circumstances of the fatal motor vehicle accident. The historic practice of the Ministry in regard to such requests is to release as much information as possible.

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 was not appropriate.

Findings

The records comprising the general occurrence report and the police officers' notes contain the personal information of the appellants, along with that of the deceased and other identifiable individuals. The undisclosed portions of these records contain only information concerning the deceased and other individuals. I find that in denying access to the undisclosed personal information in the records exempted under section 49(b) (the general occurrence report and the police officers' notes - Records pages 3 to 6, 14 to 20 and 32 to 36) the Ministry relied on relevant factors, not irrelevant ones, and therefore exercised its discretion under section 49(b) in a proper manner.

ORDER:

I uphold the Ministry's decision.

Original Signed by: _____
Diane Smith
Adjudicator

July 26, 2006