

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3014

Appeal PA10-241

Ministry of Community Safety and Correctional Services

November 29, 2011

Summary: The appellant sought access to the Ontario Provincial Police officers' notes relating to a motor vehicle accident. The ministry granted access to some of the responsive notes, and on the basis of section 49(b), denied access to the portions it withheld. The withheld information contains the personal information of the affected parties and the ministry's decision to deny access to the withheld portions of the officers' notes is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1), 21(2)(d), (f) and (h), 21(3)(b) and 49(b)

Orders and Investigation Reports Considered: PO-1715

OVERVIEW:

[1] The appellant, who is represented by counsel, was a passenger in a vehicle that was involved in an accident on a specified date in 2008.

[2] The appellant subsequently made an access request to the Ministry of Community Safety and Correctional Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for the Ontario Provincial Police (OPP) "reporting officer's notes" with respect to the incident. The appellant's counsel provided the ministry with consents from the appellant and two other individuals permitting the release of their personal information.

[3] The ministry then issued a decision to the appellant, granting access to portions of the records that were responsive to the request. The ministry relied on the discretionary invasion of privacy exemption in section 49(b) of the *Act* to deny access to certain portions of the notes that it withheld. The ministry also advised that certain portions of the notes were not responsive to the request.

[4] During mediation, the mediator contacted an affected party identified in the records to inquire whether they would consent to the release of their personal information. The affected party provided their consent to the mediator who in turn sent it to the ministry. The ministry then issued a supplementary decision letter disclosing additional information relating to that affected party to the appellant. Also during mediation, the appellant confirmed that she is not seeking the information in the notes that the ministry indicated was not responsive to her request.

[5] During the inquiry into the appeal, I sought representations from the ministry, the appellant and four other affected parties. Only the ministry and the appellant provided representations. They were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] In the discussion that follows, I reach the following conclusions:

- the records contain the personal information of the appellant and other identified individuals;
- the withheld portions of the records qualify for exemption under section 49(b).

RECORDS:

[7] The records remaining at issue consist of the withheld portions of police officers' notebooks.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 49(b) apply to the information at issue?

DISCUSSION:

A. Do the records contain “personal information” as defined in section 2(1)?

[8] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[9] The ministry states that the records at issue contain the personal information of the appellant as well as that of other identified individuals. They submit that:

... the severed 7 pages of officers' notes contain personal information belonging to individuals who were involved in the motor vehicle collision, including one of the drivers, or who became involved as a result of their relationship with the driver. Their personal information includes their names, addresses and phone numbers, and their relationship to the driver or the collision. Because of the driver's involvement with the police there is much more sensitive personal information about the driver than anyone else.

[10] The appellant does not specifically address whether the record contains personal information.

[11] On my review of the police officers' notes, I find that they contain the personal information of the appellant, as they include information relating to the motor vehicle accident involving her along with other personal information about her (paragraph (h) of the definition).

[12] I also find that the withheld portions of the records contain the personal information of other identifiable individuals including their addresses and telephone numbers [paragraph (c)], and their names, along with other personal information relating to them [paragraph (h)].

B. Does the discretionary exemption at section 49(b) apply to the information at issue?

[13] 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 exceptions to this general right of access, including section 49(b). Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the ministry must look at the information and weigh the appellant's right of access to her own personal information against the affected persons' right to the protection of their privacy.

[14] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 21(2) provides some criteria for the ministry to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4)

refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Section 49(b)

[15] Section 49(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information,

Where the disclosure would constitute an unjustified invasion of another individual's personal privacy

[16] The ministry states that section 49(b) applies to the information remaining at issue. They also refer to the factors in sections 21(2)(f) and 21(2)(h) and the presumption in section 21(3)(b) in support of their decision.

[17] Sections 21(2)(f) and (h) read:

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

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

[18] 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;

[19] The ministry states:

The OPP is concerned, among other things, that the release of officers' notes would constitute a breach of [the affected parties'] privacy, which in turn, would harm the ability of the OPP to perform its duties. The OPP questions why any member of the public would ever speak frankly and

openly to the police, if they knew what they spoke of in confidence was subject to being publicly disclosed at any time, to any member of the public, without their consent, and without any restrictions as to the information's subsequent use.

...

All of the personal information that is being withheld in the OPP officers notes, and these notes were prepared solely because of a police investigation into one or more significant violations of the law arising from the motor vehicle collision.

[20] The appellant does not specifically raise the application of any factors favouring disclosure in section 21(2); nor does she directly address the ministry's submission that sections 21(2)(f) and (h) and 21(3)(b) apply to the personal information at issue. Rather, she asserts that there is information relating to the collision in the notes that should be disclosed. Her reasons for this assertion include:

- nothing has been received concerning any statements made by the other driver "which is unusual when making a standard request for Collision Statements/Witness statements"¹
- the related Motor Vehicle Accident Report shows that charges were laid against an affected party but that she "received no information from the officers' notes regarding this"
- for such a serious collision "it seems odd that more information would not have been given by [the affected party who consented to disclosure during mediation]"

[21] The appellant submits that the request was made to investigate the nature of the collision as it concerns a claim being made by the appellant for damages arising from the accident.

[22] Although not specifically relied upon by the appellant, by inference the appellant's submissions raise the possible application of the factor at section 21(2)(d) of the *Act* which reads:

¹ In reply the ministry took the position that if the appellant is now seeking witness statements a new access request must be made. I agree. The request at issue was for access to officers' notes, not to witness statements.

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

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[23] For section 21(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing²

Findings

[24] I have carefully reviewed the withheld portions of the notes. As indicated above, all of the withheld portions contain the personal information of identifiable individuals other than the appellant. Furthermore, disclosure of the severed portions of the records would reveal the identity of the affected persons to whom the information relates.

[25] The portions of the notes which the ministry claim qualify for exemption under section 49(b) include the affected parties' identities, addresses, telephone numbers and brief statements, as well as more extensive information and observations pertaining to one of the affected parties.

[26] It is clear that the records at issue in this appeal were compiled by the OPP in the course of its investigation of the motor vehicle accident involving the appellant. On the basis of the representations provided by the ministry, I am satisfied that the personal information remaining at issue was compiled and is identifiable as part of the

² Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

OPP investigation into a possible violation of law, and falls within the presumption in section 21(3)(b). In addition, I am satisfied that the personal information contained in the withheld portions of the records has been supplied in confidence by the affected parties whose information it is, within the meaning of section 21(2)(h). I also find that the character and quality of some of the information is "highly sensitive" within the meaning of section 21(2)(f).

[27] The appellant submits that the request relates to a claim being made by the appellant for damages arising from the accident. That said, the appellant has provided little for me to conclude that the personal information is *required* in order to prepare for a proceeding or to ensure an impartial hearing within the meaning of section 21(1)(d). In any event, as set out in Order PO-1715, the existence of disclosure processes available to parties in the court context reduces the weight accorded the section 21(2)(d) factor in certain circumstances. In my view, therefore, to the extent that section 21(2)(d) is a relevant consideration, I would give it little weight.

[28] Given the application of the factors in sections 21(2)(f) and (h) and the presumption in section 21(3)(b) and the little weight accorded to the factor in section 21(2)(d), I am satisfied that the disclosure of this information would constitute an unjustified invasion of the personal privacy of the affected parties. Accordingly, I find that the withheld portions of the records are exempt from disclosure under section 49(b) of the *Act*, subject to my review of the ministry's exercise of discretion.

EXERCISE OF DISCRETION:

[29] 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).

[30] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. Based on this information, as well as on the fact that some information in the notes was disclosed to the appellant, I am satisfied that the ministry has not erred in the exercise of its discretion not to disclose to the appellant the remaining information contained in the notes.

[31] Accordingly, I find that the withheld portions of the notes at issue in this appeal qualify for exemption under section 49(b).

ORDER:

I uphold the decision of the ministry and dismiss the appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ November 29, 2011 _____