



**Information and Privacy
Commissioner/Ontario**
**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-1083

Appeal P-9500488

Ministry of Transportation



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BACKGROUND:

On the evening of December 18, 1994, an accident occurred in the City of North York. A pedestrian was struck and killed by an automobile. The driver of the automobile (the driver) was an elderly man. The family of the deceased believes that the driver may not have had adequate vision for operating a motor vehicle at night.

The family and estate of the deceased, represented by counsel, intend to bring an action against the driver for the negligent operation of a motor vehicle. Counsel states that the basis of the claim is that, because of his impaired eyesight, the driver was unfit to drive at the time of the accident.

NATURE OF THE APPEAL:

Counsel submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Transportation (the Ministry) for access to information pertaining to any restrictions on the driver's driver's licence as of the date of the accident. In particular, he sought access to:

- (1) the date and results of the last vision test administered by the Ministry to the driver; and
- (2) the particulars of all test results of any driving test administered to the driver in the two years immediately preceding the accident.

The Ministry refused to confirm or deny the existence of responsive records under section 21(5) of the Act. Counsel appealed this decision.

During mediation of the appeal, the Ministry issued a revised decision in which it acknowledged that records existed, but claimed that to disclose them would result in the unjustified invasion of the personal privacy of the driver (section 21(1) of the Act). The records identified by the Ministry are the driver's applications for renewal of his licence for the years 1993 and 1994, as well as the record of his driver examination for 1994. At this time, counsel raised the issue of the application of section 23 of the Act, arguing that there is a compelling public interest in disclosure of the records.

A Notice of Inquiry was sent to the Ministry, counsel and the driver. Representations were received from the Ministry and counsel. The Notice sent to the driver was returned to this office marked "deceased".

The Ministry subsequently issued another decision letter in which it disclosed to the appellant all of the information on the two renewal applications with the exception of the answer to question 3 and the results of the vision test. The Ministry also disclosed most of the 1994 driver examination document with the exception of the answers to questions 1 and 2, the vision test results, the evaluation of the road test, and the sections entitled "the summary reasons for disqualification", "improper use of", "violation of law-time-location" and "dangerous action". Only those portions of the records which have been withheld are still at issue in this appeal.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and 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.

The records at issue contain the personal information solely of the driver. Personal information includes such information about an individual unless he or she has been dead for more than 30 years (section 2(2) of the Act). The driver has just recently passed away and, accordingly, the information at issue still qualifies as his personal information.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. If none of the presumptions in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all the other circumstances that are relevant in the circumstances of the case.

The Ministry submits that the information contained in the records gives rise to a presumed unjustified invasion of personal privacy on the basis of sections 21(3)(a) and (g). These sections state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

Question 3 on the driver’s licence renewal forms for 1993 and 1994 pertains to various medical conditions which relate to the driver’s fitness to drive. This question also appears in the record of driver examination, as does one related to the wearing of contact lenses (questions 1 and 2). The renewal forms also contain a section entitled “Preliminary Exam” which, according to the Ministry, records the driver’s vision test results. This information also appears in the 1994 record of the driver examination.

I accept the Ministry’s submissions that the vision test results and the answers to the questions satisfy the presumption in section 21(3)(a) of the Act.

The balance of the information at issue consists of the specifics of the driver’s driving test results for his 1994 examination, as well as the sections of the form entitled “the summary reasons for disqualification”, “improper use of”, “violation of law-time-location” and “dangerous action”. The Ministry claims that

this information falls within the section 21(3)(g) presumption in that it consists of a personal evaluation of his driving skills by the examiner. The Ministry states that the criteria on which such skills are assessed are measurable standards according to the definition which past orders of the Commissioner's office have applied when considering this section. I agree.

Counsel concedes that the disclosure of the requested information is presumed to constitute an unjustified invasion of personal privacy by virtue of section 21(3) of the Act. However, he maintains that the Ministry may nonetheless consider all the relevant circumstances when determining whether the disclosure of the information constitutes an unjustified invasion of privacy.

In John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. 767, the Divisional Court ruled that where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information. A combination of factors in section 21(2) will not rebut such a presumption.

It is clear that none of the factors in section 21(4) applies to the information which I have found to be subject to a presumption under section 21(3). Although counsel raised the issue of the possible application of section 23 and was specifically invited to comment on it in the Notice of Inquiry, he has not made any representations to substantiate it. Nor does the evidence before me indicate that this provision could apply in the circumstances of this appeal. For this reason, I find that section 23 does not apply to the information I have found to be subject to a presumption under section 21(3).

Accordingly, based on the interpretation of the Divisional Court in the John Doe case cited above, I find that the application of sections 21(3)(a) and (g), as noted in my findings above, has not been rebutted. Therefore, the exemption in section 21(1) applies to the information which I have found to be subject to the presumed unjustified invasion of privacy in sections 21(3)(a) and (g).

Counsel maintains that the John Doe decision is erroneous in law in that there is nothing in the Act to support the conclusion that the intent and meaning of the statute precludes the Ministry from considering all the relevant circumstances of a case when determining whether disclosure of personal information constitutes an unjustified invasion of privacy. He then goes on to outline the factors in section 21(2) of the Act which he believes support the disclosure of the requested information in the circumstances of this case.

Counsel acknowledges that the information he seeks may be produced as a result of the discovery process in the intended legal action. Counsel's rights in this regard are expressly preserved by section 64 of the Act which states:

This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

He notes, however, that "... there would be a considerable advantage to the intended plaintiffs [his clients] in having this material made available to them before commencement of the intended action, for a proper evaluation of the case at that time".

I sympathize with counsel's desire to obtain this information at this time to advise his clients in a more expeditious and informed manner. However, as noted above, counsel concedes that the presumption in section 21(3) applies to the information he seeks. Moreover, when the findings of the Divisional Court in the John Doe case (referred to above) are applied to the circumstances of this appeal, it is clear that the presumptions have not been rebutted. The interpretation advanced by the Divisional Court is consistent with the legislature's intention in enacting section 21, which is the protection of personal privacy, including that of individuals who are deceased. Moreover, as I have noted, the legislature has expressly preserved other mechanisms to permit counsel to obtain the information he requires in connection with the intended lawsuit.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ December 18, 1995