Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3687

Appeal PA14-284

Ministry of Community Safety and Correctional Services

January 13, 2017

Summary: The Ministry of Community Safety and Correctional Services (the ministry) received a request for access to driver information in regards to a specified incident. The ministry relied on section 21(1) (invasion of privacy) to deny access to the responsive information in a Motor Vehicle Accident Report. The appellant argued that exception to section 21(1) of the *Freedom of Information and Protection of Privacy Act* (the *Act*) set out in section 21(1)(d) (other act expressly authorizes disclosure) applied. In this order, the adjudicator finds that the exception to section 21(1) of the *Act* set out in section 21(1)(d) does not apply, and that section 21(1) applies to exempt the responsive information from disclosure.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1), 21(1)(d), 21(1)(f), 21(3)(b) and 38(2); *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, section 87; *Police Services Act*, R.S.O. 1990, c. P.15, sections 41(1), 41(1.1), 41(1.2) and 41(1.3); Ontario Regulation 265/98, sections 4(1) and 4(2).

Orders and Investigation Reports Considered: Investigation Report I95-030P, Orders M-292, MO-1179, MO-2030, MO-2344, PO-2266, PO-2239 and PO-2641.

Case Considered: *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502.

OVERVIEW:

[1] 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 or *FIPPA*) for access to driver information in regards to a specified incident, "so we can send an invoice to the appropriate person responsible". The requester subsequently clarified the request to be for access to "the name and address of the driver".

[2] The ministry identified a Motor Vehicle Accident Report as being responsive to the request and relied on section 21(1) (invasion of privacy) of the *Act* to deny access to the requested information.

[3] The requester (now the appellant) appealed the decision.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the act.

[5] During the inquiry into this appeal, I sought, and received, representations from the ministry and the appellant. I also invited the driver (the affected party) to provide representations, however this individual did not provide representations in response. The other parties' representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[6] In its representations, the appellant argued that the *Police Services Act*[1] (*PSA*) authorized the disclosure of the information it sought. Accordingly, the possible application of the exception to section 21(1) of the *Act* set out in section 21(1)(d) (other act expressly authorizes disclosure) became an issue in the appeal.

[7] In this order, I find that the exception to section 21(1) of the *Act* set out in section 21(1)(d) does not apply, and that in the circumstances section 21(1) applies to exempt the remaining information from disclosure. I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[8] Remaining at issue in this appeal is the name and address of the driver set out in the responsive Motor Vehicle Accident Report.

ISSUES:

A. Issue A: Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

B. **Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?**

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[1] R.S.O. 1990, c. P.15.

DISCUSSION:

Issue A: Does the record 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) 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 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] 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.[2]

[11] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[3]

[12] The ministry submits that in the circumstances of this appeal, the affected party's name and address is their personal information. The appellant does not dispute that the information at issue is the personal information of the affected party.

[13] I find that in the circumstances of this appeal the name and address of the affected party, qualifies as the affected party's personal information under section 2(1) of the *Act*.

Issue B: Does the mandatory exemption at section 21(1) apply to the information at issue?

[14] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[15] In its representations, the appellant argued that the *PSA* authorizes the disclosure of the information it seeks. Accordingly, the possible application of the exception to section 21(1) of the *Act* set out in section 21(1)(d) became an issue in the appeal.

Section 21(1)(d)

[16] Section 21(1)(d) provides that:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except:
>
> > under an Act of Ontario or Canada that expressly authorizes the disclosure:

The appellant's initial representations

[17] The appellant submits that the provisions of the *PSA* authorizes the disclosure of the requested information and/or disclosure of "the affected party's name at the very least".

[18] Relying on section 41(1) of the *PSA*, the appellant submits that the chiefs of

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[2] Order 11.
[3] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

police or their designates are given the discretion to disclose personal information, notwithstanding the provisions of *FIPPA*.

[19] Section 41 of the *PSA* reads, in part:

> (1.1) Despite any other Act, a chief of police, or a person designated by him or her for the purpose of this subsection, may disclose personal information about an individual in accordance with the regulations.
>
> (1.2) Any disclosure made under subsection (1.1) shall be for one or more of the following purposes:
>
> 1. Protection of the public.
>
> 2. Protection of victims of crime.
>
> 3. Keeping victims of crime informed of the law enforcement, judicial or correctional processes relevant to the crime that affected them.
>
> 4. Law enforcement.
>
> 5. Correctional purposes.
>
> 6. Administration of justice.
>
> 7. Enforcement of and compliance with any federal or provincial Act, regulation or government program.
>
> 8. Keeping the public informed of the law enforcement, judicial or correctional processes respecting any individual.
>
> (1.3) Any disclosure made under subsection (1.1) shall be deemed to be in compliance with clauses 42 (1) (e) of the *Freedom of Information and Protection of Privacy Act* and 32 (e) of the *Municipal Freedom of Information and Protection of Privacy Act*.

[20] The appellant focused on purpose number three as being the foundation for the disclosure of the requested information. In that regard it argues that although it is a corporation, it still qualifies as a "victim". It bases this argument on the definition of victim set out in section 4(1) of Regulation 265/98[4] under the *PSA*.

[21] Section 4(1) of Regulation 265/98 reads:

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[4] Ontario Regulation 265/98.

> In this section,
>
> "victim" means a person who, as a result of the commission of any offence under the Criminal Code (Canada) by another, suffers emotional or physical harm, loss of or damage to property or economic harm and, if the commission of the offence results in the death of the person, includes,
>
> > (a) a spouse of the person,
> >
> > (b) a child or parent of the person, within the meaning of section 1 of the *Family Law Act*, and
> >
> > (c) a dependant of the person, within the meaning of section 29 of the *Family Law Act*,
>
> but does not include a spouse, child, parent or dependant who is charged with or has been convicted of committing the offence.

[22] Although the language of the provision appears to limit a victim to persons who are individuals, the appellant argues that by virtue of the definition set out in section 87 of the *Legislation Act, 2006*[5], a corporation is a person and thereby falls within the scope of the provision.

[23] The appellant argues that as a victim it sustained damage to its property and, relying on section 4(2) of Regulation 265/98, is entitled to disclosure of the requested personal information. The appellant submits that this is because under section 4(2) of the regulation, the chief of police or his designate is permitted to provide personal information about an individual, including information about the progress of investigations with respect to an individual, whether or not charges were laid against the individual and, if no charges are laid, the reasons for same. The appellant submits that necessarily implicit in this is the discretion to identify the affected individual.

[24] Section 4(2) of Regulation 265/98 reads:

> A chief of police or his or her designate may disclose to a victim the following information about the individual who committed the offence if the victim requests the information:
>
> > 1. The progress of investigations that relate to the offence.
> >
> > 2. The charges laid with respect to the offence and, if no charges are laid, the reasons why no charges are laid.

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[5] S.O. 2006, c. 21, Sched. F. The appellant points to the following definition in that section: In every Act and regulation: "person" includes a corporation.

> 3. The dates and places of all significant proceedings that relate to the prosecution.
>
> 4. The outcome of all significant proceedings, including any proceedings on appeal.
>
> 5. Any pretrial arrangements that are made that relate to a plea that may be entered by the accused at trial.
>
> 6. The interim release and, in the event of conviction, the sentencing of an accused.
>
> 7. Any disposition made under section 672.54 or 672.58 of the *Criminal Code* (Canada) in respect of an accused who is found unfit to stand trial or who is found not criminally responsible on account of mental disorder.
>
> 8. Any application for release or any impending release of the individual convicted of the offence, including release in accordance with a program of temporary absence, on parole or on an unescorted temporary absence pass.
>
> 9. Any escape from custody of the individual convicted of the offence.
>
> 10. If the individual accused of committing the offence is found unfit to stand trial or is found not criminally responsible on account of mental disorder,
>
> > i. any hearing held with respect to the accused by the Review Board established or designated for Ontario pursuant to subsection 672.38 (1) of the *Criminal Code* (Canada),
> >
> > ii. any order of the Review Board directing the absolute or conditional discharge of the accused, and
> >
> > iii. any escape of the accused from custody.

[25] The appellant acknowledges that is not in a position to conclusively identify whether the damage to its property arises from "an offence under the *Criminal Code*". However, the appellant submits that it is clear from the manner in which the regulation is structured that it is not necessary to conclusively establish this fact by virtue of conviction. It submits that:

> Support for this proposition arises from the fact that section 4(2) of the Regulation permits disclosure of information about the affected individual

> including when a charge is not laid against them. This presumes no conviction is necessary to assess whether an offence under the *Code* has occurred.

The ministry's reply representations

[26] In reply, the ministry submits that the *PSA* does not support the argument that the definition of a victim includes a corporation. It points out that the definition of a 'victim' in Regulation 265/98 made under the *PSA* states it is someone who "suffers emotional or physical harm". The ministry argues that corporations cannot suffer emotional or physical harm.

[27] Referring to the victim's services website[6] and the *Victims' Bill of Rights, 1995*[7], the ministry argues that:

> It is clear that government policy and law supports disclosing personal information to individual victims of crime to ease the trauma associated with being a victim, and to encourage victims' participation in the judicial process. This disclosure gives victims the right to access personal information to which they would otherwise not be permitted access. We submit accordingly it is not reasonable to conclude that corporate entities were meant to be captured within the definition of 'victims' for the purpose of the *PSA*.

The appellant's sur-reply representations

[28] The appellant submits that it is not necessary for it to suffer all of the potential harms set out in the section in order to meet the definition of victim.

[29] With respect to the ministry's website reference, the appellant submits that the website referred to makes no reference to victims being exclusively limited to individuals. The appellant argues that even if it did it "would not have binding interpretive effect but would merely express the opinion of the ministry". The appellant adds:

> The [ministry] submits "It is clear that government policy and law supports disclosing personal information to individual victims of crime to ease trauma associated with being a victim … . With respect, the appellant notes nowhere is the easing of trauma identified as a purpose of disclosure in section 41(1.2) of the *Police Services Act*. This appears to be only the non-binding opinion of the ministry.

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[6] http://www.attorneygeneral.jus.gov.on.ca/english/ovss/about.asp.
[7] 1995, S.O. 1995, c. 6.

> Finally, the appellant notes that the institution makes reference to the *Victims' Bill of Rights, 1995* ("*VBR*"). The appellant notes that the reference does not appear to be relevant to this case since the argument is premised on the application of disclosure provisions in the *Police Services Act* and its regulations. However, the appellant notes that the *VBR* contains a similar definition of victim in s.1 of the Act including the same listing of harms. This definition also does not expressly exclude corporations either … .

Analysis and finding

[30] The phrase "under an Act of Ontario or Canada that expressly authorizes the disclosure" in section 21(1)(d) closely mirrors the phrase "expressly authorized by statute" in section 38(2) of the *Act*, relating to the collection of personal information. In considering whether a collection of personal information was "expressly authorized by statute", this office has stated that:

> …the phrase "expressly authorized by statute" in section 38(2) of the Act requires either that specific types of personal information collected be expressly described in the statute, or a general reference to the activity be set out in the statute, together with a specific reference to the personal information to be collected in a regulation under the statute; i.e., in a form or in the text of the regulation.[8]

[31] The Court of Appeal has approved of this approach in *Cash Converters Canada Inc. v. Oshawa (City)*.[9] That case concerned a city by-law governing the licensing of second-hand goods dealers. The Court found that the by-law was validly enacted under the provisions of the *Municipal Act, 2001*[10], permitting municipalities to govern businesses for the purpose of, among other things, consumer protection. However, the Court also determined that the provisions of the by-law mandating the collection of personal information were not "expressly authorized by statute":

> [36] The phrase "expressly authorized by statute" has been interpreted by the Commissioner to mean that the specific types of personal information collected be expressly described either in a statute or in a regulation that has been authorized by a general reference to the activity in a statute. See Investigation I95-030P, *A College of Applied Arts and Technology*, [1995] O.I.P.C. No. 546; Investigation I96-057M, *A Board of Education*, [1996] O.I.P.C. No. 449 at paras. 17-18.

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[8] Investigation Report I95-030P.
[9] 2007 ONCA 502.
[10] S.O. 2001, c. 25.

> [37] For example, s. 9 of the *Pawnbrokers Act* … specifically obliges a pawnbroker to keep a book with the full name, address and description of the person who pawns an article sufficient to identify the person as well as details of the person's identification or a note that the person did not produce identification, and s. 13 requires pawnbrokers to make a daily report of the information to the chief of police or the person designated by by-law. There is no similar provision in the *Municipal Act, 2001*. The structure of the Act indicates that it was not the intention of the legislature to allow municipalities, simply by virtue of their power to enact by-laws, to determine the type of personal information that can be collected.

[32] The Court of Appeal therefore indicated that the statutory grant of a power to enact by-laws for purposes under the *Municipal Act, 2001*, was not sufficient to be "express authorization" for the collection of personal information under the *Act*.

[33] A number of orders of this office have adopted the above approach in the context of access to information requests. These orders have found that in order for section 21(1)(d) or its municipal equivalent to apply, there must either be specific authorization in the statute for the disclosure of the type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in a regulation.[11]

[34] Section 4(2) of Regulation 265/98 describes the circumstances in which section 4(1) applies. The appellant cites section 4(2)1 and 4(2)2 as the foundation for its position, which would allow respectively for the disclosure of information relating to the progress of investigations that relate to the offence and the charges laid with respect to the offence and, if no charges are laid, the reasons why no charges are laid. There is no evidence before me that there is an ongoing investigation and the name and address of the appellant has nothing to do with charges laid with respect to the offence and, if no charges were, the reasons why no charges are laid.

[35] Since none of the sections of the Regulation cited by the appellant applies, section 21(1)(d) has no application. Even if I were to find that one or more of these sections of the Regulation applied, in my view, section 21(1)(d) would not apply in any event, because these disclosure powers granted by the Regulation are discretionary rather than mandatory in nature. The Regulation is designed to permit chiefs of police or their designates to exercise discretion in each case and to disclose personal information only where they deemed it appropriate in the circumstances. In some cases, even if the conditions for disclosure in the Regulation are met, the chief or designate may determine that the invasion of privacy resulting from disclosure

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[11] See Orders M-292, MO-2030, MO-2344, PO-2266 and PO-2641.

outweighs any benefit and decide not to disclose. If section 21(1)(d) were interpreted in a way that the personal information must be disclosed in the event the conditions in section 4(2) of the Regulation were met, this would undermine the discretionary nature of the power, the intent of the Regulation and one of the purposes of the *Act*, as set out in section 1(b), to protect the privacy of individuals with respect to personal information about themselves held by institutions.[12]

[36] Having concluded that the exception in 21(1)(d) does not apply, I turn to consider whether another exception to the personal privacy exemption applies. In this case, the only other exception that may be relevant is section 21(1)(f), that is, where disclosure is not an unjustified invasion of personal privacy.

Section 21(1)(f)

[37] Section 21(1)(f) reads as follows:

> A head shall refuse to disclose personal information to any person other than the individual to whom the individual relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[38] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[39] 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 21(1). 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.[13] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[14] In order to find that disclosure does *not* constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.[15]

[40] The ministry submits that the disclosure of the personal information at issue would be an unjustified invasion of privacy under section 21(1)(f). The ministry claims

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[12] See in this regard the discussion in Order MO-1179.
[13] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).
[14] Order P-239.
[15] Orders PO-2267 and PO-2733.

that the presumption in section 21(3)(b) applies in this case. The ministry submits that:

> The personal information in this instance is contained in records, which were prepared by the OPP, and which are identifiable as part of an investigation into a specified incident. If the evidence had warranted, the OPP investigation could have led to charges, most likely under the *Criminal Code* or the *Highway Traffic Act*.

[41] In support of its position, the ministry relies on Order PO-2239, submitting that:

> … In that order, the IPC upheld the ministry decision that a motor vehicle accident record was properly protected pursuant to the mandatory exemption in section 21(3)(b). The ministry submits that the reasoning in that order should be adopted for the purposes of the appeal.

[42] The ministry also relies on the factor listed in section 21(2)(f) claiming that the information at issue is highly sensitive.

[43] The appellant made no specific submissions on the application of the presumption at section 21(3)(b) or the factor at section 21(2)(f). The appellant maintains that that the affected party is responsible for damage to its property and seeks the information in order to seek reimbursement for its property damage. This could potentially raise the application of the factor at section 21(2)(d) of the *Act*.

[44] Sections 21(2)(d) and (f) and 21(3)(b) read:

> (2) 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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) 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;

21(3)(b): investigation into violation of law

[45] 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.[16] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[17]

[46] The record relates 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 personal information was compiled and is identifiable as part of an investigation into a possible violation of law. I am therefore satisfied that 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*).

[47] 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.[18] Section 21(4) is not applicable in the circumstances of this appeal. The appellant did not raise the possible application of the "public interest override" at section 23, nor in my view would it apply. Accordingly, as I have found that section 21(3)(b) applies it is not necessary for me to also consider whether the factors at section 21(2)(d) or 21(2)(f) might also apply.

[48] As I have found that disclosing the information is a presumed unjustified invasion of personal privacy, I find that in the circumstances section 21(1) applies to exempt the remaining information from disclosure.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: January 13, 2017
Steven Faughnan
Adjudicator

[16] Orders P-242 and MO-2235.
[17] Orders MO-2213 and PO-1849.
[18] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).