

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3652

Appeal PA15-517

Ministry of Community Safety and Correctional Services

September 22, 2016

Summary: The appellant submitted an access request to the ministry for records related to a motor vehicle accident. The ministry identified responsive records and granted partial access, but denied access to some portions of the record citing the discretionary exemption at section 49(b) (personal privacy) read in conjunction with section 21(3)(b) (investigation into a possible violation of law). On appeal, the adjudicator upholds the ministry's decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21(1), 21(3), 47(1), 49(b).

Orders and Investigation Reports Considered: Order PO-3274.

BACKGROUND:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information held by the Ontario Provincial Police (the OPP) with respect to an identified motor vehicle accident.

[2] The ministry searched for responsive records and issued a decision letter granting partial access to the responsive records. Access was denied to some portions of the records pursuant to the discretionary exemption at section 49(b) (personal privacy), read in conjunction with section 21(3)(b) (investigation into a possible

violation of law) of the *Act*. Additionally, some information was withheld on the basis that it was not responsive to the request. The ministry also explained to the appellant that there are no statements available for this motor vehicle collision as the retention period had expired.

[3] The appellant appealed the ministry's decision and a mediator was assigned to the file.

[4] During mediation, the appellant confirmed that she seeks access to all of the information that has been withheld. Additionally, she advised that she is aware that no statements are available as they fall beyond the retention period and advised that she does not seek access to the information the ministry identified as being not responsive to the request.

[5] The mediator obtained partial consent from one of the affected parties and the ministry issued a supplementary decision letter disclosing the affected party's name and telephone number. Consent was not obtained from a second affected party.

[6] Mediation did not resolve all of the issues in this appeal and it was transferred to the adjudication stage of the appeals process. During the inquiry into this appeal, I sought representations from the ministry, the appellant and the affected parties. Only the ministry provided representations. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and Practice Direction 7.

[7] In this order, I uphold the ministry's decision to withhold the information at issue.

RECORDS:

[8] The records at issue consist of the withheld portions of an Occurrence Summary, a General Occurrence Report, and six pages of officers' notes.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(b) apply to the information at issue?
- C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[9] 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), 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,

(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,

(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;

[10] 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.¹

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[12] In its representations, the ministry submits that the records contain personal information about affected parties. This information includes their names, dates of birth, addresses, telephone numbers and their observations and views relating to the motor vehicle accident. The ministry submits that if the information is disclosed, it would identify the affected parties and link them to their involvement in the OPP

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

investigation. The ministry confirms that the appellant was provided with part of the record that contained his personal information and the record was severed so as not to disclose the personal information of the affected parties. In its representations, the ministry states that it determined that further severing of the record was not possible without disclosing the personal information belonging to the affected parties.

Finding

[13] From my review, I find that the record contains information that qualifies as the personal information of the appellant and the affected parties. The appellant and the affected parties' name, age, birthdate, address and other information about them falls within the ambit of paragraphs (a), (d), (g) and (h) of the definition of personal information in section 2(1) of the *Act*.

[14] I further find that the affected parties would be identified to the appellant if their information is disclosed.

[15] Under section 10 of the *Act*, if the ministry receives an access request that falls within one of the exceptions under sections 12 to 22, the ministry "shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions." The ministry submits that it has disclosed most of the appellant's personal information to him and what remains is his personal information that is intertwined with that of the affected parties. I will now consider the appellant's access to this information under section 49(b).

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

[16] Since I have found that the record contains both the personal information of the appellant and the affected parties, section 47(1) applies to this appeal. 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.

[17] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the appellant.

[18] 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 appellant. This involves a weighing of the appellant's right of access to his own personal information against the other individual's right to protection of their privacy.

[19] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 49(b).

[20] 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). None of these paragraphs apply to the information remaining at issue.

Section 21(3)

[21] 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). The ministry submits that the presumption at section 21(3)(b) of the *Act* applies to exempt the information from disclosure. Section 21(3)(b) 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;

[22] The ministry submits that the affected parties whose personal information is being protected have not consented to the disclosure of their personal information.

[23] The ministry refers to Adjudicator Daphne Loukidelis in Order PO-3273 where she found that the presumption in section 21(3)(b) applied to the personal information in motor vehicle accident records compiled by the OPP as part of a law enforcement investigation. The ministry points out that if the evidence gathered during the investigation had pointed in a different direction, charges could have been laid by the investigating OPP officers under either the *Criminal Code of Canada* and/or the *Highway Traffic Act*.

[24] As mentioned, the appellant did not make representations in this appeal and did not set out reasons for the appeal on the appeal form.

Finding

[25] I find that the personal information in the record was compiled and is identifiable as part of a police investigation as a result of a motor vehicle accident.

[26] I apply the reasoning in Order PO-3273 and find that the presumption in section 21(3)(b) applies to the personal information in the motor vehicle accident records compiled by the OPP as part of a law enforcement investigation. Therefore, even though no charges were laid by the police in this case, the information in the record falls within the section 21(3)(b) presumption and its disclosure is presumed to be an unjustified invasion of privacy.

[27] Furthermore, I find that there are no factors favouring disclosure of the information remaining at issue.

[28] Accordingly, I find that the presumption at section 21(3)(b) applies and the disclosure of the personal information in the record is presumed to be an unjustified invasion of privacy under section 49(b) subject to my finding on the ministry's exercise of discretion.

Issue C: Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[29] 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.

[30] In support of their exercise of discretion under section 49(b), the ministry submitted that:

- (a) The affected parties who were notified did not consent to the disclosure of their personal information remaining at issue;
- (b) The personal information presumptively constitutes an unjustified invasion of the affected parties' privacy, because it was compiled and is identifiable as part of an OPP law enforcement investigation;
- (c) The ministry is concerned that if disclosure occurred, witnesses would cease to cooperate with the OPP during law enforcement investigations, out of concern that their personal information would be disclosed, even in the absence of their consent; and,
- (d) The OPP treated the records in accordance with its usual practices.

[31] Having reviewed the ministry's representations on the factors it considered, I find that the ministry properly exercised its discretion having taken into account the relevant considerations of the spirit and content of the *Act*, the collection of personal information and the privacy interests of individuals.

[32] The appellant has been provided with the portions of the record which pertain to him. The portions of the record which have been withheld contain information about the appellant and the affected parties but are inextricably intertwined. There can be no further severance to the record without disclosing the personal information of an affected party.

[33] In summary, I find that section 49(b) of the *Act* applies to the information at issue and the record should not be disclosed.

ORDER:

I uphold the ministry's decision to withhold the remainder of the record at issue.

Original Signed by: _____

Alec Fadel
Adjudicator

September 22, 2016 _____