



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2489

Appeal PA-050224-1

**Ministry of Community Safety and Correctional
Services**



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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 the notebook entries made by an officer with the Ontario Provincial Police (the OPP) during a motor vehicle accident investigation. The requester is a representative of the insurer of the corporate owner of one of the vehicles involved in the accident.

The Ministry located responsive records and granted partial access to them. Prior to this disclosure of the records, the Ministry contacted the drivers of both vehicles involved in the accident and a witness to the accident. Only the driver of the requester's insured's vehicle consented to the disclosure of the records. Access to the remaining portions of the records was denied on the basis that this information is exempt from disclosure under the mandatory exemption in section 21(1) (invasion of privacy) in conjunction with section 21(3)(b), and the discretionary exemption in section 14(1)(l) (facilitate commission of an unlawful act) of the *Act*.

The requester, now the appellant, appealed this decision. During the mediation stage of the appeal, the mediator sought the consent of the other driver (affected person 1) and the witness to the accident. At this time, the witness consented to the release of his personal information in the records. Additional information was therefore disclosed to the appellant following the Ministry's receipt of the written consent of the witness to the accident. At the mediation stage, the appellant agreed not to seek access to the information that section 14(1)(l) was applied to. Finally, the appellant also raised the possible application of the "public interest override" provision in section 23 of the *Act*.

As further mediation was not possible, the appeal was moved to the adjudication stage of the process. This office initiated the adjudication by sending a Notice of Inquiry to the Ministry, inviting its representations. The Ministry provided representations. This office then sent a Notice of Inquiry to the appellant, including a complete copy of the Ministry's representations, and invited the appellant to provide representations. The appellant did provide representations. In his representations, the appellant reiterated that he does not seek access to the police codes (this information for which section 14(1)(l) was claimed), and the non-responsive information in the undisclosed records. That information is therefore no longer at issue, nor is section 14(1)(l).

The appellant's representations also clarify that he seeks access to the undisclosed information contained in the statements made by the driver of the other vehicle (affected person 1) involved in the accident with the appellant's client's vehicle. The appellant advised that the statements made by the passenger in the vehicle driven by affected person 1 (affected person 2) were to be the subject of a separate request. No record of this request has been received by this office.

The appellant's representations were shared with the Ministry, which was invited to provide reply representations and did so. The Ministry also re-sought the consent of affected person 1, but did not receive any reply to its request. The file was subsequently assigned to me.

RECORDS:

The records at issue consist of the undisclosed portions of the investigating officer's notes (pages 3, 4) and an Occurrence Summary (page 10), along with the entire written statement made by affected person 1 (pages 5 and 6). The Ministry claims that these records are exempt under section 21(1) in conjunction with section 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 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 where it appears with other personal information relating to the individual or where the

disclosure of the name would reveal other personal information about the individual;

The Ministry submits that the information contained in the records at issue is recorded information about an identifiable individual, other than the requester, as defined under section 2(1) of the Act. The Ministry in its representations indicates that:

The records in question contain the personal information of an identifiable individual who was involved in a motor vehicle accident and was a subject of the police investigation into this matter. The records at issue also contain a statement provided by this individual. The Ministry submits that the records contain the name, address, date of birth, telephone number and driver's licence number of an identifiable individual. In addition, the record contains the views, opinions and actions of this individual as detailed in their statement that was provided to the investigating officer.

In his appeal letter, the appellant disputes the characterization of the information as personal information. He argues that:

The Head of this Institution has confused "personal information" with "information about an event" in denying access on this proffered ground. It is worth noting that what is truly "personal information" like the person's name, address, driver's licence number, whom he insures with, is freely available and released on the accident report that the same police officer files and which is available to interested parties (including our clients who already have a copy). [Affected person 1]'s name has therefore already been disclosed and his involvement in the accident in question has already been publicly disclosed. The events surrounding the accident, are not personal information about him, but are information about the accident, i.e. about an event.

I have reviewed the records. I do not agree with the appellant's characterization of the records because in my view, they contain "recorded information" about identifiable individuals, and qualify as personal information for that reason. In particular, I agree with the Ministry that the undisclosed parts that remain at issue comprise the personal information of individuals other than the appellant, specifically:

- the notes from the police officer's notebook (pages 3 and 4) contain the personal information of both affected person 1 and affected person 2;
- the Occurrence Summary (page 10) includes the personal information of affected person 1;
- the police officer's notes were compiled from statements made by affected person 1 and contain the personal information of both affected person 1 and affected person 2; and,

- the written statement (pages 5 and 6) of affected person 1 contains affected person 1's personal information.

I also find that the records do not contain the appellant's personal information.

I have already found that the records contain recorded information about affected persons 1 and 2, meeting the definition. In particular, the undisclosed parts of the records contain "personal information" about affected persons 1 and 2 including their age (paragraph (a) of the definition), medical history (paragraph (b)), address, telephone number (paragraph (d)), and the personal views and the views or opinions of another individual about the affected persons (paragraph (g)).

INVASION OF PRIVACY

Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21. In the circumstances, the only exceptions that could apply are set forth in paragraphs (a) and (f).

Sections 21(1)(a) and (f) state:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

- (a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;
- (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(1)(a)

The appellant submits that affected person 1 consented to the disclosure of his personal information by means of his counsel's statements. In support of this position, the appellant provided me with an excerpt of a transcript from an Examination for Discovery of affected person 1 held on January 11, 2006. Counsel for affected person 1 (the plaintiff in a civil action against the appellant's client and its employee driver) engaged in an exchange with counsel for the appellant's client and his employer as follows:

Appellant's counsel: Does the plaintiff consent to the release by the appropriate authorities of the full contents of the notebooks of any investigating police officers, to the extent that they contain anything that this witness said to any of the officers?

Affected person's counsel: ... The plaintiff consents provided that all of the

documentation in the notes is provided, except for notes pertaining to what the witnesses apparently said because the police won't ordinarily give that information... I agree that the field notes should be produced containing all of what he said, that is my client, and all of what your client said. ... Is that right? Have I accurately said that, stated that?

Appellant's counsel: Yes...

In its reply representations the Ministry submits that there has not been consent to disclosure of the requested records by the affected persons as required by section 21(1)(a). In particular, the Ministry maintains that the statements made at the Examination for Discovery by affected person 1's counsel did not constitute valid consent to disclosure pursuant to the provisions of section 21(1)(a) of the *Act*.

I agree with the Ministry. Section 21(1)(a) requires that "upon the prior *written* request or consent of the individual" (emphasis added). Verbal consent by counsel, recorded in a transcript, does not constitute written consent, and for that reason alone, it does not meet the requirements of section 21(1)(a).

This is consistent with previous orders, which also held that in order to fall within the scope of the section 21(1)(a) exception, consent must be explicit and in writing [Order PO-2215]. In PO-2215, former Assistant Commissioner Tom Mitchinson found that a letter from a lawyer stating that his client supports the release of the requested information to the appellant did not constitute written consent for the purposes of section 21(1)(a).

In Order PO-1723, Adjudicator Laurel Cropley found that section 21(1)(a) requires that consent be provided under the *Act*, that is, the consenting party must provide a written consent to the disclosure of his or her personal information in the context of an access request. Adjudicator Cropley further found in that case that the affected persons' disclosure of their personal information to the appellant done in the context of their dispute (in that case a dispute regarding ownership of the property) did not extend to disclosure under the *Act*.

In Order PO-2280, which adopted the findings in PO-1723, Adjudicator Bernard Morrow stated that for consent to operate as an exception to the mandatory section 21(1) exemption, it must be in writing, and provided to the institution that has custody and control of the records containing the individual's personal information. The individual can provide this consent either directly to the institution or indirectly through this office on appeal. In Order PO-2280, Adjudicator Morrow determined that the document the appellant relied upon in that case to establish consent did not meet the requirements of the *Act* for consent under section 21(1)(a). Adjudicator Morrow concluded that the consent was not framed in the context of an access request under the *Act*. In addition, it was not addressed to the Ministry in regard to an access to information request for information in its custody and control.

I agree with the findings in the aforementioned orders. Accordingly, I find that affected person 1's counsel's statements during the Examination for Discovery of affected person 1 do not meet the requirements of the *Act*. The consent is not in writing; nor is it framed in the context of an

access request under the *Act*. Neither is it addressed to the Ministry in the context of an access to information request for information in its custody and control.

Accordingly, I find that the exception in section 21(1)(a) does not apply in the circumstances of this appeal.

Sections 21(1) and 21(3)(b)

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 21. 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].

The Ministry, in denying access to the records, has claimed that because of the application of section 21(3)(b), disclosure of the personal information in the records is presumed to be an unjustified invasion of personal privacy of affected person 1 under section 21(1).

Section 21(3)(b) reads:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Ministry submits that the presumption provided at section 21(3)(b) of the Act is applicable to the records at issue because:

The Police Services Act (the PSA), as amended, establishes the Ontario Provincial Police (OPP) and provides for its composition, authority and jurisdiction. Section 19 set out the responsibilities of the OPP, which in part include:

- Providing police services in respect of the parts of Ontario that do not have municipal police forces other than by-law enforcement officers.
- Maintaining a traffic patrol on the King's Highway, except the parts designated by the Solicitor General.

Section 42 of the PSA also lists the duties of a police officer and in part include:

- Preserving the peace;

- Apprehending criminals and other offenders and others who may lawfully be taken into custody;
- Laying charges and participating in prosecutions;

The information at issue in this appeal relates to an investigation into a traffic accident undertaken by the OPP. In the course of investigating such law enforcement matters the OPP collects relevant personal information about the parties involved. This is necessary in order to reach specific conclusions as to whether there have been any violations of the law.

In this instance, in order to release as much information from the records as possible to the appellant, the Ministry attempted to contact the individuals whose information appeared in the records. As indicated earlier, consent to release information was received from two individuals but no response was received from the third individual. In the absence of consent, the Ministry is of the view that disclosure of this individual's personal information would constitute an unjustified invasion of their personal privacy, as 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 21(3)(b) of the Act. The Ministry further submits that none of the circumstances as outlined in section 21(4) of the Act would operate to rebut the presumption of an unjustified invasion of personal privacy as has been established under section 21(3) of the Act.

In his appeal letter, the appellant stated as follows concerning this issue:

The presumption [in section 21(3)(b)] involved, is only triggered where the information was both "compiled as part of an investigation into a possible violation of the law", and also "is identifiable as part of an investigation into a possible violation of the law". The notations made in the officer's notebook were not all compiled as part of an investigation into a possible violation of law, but simply to record where he went, what he saw, and what he did. To the extent that the information he recorded from (the affected persons) and others could be said to be "compiled... as part of an investigation into a possible violation of the law", they are certainly not from their contents, identifiable as part of an investigation into a possible violation of the law".

This section of the Act is not intended to shield persons involved in an accident from what they say happened and to allow them in civil proceedings to try and say something different without being cross examined on what they said about the accident. The Act here is intended to prevent the release of information that would from its contents identify the fact that the person or someone else had been suspected of a violation of law and the information was being assembled as part of such an investigation. The description of the events of the collision of which access has been denied, do not reveal that an investigation is or has been going on

as to a violation of the law. They simply indicate what the person has said about the events of the accident.

It is also worth noting that in the publicly available accident report, the same police officer has already indicated that the two vehicles were travelling in the centre and right lanes, that they "make contact" and that the (affected person 1) vehicle "loses control and crosses L2 [the lane in which the (appellant) vehicle was present] and L1 [the lane to the left of the (appellant) vehicle] coming to a stop in the centre median ditch... facing northeast direction.

I am satisfied that the records that contain personal information were compiled during the course of a law enforcement investigation and are identifiable as such. The presumption at section 21(3)(b) applies, whether or not the investigation is complete (see Orders MO-1568, M-701, MO-1256, MO-2131, PO-2165). The fact that no criminal proceedings were commenced as a result of the investigation does not negate the applicability of subsection 21(3)(b). The presumption only requires that there be an investigation into a possible violation of law. [Order P-242]

The appellant's remarks about the unfairness of withholding the undisclosed information in the records, in relation to civil proceedings, is not persuasive in the context of a request under the *Act*. Section 64(1) speaks to this issue. It states:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

In conclusion, I find that the personal information herein at issue was compiled and is clearly identifiable as "part of an investigation into a possible violation of law". In particular, the information was compiled during the course of an investigation into a possible violation of law resulting from a motor vehicle accident, and the presumption in section 21(3)(b) applies. As a result, disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) does not apply. Therefore, subject to my discussion of the "public interest override" and "absurd result", below, disclosure of the withheld information, all of which relates to the affected person, is presumed to constitute an unjustified invasion of personal privacy. Accordingly, and subject to the remaining discussion, the section 21(1)(f) exception to the exemption therefore does not apply, and the information is exempt under section 21(1).

PUBLIC INTEREST OVERRIDE

As section 21(3)(b) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. The presumed unjustified invasion of personal privacy under section 21(3) can only be overcome in this case if the "public interest override" at section 23 applies.

Section 23 states that 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.

The Ministry submits that:

For section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*. [1999] O.J. No 484 (C.A.)]

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 relationships of the record to the Act's central purpose of shedding light on the operations of government. In order 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.

The Ministry submits that there exists no compelling public interest in the disclosure of the information at issue. The appellant has not provided the Ministry with any information, which would demonstrate that the disclosure of the records would satisfy a public interest and disclosure would not shed any light on the operations of the government. In addition, the Ministry submits that there is no rousing public interest or attention to this matter.

The Ministry submits that the interest with respect to this matter appears to be of a private interest. The appellant's request for information appears to be as a result of a civil action being commenced by one of the parties involved in the accident. The Ministry notes that previous orders issued by the Information and Privacy Commissioner have stated that a compelling public interest does not exist where, for example, a court process disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding (Order M-249, M-317). In this instance, an alternative disclosure mechanism through the courts is available to the appellant.

The appellant did not directly address the issue of public interest override in his submissions. I note, however, that in his appeal letter the appellant addressed the issue of the need to allow the undisclosed information to be made public as follows:

Disclosing what the investigating officer discovered or what each of the parties or witnesses told the officer about the events surrounding the accident cannot be

expected, let alone reasonably expected, to facilitate the commission of an unlawful act or hamper the control of crime. This Head has no grounds, and offers no grounds, that could rationally support the view that the disclosure of this information, which deals with an accident that occurred almost three years ago, is going to facilitate anyone to commit some unlawful act in the future, or in any way hamper the control of crime. This was a motor vehicle accident, of which many hundreds must be investigated every day by police forces across Ontario and there is nothing secret here. No charges were laid. The time for laying charges under the Provincial Offences Act has in any event long since expired. There is no air of reality about this ground of proffered support for the denial.

Order PO-2443 of Adjudicator Stephanie Haly is of assistance. In that Order she stated:

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [IPC Order PO-2443/January 3, 2006].

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the Act’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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 [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

Any public interest in non-disclosure that may exist also must be considered [Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.)]...

A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]...

In the present appeal, I find that there is no compelling public interest in the disclosure of the personal information. The appellant is requesting the information for a predominantly personal reason [Order M-319]. The appellant requires the information to defend a civil action brought against him by affected person 1. In addition, I find that since there is a court process providing for an alternative disclosure mechanism, the reason for the request is to obtain records for a civil proceeding and the interests being advanced are essentially private in nature.

ABSURD RESULT

This office has applied the “absurd result” principle in situations where the basis for finding that information qualifies for exemption under section 21(1) would be absurd and inconsistent with the purpose of the exemption [OrderPO-2451].

Where the requester originally supplied the information or is otherwise aware of it, the information may be found not exempt, because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The “absurd result” principle was found to be applicable where the requester already has a copy of the record [Orders MO-1196, PO-1679, MO-1755].

In this case, based on information supplied by the appellant with his representations, in particular the publicly available motor vehicle accident report, some of the undisclosed information in issue in the records is already clearly within the appellant’s knowledge, as it was provided to him by the Ministry. I find that for this reason, it would be absurd to not disclose the information in the records that is clearly within the appellant’s knowledge as it was released to him by the Ministry.

Accordingly, I find that it would not be an unjustified invasion of the affected persons’ privacy to disclose those portions of the records that include the affected persons’ names, sex, address, telephone number, driver’s licence number and insurance particulars. The date of birth of affected person 1 in the undisclosed records should also be disclosed. I will provide the Ministry with a highlighted version of the undisclosed records indicating those portions that remains exempt.

Disclosure of the remaining undisclosed information in the records would be inconsistent with the purpose of the exemption in section 21(1) [Orders M-757, MO-1323, MO-1378]. This information was compiled as part of an investigation into a possible violation of law. The

information concerns affected person 1 and the appellant is not otherwise aware of this information [Orders MO-1196, PO-1679, MO-1755].

ORDER:

- 1 I order the Ministry to disclose to the appellant the portions of the records that are already known to him no later than **August 31, 2006**, but not before **August 28, 2006**. For clarity, I have provided the Ministry with a highlighted version of the records identifying the portions that should *not* be disclosed.
2. In order to verify compliance with this order I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1, upon my request.

Original Signed by _____
Diane Smith
Adjudicator

July 27, 2006 _____