



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

ORDER PO-2986

Appeal PA10-85

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 (FIPPA or the Act)* for a copy of the police report, witness statements, notes and photographs relating to two motor vehicle accidents, which resulted in the death of the requester's husband (the deceased). These motor vehicle accidents were investigated by the Ontario Provincial Police (the OPP) which is part of the Ministry.

The Ministry issued a decision in which it denied access to the records in full citing sections 49(b) or 21(1) (personal privacy). Pursuant to section 28 of the *Act*, the Ministry notified several individuals whose personal information may be contained in the records (the affected persons) and issued a second decision, providing the requester with partial access to the records. It also advised that some information had been removed as non-responsive to the request.

The requester's, now the appellant's representative, appealed this decision.

During mediation, the appellant's representative advised that the non-responsive severances could be removed from the scope of the appeal. Therefore, pages 19 and 32 were no longer at issue. Consent to the disclosure of his personal information was received from one affected person, whose statement was released in full; accordingly, pages 52 and 53 are no longer at issue in the appeal.

As no other mediation was possible, this file was moved to adjudication, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the Ministry and the affected persons that I had current contact information for, seeking their representations. Only one affected person responded and that person consented to the disclosure of their personal information. In response to this consent, the Ministry disclosed those records related to this affected person, as well as additional information from the records after taking into consideration the application of the exception in section 21(4)(d) (compassionate reasons).

I received representations from the Ministry, a copy of which was sent to the appellant, except for a portion that I found contains confidential information. I also sent a Notice of Inquiry to the appellant's representative seeking the appellant's representations. The appellant's representative did not provide representations.

RECORDS:

Remaining at issue in the records are portions of the information on pages 20 to 25, 27 to 29, 31, 34, 35, 37 and 38, which are police officer handwritten notes. Also remaining at issue is all of the information in five witness statements. One of the witness statements was written on the date of the accidents. The other four witness statements were written after the date of the accidents.

DISCUSSION:

PERSONAL INFORMATION

I will first determine whether the records contain “personal information” as defined in section 2(1) and, if so, to whom it relates. That term reads 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).

Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(3) 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.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

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, PO-2225 and MO-2344).

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 in dispute result from a motor vehicle collision, which resulted in a death... The records at issue contain police officers notes, and statements provided by third parties [the affected persons] whose evidence was applicable to the investigation into [into the collision]. The kinds of personal information included in the records focus on statements made about what witnesses observed, information about the deceased's mental state prior to his death, and contact information such as phone numbers...

The Ministry has ...provided the appellant with her own personal information, and that of her close relatives, so as to avoid the "absurd result" doctrine. The Ministry has, however, withheld personal information belonging to third parties, who have objected to the disclosure of their personal information, or who the Ministry was not able to contact for the purpose of obtaining consent...

Analysis/Findings

Upon review of the records, I agree with the Ministry that they contain the personal information of the affected persons who were interviewed as part of the police investigation, or whose personal information was otherwise collected as part of the police investigation. They also contain the personal information of the appellant and the deceased.

The personal information in the records includes information relating to medical, psychiatric, psychological, or employment history of an individual (paragraph (b) of the definition of personal information), identifying numbers (paragraph (c)), addresses and telephone numbers (paragraph (d)), the personal opinions or views of an individual (paragraphs (e) and (g)), and individuals' names where they appear with other personal information relating to the individuals or where the disclosure of the names would reveal other personal information about the individuals (paragraph (h)).

As stated above, the records remaining at issue contain the personal information of the deceased and other identifiable individuals. Remaining at issue are portions of the information on pages 20 to 25, 27 to 29, 31, 34, 35, 37 and 38, which are police officer handwritten notes, as well as pages 42 to 51, which are five witness statements. One of the witness statements, on pages 48 to 51 of the records, was written on the date of the accidents. The other four witness statements were written after the date of the accidents. Only the four witness statements written after the accidents contain the personal information of the appellant, in addition to the personal information of other identifiable individuals, including the deceased.

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 21(1) applies to the information at issue on pages 20 to 25, 27 to 29, 31, 34, 35, 37 and 38, which are police officer handwritten notes, as well as to pages 48 to 51, the witness statement written on the date of the accidents. I will also determine whether discretionary exemption at section 49(b) applies to pages 42 to 47, the four witness statements that contain the personal information of the appellant and other identifiable individuals.

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.

Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an “unjustified invasion of personal privacy”.

In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

Section 21(4)(d)

The Ministry considered the possible application of the exception in section 21(4)(d) of the *Act*. This section reads:

Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

The terms “close relative” and “spouse” are defined in section 2(1) of the *Act* as follows:

“close relative” means a parent, child, grandparent, grandchild, brother, sister, uncle, aunt, nephew or niece, whether related by blood or adoption; (“proche parent”); and

“spouse” means,

- (a) a spouse as defined in section of the *Family Law Act*, or
- (b) either of two persons who live together in a conjugal relationship outside marriage. (“conjoint”)

Personal information about a deceased individual can include information that also qualifies as that of another individual. Where this is the case, the “circumstances” to be considered would include the fact that the personal information of the deceased is also the personal information of another individual or individuals. The factors and circumstances referred to in section 21(2) may provide assistance in this regard, but the overall circumstances must be considered and weighed in any application of section 21(4)(d) (Orders MO-2237, MO-2270, MO-2290, MO-2306, MO- 2387 and MO-2615).

After the death of an individual, it is that person’s spouse or close relatives who are best able to act in their “best interests” with regard to whether or not particular kinds of personal information would assist them in the grieving process. The task of the institution is to determine whether, “in the circumstances, disclosure is desirable for compassionate reasons” (Order MO-2245).

The application of section 21(4)(d) requires a consideration of the following questions, all of which must be answered in the affirmative in order for the section to apply:

1. Do the records contain the personal information of a deceased individual?
2. Is the requester a spouse or "close relative" of the deceased individual?
3. Is the disclosure of the personal information of the deceased individual desirable for compassionate reasons, in the circumstances of the request?

(Orders MO-2237 and MO-2245)

The Ministry submits that:

...[it] has already exercised its discretion to disclose personal information about the deceased to the appellant, since the appellant is a "close relative" of the deceased as defined in the *Act*. However, this disclosure can only occur where the Ministry is "satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons".

The Ministry has determined that the records pertain to third parties, other than the deceased, and observations about the deceased made by others. As already mentioned, none of these individuals have consented to their personal information being disclosed. One of the individuals has expressly withheld his consent; in other words, he has specifically indicated he does not want his personal information being disclosed to the appellant. The Ministry is not 'satisfied' that it is compassionate to disclose these records to the Appellant pursuant to subsection 21(4)(d) for the following reasons:

- First, the records that have already been disclosed to the appellant are sufficient to meet the requirements of subsection 21(4)(d)... The Ministry has disclosed the records that provide the appellant with significant factual knowledge of the circumstances of the deceased's death (Order MO-2237).
- The Ministry asserts [that] ... to disclose the records that are in dispute would be to demonstrate a distinct lack of compassion towards the privacy rights of those individuals who have not consented to the disclosure of their personal information to the appellant. In other words, the Ministry claims that disclosing the records in dispute without the relevant individuals consent would be to render meaningless the significant privacy protections set out elsewhere in section 21.

Although the appellant did not provide representations in response to the Notice of Inquiry, her representative did provide some pertinent submissions in his letter of appeal. In that letter, he

stated that the deceased died as a result of two motor vehicle accidents that occurred on the same date and that the appellant has full knowledge of the other parties involved in the accidents. The appellant's representative provided copies of both police accident reports with the letter of appeal to this office.

Analysis/Findings re: section 21(4)(d)

Step 1 – Personal Information of the Deceased

As stated above, the records contain the personal information of the deceased, the appellant and other identifiable individuals. I am, therefore, satisfied that the first requirement for the application of section 21(4)(d) is satisfied.

Step 2 – Spouse or “Close Relative”

The appellant, who is the requester in this appeal, is the wife of the deceased and, therefore, qualifies as a close relative of the deceased. I am, therefore, satisfied that the second requirement for the application of section 21(4)(d) is satisfied.

Step 3 – Desirable for Compassionate Reasons

Because section 21(4)(d) can override the presumed unjustified invasion of privacy as set out in section 21(3)(b), it raises an issue about the interpretation of the words “desirable for compassionate reasons.”

In Order MO-2237, Assistant Commissioner Brian Beamish considered the definition of the word “compassionate” and the intent of the Legislature as follows:

The *Concise Oxford Dictionary, Eighth Edition*, defines “compassionate” as follows: “*adj.* sympathetic, pitying.” Compassion is defined in the *Concise Oxford Dictionary, Eighth Edition*, as follows: “*n.* pity inclining one to help or be merciful.”

Assistant Commissioner Beamish accepted these definitions as evidence of the plain and ordinary meaning of the word “compassionate” and I adopt them for the purposes of this appeal. In Order MO-2237, he stated that:

As discussed above, I have concluded that by using the words “in the circumstances” the Legislature intended that a broad and all encompassing approach be taken to the consideration by this office of whether or not disclosure is “desirable for compassionate reasons.” In my view, by enacting this amendment to the *Act*, the Legislature intended to address an identified gap in the access to information legislation and increase the amount of information being provided to bereaved family members. It is recognition that, for surviving family members, greater knowledge of the circumstances of their loved one's death is by its very nature compassionate.

I also adopt this approach by Assistant Commissioner Beamish for the purposes of this appeal.

The appellant is aware of the nature of certain undisclosed information in the records as a result of already receiving it from the accident reports and other information disclosed to her by the Ministry. In addition, she herself provided some of the information to the OPP. I find that disclosure of this information from the records in the circumstances is desirable for compassionate reasons. This information is identical or very similar to the information already disclosed to her by the Ministry in response to the request or disclosed by the OPP in the accident reports provided to her. I am, therefore, satisfied that the third requirement for the application of section 21(4)(d) is satisfied with respect to this information.

However, I find that the remaining information at issue in the records is not subject to section 21(4)(d). The disclosure of this information will not better inform the appellant about the circumstances surrounding the death of the deceased. Disclosure of this remaining information does not outweigh the privacy rights of the other identifiable individuals in the records (Orders MO-2237 and MO-2533). This information includes the contact information of witnesses not identified in the accident reports and includes their addresses, dates of birth, phone numbers, driver's license numbers and other identifying personal information (Orders MO-2290 and MO-2292). The information that I have found not subject to the exception in section 21(4)(d) also includes undisclosed information about the deceased or other identifiable individuals in the records other than the appellant that is not related to the circumstances surrounding the two motor vehicle accidents that resulted in the death of the deceased.

I will now consider whether the presumption in section 21(3)(b) applies to the information that I have found not to be subject to the exception in section 21(4)(d).

Section 21(3)(b)

The Ministry has raised the application of section 21(3)(b) of the *Act* to the information contained in the records. This section 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 records were prepared by the OPP as part of a law enforcement investigation into the motor vehicle collision. No charges followed, but the police had to investigate the collision nevertheless to ensure that there was in fact no criminal wrongdoing. The presumption in subsection 21(3)(b) does not require that there be an actual violation of the law, only that it be possible. Since this was a motor vehicle collision involving a death, the police would be typically checking to ensure there were no violations of the *Criminal Code* and the *Highway Traffic Act*, as well as possibly other statutes.

Not only were the records compiled as part of a law enforcement investigation, but they are clearly identifiable as such. The first part of the responsive records contain the police officer's notes of her investigation, which are on a standard officer's notepad. The police officer's business card is on the side of each page. The officer's notes identify the officer that prepared them. The second part of the records are on a standard OPP template identifying the interviewing police officer, the date of the witness statement and other similar information.

Analysis/Findings re: section 21(3)(b)

I agree with the Ministry that section 21(3)(b) applies to the remaining personal information in the records as it was compiled and is identifiable as part of an investigation into a possible violation of law; in particular, a violation of law under the *Highway Traffic Act* or the *Criminal Code of Canada* as indicated above by the Ministry. I have found above that disclosure of this information is not desirable for compassionate reasons under section 21(4)(d).

As section 21(3)(b) applies, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21(1) or 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 (Div.Ct.)). The public interest override has not been raised by the appellant. I have considered and applied section 21(4) above.

Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law (Orders P-242 and MO-2235). The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn (Orders MO-2213, PO-1849 and PO-2608).

Accordingly, I find that the information that is not related to the appellant, and that is subject to 21(3)(b), is exempt under section 21(1). Disclosure of this information would constitute an unjustified invasion of the personal privacy of identifiable individuals other than the appellant under section 21(1).

I will consider below the Ministry's exercise of discretion under section 49(b) with respect to the information that is related to the appellant and other identifiable individuals and that is subject to section 21(3)(b). This information consists of the information in four witness statements that contain the personal information of the appellant and other identifiable individuals.

EXERCISE OF DISCRETION

General principles

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)).

Relevant considerations

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

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information

- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

The Ministry submits that the records are, by their very nature, highly sensitive. They relate to an investigation of serious motor vehicle accidents. The OPP tried to determine how the collisions occurred, and why they occurred, and much of the personal information consists of individuals' recollections of the deceased. Much of the undisclosed personal information consists of phone numbers and other personal identifiers of the affected persons, which could be used to contact or to locate the individuals who provided their personal information.

The Ministry also submits that it exercised its discretion properly, having regard to the right of the appellant to access information as a "close relative" balanced against the privacy interests of other individuals.

Analysis/Findings

Based upon my review of the records and the Ministry's representations, I find that the Ministry exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

The information that I have found subject to section 21(3)(b) is sensitive personal information concerning identifiable individuals other than the appellant. In the circumstances of this appeal, I have found that disclosure of this personal information is not desirable for compassionate reasons, as it does not inform the appellant about the circumstances surrounding the death of the deceased.

Accordingly, I uphold the Ministry's exercise of discretion concerning the information in the records that is subject to section 21(3)(b) and contains the personal information of the appellant and other identifiable individuals. Therefore, this information is exempt under section 49(b).

ORDER:

1. I order the Ministry to disclose to the appellant by **August 30, 2011 and not before August 25, 2011** the personal information that I have found subject to section 21(4)(d). For ease of reference, I have provided the Ministry with a highlighted copy of the information to be disclosed in the records.
2. I uphold the Ministry's decision to withhold the remaining information in the records.
3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the information in the records disclosed to the appellant pursuant to provision 1.

Original signed by: _____
Diane Smith
Adjudicator

_____ July 25, 2011