



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

ORDER PO-2822

Appeal PA08-269

Ministry of Community Safety and Correctional Services



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

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 pertaining to a motor vehicle accident involving the requester. The requester sought access to the notes and interview statements taken by a named Ontario Provincial Police (OPP) constable in relation to a motor vehicle accident on a specified date and at a specified location.

After having notified an individual whose personal information may be contained in the records (the affected person) of the request under section 28 of the *Act*, the Ministry issued a decision granting partial access to the OPP records pertaining to the motor vehicle accident. The Ministry further advised that access had been denied to parts of the responsive information pursuant to the discretionary exemptions in sections 14(1) (law enforcement) and 49(b) (personal privacy) of the *Act*, and that some non-responsive information had also been removed from the records.

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

During mediation, the appellant indicated that the non-responsive information and the police codes, which have been severed from the records, are not at issue in this appeal. The appellant also indicated that he is pursuing access to the severed portion of the officer's notebooks which pertains to the affected person, along with this individual's written statement; and to any other statements provided to the OPP. Upon discussion with the Ministry, the mediator contacted the affected person to seek his views on disclosure of his personal information. The affected person did not consent to the disclosure of his personal information.

The appellant indicated that the affected person's statement remains at issue in this appeal, taking the position that this record is relevant to a fair determination of his rights under section 21(2)(d) of the *Act*. Also during mediation, the appellant indicated that he wished to pursue access to the contact information relating to the independent witness whose name was severed from the copy of the motor vehicle accident report he had received.

Upon discussion with the Ministry, the mediator contacted the independent witness to seek her views on the disclosure of her personal information to the appellant. The independent witness consented to the release of all her personal information, which consists of her name, date of birth, address, and telephone number, to the appellant.

After having received the independent witness's written consent, the Ministry issued a supplementary decision letter, granting access to additional information on pages 1 and 2 of the responsive records.

No further mediation was possible and the file was transferred to the adjudication stage of the process where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry and the affected person, seeking their representations initially. I received representations from the Ministry and a letter from the affected person. The affected person objected to the disclosure of their name and personal information, but not their statement contained in the records. As a result, the Ministry

released a copy of the affected person's statement to the appellant, except for the affected person's name, address, telephone number and date of birth. I sent a copy of the Ministry's representations to the appellant. Portions of these representations were not enclosed due to concerns about their confidentiality. I received representations from the appellant's lawyer on his behalf in response.

RECORDS:

The records remaining at issue consist of the information severed from a page of the officer's notebook which relates to the affected person, and the name, telephone number, date of birth and address of the affected person as contained on his written statement.

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 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, the information must be about the individual in a personal capacity. 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 and PO-2225].

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 and PO-2225].

Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity". Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

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 records contain the personal information of the affected person in accordance with all of the subsections described in the definition of that term, except for paragraph (f). The appellant did not provide direct representations on this issue.

Analysis/Findings

The records were created as a result of a motor vehicle accident that occurred when the appellant's motor vehicle collided with two cows. Based on my review of the records and the representations, I conclude that the records contain the personal information of the appellant, an independent witness and the affected person. The information from the affected person's statement that has been disclosed reveals that the affected person owned the cows that were hit by the appellant's motor vehicle. I find that he owned these cows in his business capacity as the operator of a farming enterprise, which was not operated out of his home.

The information that remains at issue concerns the affected person and includes his name, home address, home telephone number, date of birth and other information exchanged between the OPP and the affected person.

Section 2(3) excludes from the definition of “personal information” an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity.” This section reads:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity

I find that the affected person’s name in the records identifies him in his business capacity. As this information is not personal information, section 49(b) cannot apply to it. As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order that the affected person’s name be disclosed.

I find that the remaining information in the records concerns the affected person in a business context, not a personal context. However, even if this information relates to the affected person in a business capacity, it may still qualify as personal information if the information reveals something of a personal nature about this individual [Orders P-1409, R-980015 and PO-2225].

I find that portions of the information at issue relates to the affected person in his personal capacity. Specifically, I find that the disclosure of his home address and telephone number and date of birth would reveal something of a personal nature about him. Accordingly, this information qualifies as the affected person’s personal information in accordance with paragraphs (a) and (d) of the definition of that term in section 2(1).

I find that disclosure of the other information in the records, other than the affected person’s home address and telephone number and date of birth, would not reveal something of a personal nature about the affected person [Orders MO-2342 and MO-2343]. In my view, there is nothing present here that would allow the information at issue to “cross over” into the “personal information” realm. This information concerns the affected person’s ownership of the cows and is considered to be related to his business, rather than his personal activities. As this information, as well as the affected person’s name, is not personal information, section 49(b) cannot apply to exempt it from disclosure. As no other exemptions have been claimed for this information and no mandatory exemptions apply to it, I will order it disclosed.

I will consider below whether disclosure of the affected person’s home address and telephone number and date of birth would constitute an unjustified invasion of the affected person’s privacy under section 49(b).

PERSONAL 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), 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 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). None of the exceptions in paragraphs (a) to (e) of section 21(1) apply nor do paragraphs (a) to (d) of section 21(4) apply.

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].

The Ministry relies on the presumption in section 21(3)(b). It submits that:

...the personal information remaining at issue consists of 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 documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident involving the appellant’s client. 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 the appeal resulting 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.

In the appeal resulting in Order PO-2409, Adjudicator Steven Faughnan also considered whether exempt personal information collected during the course of a law enforcement investigation conducted by the OPP into the circumstances of a motor vehicle accident was subject to the presumption contained in section 21(3)(b). Adjudicator Faughnan commented:

On their face, 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 information was compiled and is identifiable as part of an investigation into a possible violation of law. I am therefore satisfied 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*....

The Ministry submits that the application of section 21(3)(b) of the [Act] is not dependent upon whether charges are actually laid (Orders P-223, P-237 and P-1225).

The appellant submits that:

...it is not aware of the existence of an on-going police investigation in this case. Furthermore, nothing in the Ministry's representations holds any evidence to the contrary.

The mere existence of a police report, taken approximately a year ago, without any further evidence cannot be found to be prima facie proof of an ongoing police investigation. As such, the appellant's position is that section 21(3)(b) of the *Act* is inoperative because the freedom of information request would not be interfering with an on-going police investigator as far as it is aware and, thus, there is no presumptive invasion of personal privacy.

Analysis/Findings

The records contain the personal information of the appellant and the affected person, as well as the independent witness. Based on my review of the records and the representations of the parties, I find that the personal information in the records was compiled and is identifiable as part of an investigation by the OPP into a possible violation of law as contemplated by section 21(3)(b). The Police were investigating whether charges pursuant to the *Criminal Code of Canada* or the *Highway Traffic Act* should be laid in respect of the appellant's collision with the affected person's cows.

Remaining at issue is the affected person's home address, telephone number and date of birth. I find that the presumption in section 21(3)(b) applies to this personal information. This presumption applies even though criminal proceedings were not commenced. The presumption in section 21(3)(b) only requires that there be an investigation into a possible violation of law [Order P-242]. As section 21(3) applies, disclosure of the information at issue is presumed to be an unjustified invasion of personal privacy under section 49(b).

This presumed unjustified invasion of personal privacy under section 21(3), cannot be rebutted by one or more factors or circumstances under section 21(2). 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*, cited above]. Section 23 has not been raised by the appellant and, as stated above, section 21(4) is inapplicable in this appeal.

Accordingly, subject to my review below of the Ministry's exercise of discretion, I conclude that disclosure of the affected person's home address and telephone number and date of birth is presumed to constitute an unjustified invasion of the personal privacy of the affected person and this personal information is exempt under section 49(b).

EXERCISE OF DISCRETION

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 54(2)].

The Ministry submits that:

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.

The Ministry carefully weighed the appellant's client's right of access to the withheld portion of the investigating officer's notes and statement containing information supplied by the affected party.

The Ministry was satisfied that release of additional information would cause personal distress to the affected party. The Ministry was satisfied that the information remaining at issue is subject to the presumption contained in section 21(3)(b) for information compiled and identifiable as part of an investigation into a possible violation of law.

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 1 year ago.

In its exercise of discretion, the Ministry carefully considered the potential benefits to the appellant's client should additional information be disclosed. The Ministry took into consideration the fact that the appellant has indicated that disclosure of the exempt information is relevant to a fair determination of the appellant's client's rights.

The historic practice of the Ministry in regard to such requests is to release as much information as possible. This has been done in the circumstances of the current request.

The Ministry ultimately concluded that additional release of information is not feasible in the circumstance of the appellant's request. The exempt information relates to an affected party who has declined to consent to disclosure of this police information.

The appellant did not provide representations on this issue.

Analysis/Findings

I find that the Ministry exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors, in denying the appellant access to the affected person's home address and telephone number and date of birth for which it has claimed the section 49(b) exemption.

Accordingly, I uphold the Ministry's exercise of discretion and find that this information at issue in the records is properly exempt under section 49(b).

ORDER:

1. I order the Ministry to disclose to the appellant, **by October 8, 2009 but not before October 2, 2009**, all of the information in the records except for the affected person's home address, telephone number and date of birth. For ease of reference I have highlighted the information that should *not* be disclosed to the appellant on the copy of the records that accompany this order to the Ministry.
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

September 3, 2009 _____