

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4319

Appeal PA20-00477

Ministry of the Solicitor General

October 28, 2022

Summary: The ministry received and responded to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specified motor vehicle collision. The ministry issued a decision granting partial access to two responsive records. The information remaining at issue in this appeal is withheld under the discretionary personal privacy exemption at section 49(b). The ministry also found some portions of the records to not be responsive to the request. In this order, the adjudicator partially upholds the ministry's decision, but she orders the ministry to disclose additional information to the appellant.

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(2)(f), 21(3)(b), and 49(b).

OVERVIEW:

[1] On February 10, 2020, a motor vehicle collision occurred in Ontario. Subsequently, one of the individuals involved in the collision made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a "copy of the motor vehicle accident report and any witness statements that were collected by the police officers who attended the accident" to the Ministry of the Solicitor General (the ministry).

[2] The ministry identified two responsive records (an occurrence summary report

and a police officer's handwritten notes) and issued an access decision. The ministry granted partial access to these records, relying on sections 49(a) (discretion to refuse to disclose requester's own information), read with section 14(1)(l) (law enforcement information), and section 49(b) (personal privacy) to deny access to the portions it withheld. The ministry also took the position that certain information in the records were not responsive to the request.

[3] The requester (now the appellant) appealed the ministry's access decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] Although mediation was attempted, it did not resolve the appeal. As such, the appeal was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[5] The adjudicator initially assigned to this appeal invited the ministry and the appellant to provide representations on the issues in this appeal. He received representations from both parties. This appeal was subsequently transferred to me to adjudicate.¹

[6] During the inquiry, the appellant noted that he is not seeking the Workplace Identification Number (WIN) of any officer or police personnel involved as that information is not relevant and not of assistance. As such, I have removed this withheld information from the scope of this appeal.

[7] The appellant also states that he is not interested in pursuing access to the police codes unless such codes are necessary for the understanding of the information provided in the occurrence summary report (the report). In my view, such codes are not necessary to understanding the report. As such, I have removed the withheld information pertaining to police codes from the scope of this appeal. As access to the police codes are no longer an issue, I have removed section 49(a) read with section 14(1)(l) from the scope of this appeal.

[8] In this order, I partially uphold the ministry's access decision. I order the ministry to disclose additional information to the appellant that is not exempt under the *Act*.

RECORDS:

[9] At issue in this appeal are the withheld portions of a report and a police officer's handwritten notes.

¹ I have reviewed the parties' representations and have decided that I do not require further representations before making my decision.

ISSUES:

- A. What is the scope of the request for records? What information is responsive to the request?
- B. Do the records contain “personal information” as defined in section 2(1) and, if so, whose personal information is it?
- C. Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?
- D. Did the ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

A: What is the scope of the request for records? What information is responsive to the request?

[10] As the ministry took the position that certain withheld portions in the records were not responsive to the request in its decision, this issue was added to the appeal.

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester’s favour.² To be considered responsive to the request, records

² Orders P-134 and P-880.

must "reasonably relate" to the request.³

[13] The ministry submits the request was sufficiently detailed to identify responsive records. It also submits that it chose to respond literally to the request because the request was clearly set out as it contained the Ontario Provincial Police (OPP) incident number. While the ministry claimed that certain portions of the records were not responsive to the appellant's request it did not specifically identify which of the withheld portions of the records it considers to be not responsive to the request.

[14] On my review, I find a few withheld portions of the records to not "reasonably relate" to the appellant's request. With respect to the report, there are withheld portions pertaining to when and whom printed it for the purpose of responding to the request. These withheld portions are not reasonably related to the appellant's request as they deal with the details of the printing of the report. With respect to the police officer's handwritten notes, the bottom withheld portion of the second page is not reasonably related to the appellant's request as it pertains to a different incident in which the police officer attended. Accordingly, I uphold the ministry's decision to withhold those portions discussed above as not responsive to the request.

B: Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[15] In order to decide whether section 49(b) applies, I must first decide whether the records contain "personal information," and if so, to whom this personal information relates.

[16] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." Recorded information is information recorded in any format, including paper and electronic records.⁴

[17] Information is "about" the individual when it refers to them in their personal capacity, meaning that it reveals something of a personal nature about them. Generally, information about an individual in their professional, official, or business capacity is not considered to be "about" the individual if it does not reveal something of a personal nature about them.⁵

[18] Information is about an "identifiable individual" if it is reasonable to expect that an individual can be identified from the information either by itself or if combined with

³ Orders P-880 and PO-2661.

⁴ The definition of "records" in section 2(1) includes paper records, electronic records, digital photographs, videos and maps. The record before me is a paper record located by searching a police database.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

other information.⁶

[19] Section 2(1) of the *Act* gives a list of examples of personal information. All of the examples that are relevant to this appeal are set out below:

“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,

...

(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,

...

(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.

[20] Sections 2(2.1) and (2.2) distinguish personal information from information about an individual in a business or professional capacity. Section 2(2.1) states that:

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.

[21] To qualify as personal information, the information must be about the individual in a personal capacity. In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be “personal information” if it reveals something of a personal nature about the individual.⁷

[22] The list of examples of personal information under section 2(1) is not a complete

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

list. This means that other kinds of information could also be "personal information."⁸

[23] It is important to know whose personal information is in the records. If the records contain the requester's own personal information, their access rights are greater than if it does not.⁹ Also, if the records contain the personal information of other individuals, one of the personal privacy exemptions might apply.¹⁰

[24] The ministry submits that the records contain "personal information" as defined in section 2(1) of the *Act*. It submits that the name and other identifying information belonging to affected party individuals are in the records.

[25] Although the appellant provided representations, his representations did not address this issue.

[26] I note that the appellant has been granted access to most of the information in the records and the remaining withheld information contains information that would qualify as the personal information of the appellant and other identified individuals within the meaning of that term as defined in section 2(1) of the *Act*.

[27] With respect to the withheld information at the top of page 2 of the police officer's handwritten notes, it contains the personal information of the appellant and another individual. However, I find that the appellant's personal information can be disclosed to him after severing three lines about the other individual. As the personal privacy exemptions cannot apply to exempt the appellant's own personal information from disclosure to himself, I will order the ministry to disclose all of the withheld information at the top of page 2 of the police officer's handwritten notes (excluding the three lines discussed above) to him in accordance with the highlighted records enclosed with this order. I will consider whether the withheld information related to the other individual is exempt under section 49(b) below.

[28] In addition, I find that the withheld information about the vehicles involved in the collision (found on page 2 of the police officer's handwritten notes) is not the personal information about any identifiable individual as it pertains to the vehicles. As only personal information can be withheld under section 49(b) and the ministry has not claimed any other discretionary exemption for this information, I will order it to be disclosed to the appellant.

[29] As I have found that the withheld information in the report and the police officer's handwritten notes contain the personal information of the appellant along with other identifiable individuals, I will consider the appellant's access to the records under

⁸ Order 11.

⁹ Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

¹⁰ See sections 21(1) and 49(b).

Part III of the *Act*.

C: Does the discretionary personal privacy exemption at section 49(b) apply to the information at issue?

[30] 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.

[31] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of exceptions in sections 21(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[32] Sections 21(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[33] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.¹¹

[34] If any of sections 21(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). 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.¹² The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹³

Analysis and findings

[35] I note that the withheld personal information does not fit within the exceptions set out in section 21(1)(a) to (e) nor section 21(4) of the *Act*. As such, I will turn to discuss whether any of the factors or presumptions under sections 21(2) and (3) apply.

¹¹ Order MO-2954.

¹² Order P-239.

¹³ Order P-99.

[36] The ministry relies on the presumption in section 21(3)(b) and the factor favouring non-disclosure in section 21(2)(f) to withhold the personal information under section 49(b). Sections 21(2)(f) and 21(3)(b) state:

(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,

(f) the personal information is highly sensitive;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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.

[37] The ministry submits that the withheld personal information was collected during an OPP investigation resulting from a motor vehicle collision. It relies on Orders PO-3218, PO-3544, PO-3766, PO-3712 and PO-3897, which have upheld their application of section 21(3)(b) to OPP investigative records containing affected parties' personal information.

[38] 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.¹⁴ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.¹⁵

[39] Based on my review of the records, I find that the presumption at section 21(3)(b) applies in this circumstance. The records concern information about an investigation resulting from a motor vehicle collision. The withheld information was compiled and is identifiable as part of the OPP investigation into a possible violation of the *Highway Traffic Act* or the *Criminal Code of Canada* which did not result in any charges being laid. Although no charges were laid, there need only have been an investigation into a possible violation of law for the presumption at section 21(3)(b) to apply.¹⁶ Section 21(3)(b) therefore weighs in favour of non-disclosure of the withheld personal information.

[40] The ministry also relies on the factor in section 21(2)(f). It points out that in Order P-1618, the IPC found that the personal information of individuals who were "complainants, witnesses or suspects" as part of their contact with the OPP was "highly sensitive" pursuant to this subsection. The ministry also relies on Order PO-3712, where

¹⁴ Orders P-242 and MO-2235.

¹⁵ Orders MO-2213, PO-1849 and PO-2608.

¹⁶ Orders P-242 and MO-2235.

the IPC upheld the application of section 21(2)(f) where consent had not been provided by affected parties.

[41] In the appellant's representations, his counsel submits that the withheld personal information is not highly sensitive as it is information pertaining to a motor vehicle collision. He points out that it is required by law for the involved parties to exchange their name, address and insurance coverage.

[42] To be considered highly sensitive, however, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁷

[43] In Order MO-2980, Adjudicator Colin Bhattacharjee found that whether an individual's name and address is highly sensitive depends on the context, and should be assessed on a case-by-case basis. Specifically, Adjudicator Bhattacharjee wrote:

An individual's name and address is not always sensitive information. For example, the names and addresses of most individuals appear in publically accessible telephone or online 411 directories and are clearly not highly sensitive in that context.

However, the names and addresses of individuals have greater sensitivity when this information is collected by the state or agencies of the state such as the police ...

[44] I agree with and adopt the above reasoning for the purpose of this appeal.

[45] In this case, the affected parties' personal information (such as their name, date of birth and address) is contained in a police report. I, therefore, find that the context suggests the personal information is highly sensitive. As such, disclosure of their personal information may likely cause the affected parties' significant personal distress as the factor in section 21(2)(f) requires. As a result, I give this factor some weight.

[46] I note that the appellant did not raise any of the listed factors favouring disclosure of the withheld personal information. The appellant states that he is starting a civil action and requires the personal information of the other driver and witnesses (if any were present). He also states that he needs to know the reason for why the other driver was not charged for failing to obey a stop sign. While section 21(2)(d) deals with the fair determination of rights as a factor favouring disclosure, I find that the appellant has not established that this factor is relevant to my determination.

[47] However, as an unlisted factor, I will consider that the appellant wants the withheld personal information for the purpose of his civil action against the other driver in the motor vehicle collision, especially the reason for why the other driver was not charged for failing to obey a stop sign. I give this factor some weight in favour of

¹⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

disclosure.

[48] Having reviewed the withheld personal information and considering the factors (listed and unlisted) and presumption in sections 21(2) and (3), I find that disclosure of the withheld information would be an unjustified invasion of the affected parties' personal privacy. The personal information was compiled and is identifiable as part of the OPP investigation. While I also give weight to the appellant's need to know the personal information of the other driver and witnesses (if any were present) for his civil action, I find that it is outweighed by the presumption in section 21(3)(b) and the factor in section 21(2)(f) weighing in favour of non-disclosure. Accordingly, I find that the remaining personal information is exempt under section 49(b) subject to my finding on the ministry's exercise of discretion.

[49] Finally, I note that the withheld personal information at the top of page 2 of the police officer's handwritten notes is about an affected party and the appellant. In my view, the absurd result principle applies to the withheld personal information about this affected party. This principle states that where the appellant originally supplied the information, or the appellant is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.¹⁸ In this case, given the circumstances set out in the notes and the identity of the affected party, I find that the appellant would otherwise be aware of the withheld personal information relating to this individual. As such, it would be absurd to withhold this affected party's personal information from him and find that it is not exempt from disclosure under the discretionary privacy exemption at section 49(b) of the *Act*.

D: Did the ministry exercise its discretion under section 49(b)? If so, should the IPC uphold the exercise of discretion?

[50] The section 49(b) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[51] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[52] In either case, the IPC may send the matter back to the institution for an

¹⁸ Orders M-444 and MO-1323. Section 38(b) is the municipal equivalent of section 49(b).

exercise of discretion based on proper considerations.¹⁹ The IPC cannot, however, substitute its own discretion for that of the institution.²⁰

[53] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:²¹

- 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, and
 - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking their 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, and
- the historic practice of the institution with respect to similar information.

[54] The ministry submits that it had exercised its discretion appropriately by taking into the following considerations. First, the usual practice of the OPP, which is to protect affected parties' personal information contained in investigative records. Second, successive IPC orders, which have upheld its decision to exempt affected parties' personal information from disclosure. Finally, the failure to obtain or in other instances

¹⁹ Order MO-1573.

²⁰ Section 43(2).

²¹ Orders P-344 and MO-1573.

to even seek consent of affected parties identified in the records.

[55] Although the appellant provided representations, his representations did not address this issue.

[56] Based on my review of the parties' representations and the nature and the content of the records at issue, I find that the ministry properly exercised its discretion to withhold the personal information pursuant to the discretionary personal privacy exemption at section 49(b) of the *Act*. I note that the ministry took into account the following relevant considerations: the relationship between the appellant and the affected parties; and the wording of the exemption and the interests it seeks to protect. I am satisfied that the ministry took into account relevant considerations, and did not act in bad faith or for an improper purpose. Accordingly, I uphold the ministry's exercise of discretion in deciding to withhold the personal information in the records, pursuant to the section 49(b) exemption.

ORDER:

1. I order the ministry to disclose the withheld personal information about the affected party at the top of page 2 of the police officer's handwritten notes and the withheld information about the vehicles on page 2 of the police officer's handwritten notes to the appellant by **December 5, 2022** but not before **November 30, 2022**. I have identified the portions that the ministry must disclose by highlighting them in brown on the copy of the records provided to the ministry with this order.
2. I otherwise uphold the ministry's access decision.
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 records disclosed upon request.

Original Signed By: _____
Lan An
Adjudicator

_____ October 28, 2022