

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3708

Appeal PA15-532

Ministry of Community Safety and Correctional Services

March 16, 2017

Summary: The appellant made a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information about an Ontario Provincial Police investigation of a motor vehicle accident. The appellant seeks to establish whether there was any discussion of his steering wheel locking in connection with the accident. The record at issue is a witness statement by an affected party. The ministry denied access to this record under section 49(b) of the *Act* (personal privacy). During the adjudication of the appeal, the affected party consented to the disclosure of part of his statement. The adjudicator finds that, although the affected party may have been driving in a commercial capacity, the statement contains his personal information as well as that of the appellant and an additional affected party. Information at issue whose disclosure is consented to by the affected party is not exempt under section 49(b), and the adjudicator orders it to be disclosed. The remaining information is exempt under section 49(b).

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

Orders and Investigation Reports Considered: Orders MO-2565 and PO-2225.

OVERVIEW:

[1] The appellant submitted a request to the Ministry of Community Safety and Correctional Services (the ministry) under the Freedom of Information and Protection of

Privacy Act (the Act) for access to records regarding a motor vehicle accident. Specifically, the request was for the following:

1. Field Notes and Witness Statements; and
2. A copy of the note book/officer's handwritten notes.

[2] The ministry identified the following Ontario Provincial Police (OPP) records as responsive to the request:

- police notes;
- the appellant's statement; and
- the statement of the second driver (the affected party).

[3] In its access decision, the ministry provided full access to the appellant's statement. It denied access to some information in the police notes on the basis that it was not responsive to the request. The ministry also denied access to the affected party's statement in full pursuant to section 49(b) (personal privacy) of the *Act*, with reference to the presumed unjustified invasion of privacy in section 21(3)(b).

[4] The appellant appealed the denial of access.

[5] The appeal was assigned to a mediator under section 51 of the *Act*. During mediation, the appellant confirmed that he was not seeking access to the information denied in the police notes. As a result, the officer's notes are not at issue in this appeal. The appellant also advised the mediator that he seeks access to the affected party's statement. Therefore, the affected party's statement remains at issue in this appeal.

[6] Mediation did not resolve the issue of access to the affected party's statement, and accordingly, the appeal moved on to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I began the inquiry by sending Notices of Inquiry to the ministry and the affected party, outlining the issues in the appeal and inviting them to provide representations. The ministry responded with representations. The affected party consented to partial disclosure of his statement, with his name and certain other information severed.

[7] The appellant also responded to my letter advising that I had invited representations from the ministry and affected party. In his letter, the appellant stated:

Please note we are only interested in receiving the witness statements and all officer field notes for the purposes of confirming whether there was ever any discussion regarding the fact that [the appellant]'s steering wheel locked and this is why he lost control of the vehicle, which is the cause of the rear-end collision.

[8] Subsequently, I sent a Notice of Inquiry to the appellant, including the ministry's representations, and invited him to provide his representations. The Notice of Inquiry included the following, in response to the statements by the appellant that I have just quoted from his letter:

The appellant had previously narrowed the request to include only the affected party's statement, and as noted above, officer's field notes are not at issue. The appellant may not now seek to expand the request to include these notes.

It is not clear that the record addresses the subject referred to by the appellant in his letter.

[9] I invited the appellant to provide representations on all issues, including those I have just noted. The appellant responded by reaffirming the statements made in his earlier letter, quoted above.

[10] Given that the appellant seeks to "confirm" whether there was discussion of his steering wheel locking, and that he has not withdrawn his appeal, I have proceeded to complete the inquiry by issuing this order.

[11] In the result, Information at issue whose disclosure is consented to by the affected party is not exempt under section 49(b), and I am ordering it to be disclosed. The remaining information is exempt under section 49(b).

RECORDS:

[12] The record remaining at issue is a one-page statement that the affected party provided to the OPP.

ISSUES:

- A. Does the record 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?
- C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[13] In order to determine whether section 49(b) applies, it is necessary, as a preliminary step, to decide whether the record contains “personal information” and, if so, to whom it relates. Only personal information of individuals other than the appellant can be exempt under section 49(b). “Personal information” 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;

[14] 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.¹

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

(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.

[16] 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.²

[17] 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.³

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[19] The ministry submits:

. . . that the record we have exempted contains personal information within the meaning of the definition in section 2 of [the *Act*]. The personal information is contained in a witness statement provided by the affected party to the OPP. The personal information at issue includes the affected party's name, date of birth, address, telephone number, the name of an employer, and the affected party's account of the party's involvement in a motor vehicle accident. As a result of the detailed personal information in the record, it is our position that its disclosure would likely reveal the identity of the affected party, and the affected party's opinions and actions which were collected as evidence for the purpose of the OPP investigation.

¹ Order 11.

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[20] The appellant has not commented on whether the records contain personal information.

[21] Having reviewed the record, I find that its narrative portion contains the personal information of the affected party, as described by the ministry. In addition, it contains the personal information, in the form of name, address and date of birth, of an additional affected party who I was unable to notify concerning this appeal. It also contains the appellant's personal information because it describes an accident in which he was involved.

[22] Based on the contents of the record, it appears that the affected party's driving on this occasion may have been related to a business activity. For this reason, I provided the ministry with a copy of Order MO-2565, which found that the name of the driver of a commercial vehicle that had brought down hydro wires in front of the home of the appellant in that case was not the driver's personal information. Order MO-2565 also found that the name of the company was not personal information.

[23] The ministry observes that in Order MO-2565, the adjudicator did not refer to Order PO-2225, and submits that Order MO-2565 is therefore irrelevant. Order PO-2225 describes the distinction between personal information and business information and, as the ministry points out, it has been followed in many subsequent decisions.⁵ Order PO-2225 sets out the following two-step analysis as a basis for deciding this issue:

. . . the first question to ask in a case such as this is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

. . .

The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[24] Under the first step analysis in Order PO-2225, the evidence is not conclusive. It is possible that the affected party's involvement was in a business context if he was in fact engaged in commercial driving at the time. However, under the second step, I conclude that, on the facts before me in this case, disclosure of the affected party's name and business contact information, along with the other information in the records, would reveal information about the affected party that is not in the ordinary course of business and is inherently personal in nature. In my view, in this context, section 2(3)

⁵ See, for example, Order MO-3366.

should not be interpreted as precluding a finding that the affected party's name and contact information are personal information.

[25] Accordingly, the outcome in this case differs from Order MO-2565. I find that in the circumstances of this case, the affected party's name and contact information qualify as personal information.

[26] In summary, the record consists of the personal information of the appellant, the affected party, and the additional affected party.

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

[27] 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.

[28] 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 requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.⁶

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

[30] 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).

Consent – Section 21(1)(a)

[31] Because the affected party has consented to disclosure of part of his statement, section 21(1)(a) must be considered. It states that "[a] head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, . . . upon the prior written consent of the individual, if the record is one to which the individual is entitled to have access."

[32] With respect to consent, the ministry submits:

The Ministry's position is that if the affected party provides consent, the Ministry is not opposed to the release of the witness statement. However,

⁶ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

if the affected party does not provide consent, the Ministry is of the view that the record at issue should be protected under the [Acf]. . . .

[33] In this submission, the ministry appears to concede that the affected party would be entitled to have access to his own statement. The consent form signed by the affected party states that he consents “. . . to disclosure of my statement to the [OPP] with respect to a motor vehicle accident that occurred on [date] except for my name, address, contact information and date of birth.” The affected party adds, “please don’t release my name address or my company [information].”

[34] With the exceptions noted here by the affected party, and two additional exceptions outlined below, I find that the affected party has consented to disclosure of the remainder of his statement, which would therefore not be an unjustified invasion of personal privacy, and that information is not exempt under section 49(b).

[35] The first exception is the affected party’s driver’s licence number, which bears no relation to the information the appellant seeks, as described earlier. As it is sensitive personal information of the affected party, I will not order it disclosed, and will not discuss it further in this order.

[36] The second exception is the name, date of birth and address of the additional affected party. As I was not able to contact this party, he has not been notified of this appeal. Again, this bears no relation to the information the appellant seeks and I will not order it disclosed, nor discuss it further in this order.

[37] To summarize, based on the affected party’s consent, I find that section 21(1)(a) applies to the record, subject to the exceptions noted above. In particular, the affected party’s consent applies to the entire narrative portion of his statement, which will therefore be ordered disclosed.

Sections 21(2) and (3)

[38] I will now consider whether disclosure of the remaining information, which is, essentially, the name, contact information and employment information of the affected party, would be an unjustified invasion of personal privacy.

[39] In determining this issue under section 49(b), I will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁷

[40] The appellant makes no submissions in relation to these sections, and given that his interest in the record clearly relates to the narrative portion, which I have found not to be exempt, I am unable to conclude that any factors favour disclosure of the

⁷ Order MO-2954.

remaining information.

[41] The ministry relies on the presumed unjustified invasion of personal privacy under section 21(3)(b). This section states, in part, that “[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. . . .”

[42] It is clear that the record was compiled as part of an OPP investigation into the motor vehicle accident referred to in the records. Part of the purpose of such an investigation is to determine whether charges are warranted based on possible violations of the *Highway Traffic Act* and/or the *Criminal Code*.

[43] I find that the section 21(3)(b) presumption applies to all of the information that remains at issue.

[44] As it has not been demonstrated that the appellant knows the identity of the affected party, and the appellant is unlikely to be aware of the other information that is being withheld, I find that the absurd result principle does not apply here.⁸

[45] Absent any factors favouring disclosure, I find that disclosure of the remaining information would constitute an unjustified invasion of personal privacy, and the section 49(b) exemption therefore applies to that information.

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

[46] 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.

[47] 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.

[48] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁹ This office may not, however,

⁸ Orders M-444 and MO-1323.

⁹ Order MO-1573.

substitute its own discretion for that of the institution.¹⁰

[49] The ministry submits that it exercised its discretion based on the following considerations:

- a. The public policy interest in protecting the privacy of personal information belonging to an affected individual who is associated with a law enforcement investigation, particularly where the affected individual has not consented to their personal information being disclosed; and,
- b. The public policy interest in safeguarding the confidentiality of law enforcement records on the basis that individuals may cease cooperating with the police if they know that the information they provide is subject to disclosure in the manner contemplated by this appeal.

[50] The affected party had not yet provided consent when the ministry prepared these representations, so this was a relevant factor when the ministry made its initial decision. The affected party's consent, received during the adjudication process, has resulted in my ordering disclosure of a substantial portion of the record, including the narrative portion in its entirety.

[51] It is evident from the ministry's disclosures at the request stage that the ministry sought to disclose as much information as possible without disclosing exempt personal information.

[52] The appellant does not address this issue.

[53] I find that the ministry took relevant factors into account, and not irrelevant ones, in deciding to apply the discretionary exemption in section 49(b). I therefore uphold the ministry's exercise of discretion in relation to the information I have found exempt under section 49(b).

ORDER:

1. I uphold the ministry's decision to deny access to part of the record.
2. For greater certainty, I am enclosing, with the copy of this order that is being sent to the ministry, a copy of the record on which the exempt information is highlighted. The highlighted information is *not* to be disclosed.

¹⁰ See section 54(2).

3. I order the ministry to disclose to the appellant the parts of the record that are not highlighted on the enclosed copy, not later than **April 24, 2017** and not earlier than **April 18, 2017** by sending a copy to the appellant.

Original Signed by: _____

John Higgins
Adjudicator

_____ March 16, 2017