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

ORDER PO-2506

Appeal PA-050169-1

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 copies of the statements provided to the Ontario Provincial Police by the requester and the other driver involved in a motor vehicle accident that occurred on a specific date.

The Ministry initially denied access to both statements in their entirety pursuant to section 49(a) in conjunction with sections 14(1)(a), 14(1)(b), 14(1)(f), 14(2)(a) and 19, and pursuant to section 49(b) with sections 21(1), 21(2)(f) and 21(3)(b) of the *Act*. The requester (now the appellant) appealed the Ministry's decision to deny access to the statements.

The appellant authorized another individual to represent him in the appeal. For ease of reference, I will be referring to the appellant's representative as the appellant in this order.

This appeal could not be resolved at mediation and it proceeded to the adjudication stage.

I sent a Notice of Inquiry to the Ministry and an individual whose interests may be affected by the outcome of this appeal (the affected party). Neither the affected party nor the Ministry provided representations. However, the Ministry issued a revised decision letter disclosing the appellant's statement to him while denying access to the affected party's statement pursuant to section 49(b), in conjunction with sections 21(1), 21(2)(f) and 21(3)(b) of the *Act*, on the basis that disclosure of the statement would be an unjustified invasion of the affected party's personal privacy. Accordingly, section 49(a) and the sections originally relied on in conjunction with it (listed above) are no longer at issue in this inquiry.

I then sent a modified Notice of Inquiry to the appellant offering him an opportunity to submit representations, which he declined. Although the appellant did not submit representations, he did advise staff from this office that he still wished to pursue access to the affected party's statement and, in his appeal letter, he provided a number of reasons why, in his view, he ought to have access to the statement.

RECORDS:

The sole record remaining at issue in this appeal is a two-page document titled "Motor Vehicle Accident Driver's Statement Form".

DISCUSSION:

PERSONAL INFORMATION

For the purpose of deciding whether or not the disclosure of the record would constitute an unjustified invasion of personal privacy, it is necessary to determine whether the record contains personal information and, if so, to whom it belongs.

Section 2(1) of the *Act* defines personal information, in part, 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, …
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the 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…

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].

The record at issue, a two-page MVA statement, relates to an incident involving the appellant. Based on my review of the record, it is evident that it contains the name, date of birth, address, driver's license number, and other details relating to the affected party, which qualifies as that individual's personal information under paragraphs (a), (c), (d) and (h) of section 2(1) of the *Act*. As one of the drivers involved in the motor vehicle accident, the record also contains the appellant's personal information since it contains the affected party's views or opinions about the appellant in relation to the accident in question, as contemplated by paragraph (g) of section 2(1). I find, therefore, that the record contains the personal information of the appellant and the affected party.

In circumstances where a record contains both the personal information of the appellant and another individual, the request falls under Part II of the *Act* and the relevant personal privacy exemption is the exemption at section 49(b) [Order M-352]. Some exemptions, including the personal privacy exemptions at sections 21(1) and 49(b), are mandatory under Part I but discretionary under Part II and thus, in the latter case, an institution may disclose information that it could not disclose if Part I is applied [Order MO-1757-I].

However, it is not necessary for me to consider whether the appellant's own personal information qualifies for exemption under section 49(b) since its disclosure to him cannot be an unjustified invasion of another individual's personal privacy, as required under that section. Accordingly, I will order the disclosure of the appellant's own personal information to him, as highlighted in the copy of the record at issue to be sent to the Ministry.

I must now review whether the information remaining at issue qualifies for exemption under the discretionary exemption at section 49(b) of Part II of the *Act*.

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.

Under section 49(b) of the *Act*, where a record contains the personal information of both the appellant and another individual, the Ministry has the discretion to deny the appellant access to that information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. Section 49(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. On appeal, I must be satisfied that disclosure of the information **would** constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Sections 21(1) to (4) provide guidance in determining whether the threshold for an unjustified invasion of personal privacy under section 49(b) is met. If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). If any of paragraphs (a) to (c) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(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 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].

In both its decision letters, the Ministry identified the presumption in section 21(3)(b) as applicable to the personal information of the affected party in the record at issue in this appeal.

This section states:

> 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;

Although the Ministry did not provide representations in this appeal, the Ministry's position as expressed in its decision letters is evidently that the record at issue was compiled and is identifiable as part of an investigation into a possible violation of law under section 21(3)(b).

Similarly, and as noted above, the appellant did not submit representations in response to the Notice of Inquiry sent to him. However, in correspondence sent to this office earlier in the appeal process, and prior to the release of the appellant's own statement, the appellant alluded to the factor at section 21(2)(d) of the *Act* by stating:

> … failure to disclose, without further delay, the two requested documents will deprive me of my rights as a Canadian citizen to a fair trial and/or an impartial adjudication in the matter of a disputed careless driving case, which is currently outstanding in the legal system [emphasis deleted].

Findings

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

I have reviewed the record and, in my view, it was compiled and is identifiable as part of an investigation by the Ontario Provincial Police [OPP] into a motor vehicle accident with the view to determining whether or not a violation of law had taken place in the circumstances. I also take the appellant's reference in his correspondence to a matter before the courts as being related to the offence of careless driving under section 130 of the *Highway Traffic Act*. In this context, I am satisfied that the information at issue was compiled and is identifiable as part of an investigation into a possible violation of law by the OPP.

As such, I find that the presumption in section 21(3)(b) applies to the personal information of the affected party contained in the record at issue and that its disclosure is presumed to constitute an unjustified invasion of personal privacy.

Once established, a presumption under section 21(3) cannot be rebutted by one or a combination of factors under section 21(2) (*John Doe*, cited above). In view of my finding that the presumption in section 21(3)(b) applies, it is therefore not necessary for me to consider the criteria listed in section 21(2), including the factor at paragraph (d) (fair trial/impartial adjudication) raised by the appellant and the factor at paragraph (f) (highly sensitive information) claimed by the Ministry. Furthermore, as established by *John Doe*, cited above, a section 21(3) presumption can only be overcome if the personal information at issue is caught by section 21(4)

or if a "compelling public interest", as contemplated by section 23, is established. Neither of sections 21(4) or 23 are raised or available in the circumstances of this appeal.

Accordingly, the information remaining at issue (i.e. information in the record that is *not* the appellant's personal information) is exempt from disclosure under section 49(b) of the *Act*.

EXERCISE OF DISCRETION

As previously noted, the section 49(b) exemption is discretionary and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry'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).

After the Ministry received the Notice of Inquiry in this appeal, the Ministry informed this office that it had reconsidered its position regarding the release of the appellant's information because "the matter is no longer pending before the Court". The Ministry then sent the appellant a revised decision letter enclosing a copy of his own statement, but continuing to withhold the affected party's statement.

Upon review of the circumstances of this appeal, including the steps taken by the Ministry in revising its decision in response to the changing circumstances of the matter before the courts, I am satisfied that the Ministry exercised its discretion under section 49(b) properly and I will not disturb it on appeal.

ORDER:

1. I order the Ministry to disclose to the appellant those portions of the record containing the personal information of the appellant. For the sake of clarity, I have highlighted the portions of the record the Ministry is to disclose to the appellant. The information that is not highlighted is *not* to be disclosed. I order the Ministry to disclose the highlighted portions of the record by **November 1, 2006** but not earlier than **October 26, 2006.**

2. I uphold the decision of the Ministry not to disclose the remaining portions of the record containing the personal information of the affected party.

Original Signed By: September 27, 2006
Daphne Loukidelis
Adjudicator