



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

# ORDER P-1315

Appeal P\_9600237

Ministry of the Attorney General



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## **NATURE OF THE APPEAL:**

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information contained in a Special Investigations Unit (SIU) file concerning a pedestrian/motor vehicle accident which occurred on December 26, 1992. The request was made by the law firm representing the pedestrian who was struck by a police car. For ease of reference, the pedestrian will be referred to as the appellant in this order.

The Ministry located records responsive to the request and denied access to them in their entirety based on the following exemptions under the Act:

- advice or recommendations - section 13(1)
- law enforcement - sections 14(1)(c) and 14(2)(a)
- solicitor-client privilege - section 19
- invasion of privacy - sections 21(1) and 49(b)
- discretion to refuse requester's own information - section 49(a).

The appellant appealed the denial of access.

Following confirmation of the appeal, the Ministry located further records, and issued a second decision in which it denied access to these records pursuant to sections 14(2)(a) and 21(1).

The appellant confirmed that these records are also at issue in this appeal.

This office provided a Notice of Inquiry to the Ministry and the appellant. Only the Ministry provided representations in response to this notice.

In its representations, the Ministry indicated that it withdraws its reliance on the exemption in section 13(1). In addition, the Ministry states that it no longer objects to the disclosure of page 242 (a news release) and that it has no interest in page 283, which is a lab report from a hospital and contains medical information regarding the appellant. The Ministry originally claimed section 14(2)(a) for both records and section 13(1) for page 242. As these are discretionary exemptions, and the Ministry no longer objects to their disclosure, **pages 242 and 283** should be disclosed to the appellant.

The records at issue consist of the entire investigative file, including letters, memoranda and reports totalling 342 pages. An index of the records is attached to this order as Appendix "A".

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records to determine if they contain personal information and, if so, to whom the personal information relates, and I make the following findings:

1. Pages 1 - 243, 247 - 263, 265 - 273, 275 - 281, 285 - 287, 290 - 303, 306 - 309, and 316 - 344 contain the personal information of the appellant and the police officer;
2. Pages 1 - 239, 250 - 253, 255, 267 - 272, 276 - 279, 291 - 303, 306 - 308, and 316 - 344 also contain the personal information of witnesses or other identifiable individuals;
3. Pages 310 - 311 and 313 - 315 contain the personal information of the police officer or other identifiable individuals, but do not contain the personal information of the appellant;
4. Pages 244 - 246, 264, 274, 282, 284, 288 - 289, 304, 305 and 312 do not contain personal information.

Section 47(1) of the Act gives an individual a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

### **DISCRETION TO REFUSE REQUESTER'S OWN PERSONAL INFORMATION**

Under section 49(a), the Ministry has the discretion to deny access to records which contain an individual's own personal information where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include sections 14 (law enforcement) and 19 (solicitor-client privilege).

### **LAW ENFORCEMENT REPORT**

The Ministry claims that all of the records are exempt from disclosure on the basis of section 14(2)(a), which states:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

For a record to qualify for exemption under this section, the Ministry must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[See Order 200 and Order P-324]

In Order 221, Commissioner Tom Wright made the following comments about part one of the test:

The word “report” is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

I agree with this approach and will apply it to the records at issue in this appeal.

Pages 1 - 239 contain the SIU’s final investigation report which provides an overview of the incident and a description of the events prior to, during and subsequent to the accident. It includes witness statements, expert reports, summaries of forensic testing and other evidence gathered in the course of the police investigation into the accident. Finally, the report reaches a conclusion regarding the conduct of the police officer. Page 240 is a report of the Director of the SIU and also contains a brief overview of the accident, refers to the final investigation report and includes the Director’s conclusions based on the SIU’s investigation of the accident.

In my view, both reports thus consist of a formal account of the results of the consideration of the information related to the accident. On this basis, I find that these two records constitute “reports” for the purposes of section 14(2)(a) of the Act, meeting part one of the test.

The SIU is established by section 113 of the Police Services Act and is charged with the investigation of “... the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers” (section 113(5)). The Ministry states that, in the event of such an incident, SIU investigators are dispatched to conduct an independent investigation into the incident with a view to determining whether any police officer may have committed a criminal offence in the circumstances. When the investigation is complete, a comprehensive brief is submitted to the Director for review and determination. The Director, if reasonable grounds exist to do so, may cause informations to be laid against police officers in connection with the matters investigated and would refer such informations to the Crown Attorney for prosecution. The Director is required to provide a report of the results of the investigation to the Attorney General (section 113(8)).

The Ministry indicates that pages 1 - 239 contain the Final Investigative Report of the SIU which was submitted to the Director for review and determination. The Ministry submits that the Director relied on this report to make a decision as to whether charges should be laid against the police officer.

The Ministry indicates further that page 240 consists of the Director’s report to the Attorney General (pursuant to section 113(8) of the Police Services Act).

On the basis of the above, I find that both reports were prepared in the course of a law enforcement investigation by the SIU, an agency which has the function of enforcing and regulating compliance with a law. Thus parts two and three of the test have also been met and these pages qualify for exemption under section 14(2)(a) of the Act. I find, therefore, that **pages**

**1 - 239 and 240** are properly exempt under section 49(a) of the Act. Accordingly, it is not necessary for me to consider the possible application of section 14(1)(c) to pages 1 - 239.

In my view, the remaining pages, which consist of facsimile cover sheets, correspondence and interdepartmental memoranda, memoranda to file, summons', requisition forms, interview notes, notes of testimony taken at trial, a motor vehicle accident report and vehicle examination and damage report, a media release, and Ministry of Transportation driving records do not contain "a formal statement or account of the results of the collation and consideration of information" as contemplated by this section and these records, therefore, do not qualify for exemption under section 14(2)(a).

The Ministry has not claimed any other exemptions (and has withdrawn its objection under section 13(1)) for pages 243, 244, 249, 254, 262, 263, 264, 265, 275, 281, 282, 284, 285, 286, 288 - 289, 304, 305 and 312. I have reviewed these pages, and I find that page 281 contains primarily information about the medical condition of the appellant. This record only contains the personal information of the police officer in that it refers to the case file number. In this case, it would be absurd to withhold this information from the appellant on the basis of section 49(b). Accordingly, I find that it does not qualify for exemption.

I find further that pages 243, 249, 254, 262, 263, 265, 275 and 285 (duplicate page 286) contain references to identifiable individuals. Once this information is removed from these pages, however, the remaining information does not qualify as personal information. I have highlighted the personal information on the copies of these nine pages which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order. I will consider the application of section 49(b) to this information.

As I have found that no exemptions apply to the **non-highlighted information in pages 243, 249, 254, 262, 263, 265, 275 and 285 (duplicate page 286) or to pages 244, 264, 281, 282, 284, 288 - 289, 304, 305 and 312**, this information should be disclosed to the appellant.

## **SOLICITOR-CLIENT PRIVILEGE**

Section 19 consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**  
(b) the communication must be of a confidential nature, **and**

- (c) the communication must be between a client (or his agent) and a legal advisor, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

**OR**

- 2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

- 1. the record must have been prepared by or for Crown counsel; **and**
- 2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The Ministry claims that pages 258, 259 and 261 (page 266 is a duplicate of page 261) are exempt under Branch 1, and pages 245 - 248, 256 and 260 are exempt under Branch 2.

Page 261 (and duplicate page 266) is a memorandum from the Director of the SIU to Crown counsel in which the Director requests an opinion on a legal issue. Pages 258 and 259 constitute the legal opinion provided by Crown counsel in response to this request. In my view, these pages qualify for exemption under both branches of the section 19 exemption as they are confidential written communications prepared by Crown counsel for the Director of the SIU and are directly related to seeking, or are prepared for use in giving, legal advice.

Pages 248, 256 and 260 are letters between the SIU and Crown counsel which communicate information or requests for information in relation to a criminal trial. I find that these three letters qualify for exemption under Branch 2 in that they were prepared by or for Crown counsel in contemplation of or for use in litigation.

Pages 245 - 247 consist of facsimile cover pages. I find that while they may have been prepared by or for Crown counsel, they were not prepared for use in giving legal advice or for use in litigation. Therefore, they are not exempt under Branch 2 of section 19.

In summary, I find that **pages 248, 256, 258, 259, 260, 261 and 266** qualify for exemption under section 19. Accordingly, they are exempt under section 49(a) of the Act.

In reviewing pages 245 - 247, I find that pages 245 and 246 do not contain information which would identify any individual. Page 247 contains one reference to another individual which I have highlighted in yellow on the copy of this page which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order. Once this information is removed from page 247, however, the remaining information does not qualify as personal information. The Ministry has not claimed any other exemptions for these three pages, and as no mandatory exemptions apply **pages 245, 246 and the non-highlighted portions of page 247** should be disclosed to the appellant.

## **INVASION OF PRIVACY**

The Ministry claims that the following records are exempt pursuant to the invasion of privacy provisions: pages 1 - 239, 241, 248, 250 - 253, 255 - 257, 267 - 274, 276 - 280, 287, 290 - 303, 306 - 308 and 310 - 344. Following my review of the records, I found that pages 240, 242, 243, 247, 249, 254, 258 - 263, 265 - 266, 275, 281, 285 - 286 and 309 also contain the personal information of the police officer and or other identifiable individuals. I have previously found that pages 1 - 240, 248, 256, 258, 259, 260, 261 and 266 are exempt under section 49(a). I have also found that pages 244, 245, 246, 264, 281, 282, 284, 288 - 289, 304, 305 and 312, and the non-highlighted portions of pages 243, 247, 249, 254, 262, 263, 265, 275 and 285 (duplicate page 286) are not exempt and should be disclosed to the appellant. Accordingly, I will restrict my discussion of the exemption in sections 21(1) and 49(b) to the following pages: pages 241, 242, 250 - 253, 255, 257, 267 - 274, 276 - 281, 286, 287, 290 - 303, 306 - 311, 313 - 344, and the highlighted portions of pages 243, 247, 249, 254, 262 - 263, 265, 275 and 285 (duplicate page 286).

Under section 49(b) of the Act, where a record contains the personal information of **both the appellant and other individuals**, and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information. For these records (pages 241, 242, 250 - 253, 255, 257, 267 - 274, 276 - 281, 286, 287, 290 - 303, 306 - 309, 316 - 344, and the highlighted portions of pages 243, 247, 249, 254, 262 - 263, 265, 275 and 285 (duplicate page 286)), I will consider whether disclosure would be an unjustified invasion of the personal privacy of other individuals under section 49(b).

Where, however, a record **only contains the personal information of other individuals**, and the release of this information would constitute an unjustified invasion of the personal privacy of these individuals, section 21(1) of the Act prohibits the Ministry from releasing this information. For these records (pages 310 - 311 and 313 - 315), I will consider whether disclosure would be an unjustified invasion of personal privacy under section 21(1).

Under both sections 21(1) and 49(b), sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found 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 where 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.

If none of the presumptions contained in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

The Ministry states that the personal information which has been withheld was compiled as part of the SIU investigation into a possible violation of law, i.e. the potential commission of criminal offences by the police officer who was involved in the incident. Accordingly, the Ministry argues that the presumption in section 21(3)(b) applies to exempt this information from disclosure. This section provides:

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.

Based on the submissions of the Ministry and my review of the records, I find that the personal information which I have identified above was compiled and is identifiable as part of an investigation into a possible violation of law, that is the Highway Traffic Act. The information does not fall within the types of information listed in section 21(4). The appellant has not raised the possible application of section 23.

Based on the application of section 21(3)(b), I find that the disclosure of the information to which this presumption applies would be an unjustified invasion of the personal privacy of individuals other than the appellant. For this reason, the information in **pages 241, 242, 250 - 253, 255, 257, 267 - 274, 276 - 281, 286, 287, 290 - 303, 306 - 309, 316 - 344, and the highlighted portions of the records comprising pages 243, 247, 249, 254, 262 - 263, 265, 275 and 285(duplicate page 286)** is exempt under section 49(b), and the information in the records comprising **pages 310 - 311 and 313 - 315** is exempt under section 21(1).

## **ORDER:**

1. I order the Ministry to disclose pages 242, 244, 245, 246, 264, 281, 282, 283, 284, 288 - 289, 304, 305 and 312 and the non-highlighted information in pages 243, 247, 249, 254, 262, 263, 265, 275 and 285 (duplicate page 286) to the appellant by sending him a copy of these records and parts of records by **January 6, 1996**.
2. I uphold the Ministry's decision to deny access to the remaining pages (including the information on pages 243, 247, 249, 254, 262, 263, 265, 275 and 285 (duplicate page 286) which I have highlighted on the copies of these pages which I have provided to the Freedom of Information and Privacy Co-ordinator of the Ministry with a copy of this order).

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ December 12, 1996

## APPENDIX "A"

### INDEX OF RECORDS AT ISSUE

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
1-239	Final Investigative Report concerning a Motor Vehicle Accident on December 26, 1992 in Aurora, Ontario prepared by the Special Investigations Unit (SIU), Ministry of the Attorney General	14(1)(c), 14(2)(a), 21(3)(b)
240	Director's Report to the Attorney General, prepared by the Director SIU	14(2)(a)
241	Summons to Appear. Sworn before a Justice of the Peace on June 25, 1993 in Newmarket, Ontario	14(2)(a), 21(3)(b)
242	News Release of the SIU dated June 29, 1993	13(1), 14(2)(a)
243	Letter dated October 4, 1993 from Chief Investigator, SIU to Court Support Services Office, Newmarket Office	14(2)(a)
244	Fax Transmission dated October 4, 1993 from SIU to Court Support Services Office	14(2)(a)
245	Fax Transmission dated September 28, 1993 from SIU to Office of the Director of Criminal Prosecutions	14(2)(a), 19
246	Fax Transmission dated September 28, 1993 from SIU to counsel, Office of the Director of Criminal Prosecutions	14(2)(a), 19
247	Fax Transmission dated September 27, 1993 from counsel, Office of the Director of Criminal Prosecutions to SIU	14(2)(a), 19
248	Letter dated September 27, 1993 from counsel, Office of the Director of Criminal Prosecutions to SIU	14(2)(a), 19, 21(3)(b)
249	Letter dated August 24, 1993 from Inspector, Investigative Services, York Regional Police to Director SIU	14(2)(a)
250	Subpoena to witness to appear in court on October 1, 1993	14(2)(a), 21(3)(b)
251	Subpoena to witness to appear in court on October 1, 1993	14(2)(a), 21(3)(b)
252	Letter dated August 19, 1993 from Chief Investigator, SIU to Director of Criminal Prosecutions	14(2)(a), 21(3)(b)

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
253	Letter dated August 17, 1993 from Chief Investigator, SIU to Chief of Police, York Regional Police	14(2)(a), 19
254	Letter dated August 10, 1993 from Acting Director SIU to Inspector Investigative Services, York Regional Police	14(2)(a), 19
255	Letter dated July 29, 1993 from Investigator SIU, Re: Motor vehicle accident, December 26, 1992	14(2)(a), 21(3)(b)
256	Letter dated July 12, 1993 from Counsel, Office of the Director of Criminal Prosecutions to SIU	14(2)(a), 19, 21(3)(b)
257	Summons	14(2)(a), 21(3)(b)
258-259	Letter dated June 30, 1993 from Counsel, Crown Law Office Civil to Director SIU	14(2)(a), 19
260	Letter dated June 28, 1993 from Director SIU to Acting Director of Criminal Prosecutions	14(2)(a), 19
261	Memo dated June 22, 1993 from Director SIU to Counsel Crown Law Office Civil	14(2)(a), 19
262	Letter dated June 22, 1993 from Director SIU to Inspector	14(2)(a)
263	Letter dated June 22, 1993 from Director SIU to Chief of Police, York Regional Police	14(2)(a)
264	Fax transmission dated June 25, 1993 from Director SIU to Minister of the Attorney General, Message: Confidential Report	14(2)(a)
265	Duplicate of 262	
266	Duplicate of 261	
267-268	Letter dated June 2, 1993 from Inspector, Investigative Services, York Regional Police to Director SIU, Ministry of the Solicitor General	14(2)(a), 21(3)(b)
269-270	Duplicate of 267-268	
271-272	Duplicate of 267-268	
273	Letter dated February 9, 1993 from Chief Investigator SIU, Ministry of the Solicitor General	14(2)(a), 21(3)(b)
274	Fax transmission dated February 9, 1993 from Investigator SIU	14(2)(a), 21(3)(b)

RECORD NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED
275	Letter dated February 5, 1993 from Superintendent, Operations, York Regional Police to Chief Investigator SIU, Ministry of the Solicitor General	14(2)(a)
276-277	Letter dated January 21, 1993 from Chief Investigator SIU, Ministry of the Solicitor General to Chief of Police, York Regional Police	14(2)(a), 21(3)(b)
278-279	Duplicate of 276-277	
280	Letter dated January 19, 1993 from Chief Investigator SIU, Ministry of the Solicitor General	14(2)(a), 21(3)(b)
281	Memo to file dated January 8, 1993	14(2)(a)
282	Fax transmission from York County Hospital to Investigator SIU	14(2)(a)
283	Lab results sent by York County Hospital to SIU	14(2)(a)
284	OPP requisition for photographic services	14(2)(a)
285	Fax transmission dated December 27, 1993 to SIU	14(2)(a)
286	Duplicate of 185	
287	Motor vehicle accident report	14(2)(a), 21(3)(b)
288-289	Vehicle examination	14(2)(a)
290	Vehicle damage report	14(2)(a), 21(3)(b)
291	Inter office correspondence dated December 26, 1992 from Police Constable to Inspector, York Regional Police	14(2)(a), 21(3)(b)
292-294	Inter office correspondence dated December 26, 1992 from Constable to Inspector, York Regional Police	14(2)(a), 21(3)(b)
295-296	Inter office correspondence dated December 26, 1992 from Police Constable to Inspector, York Regional Police	14(2)(a), 21(3)(b)
297-299	Interview report dated December 16, 1992	14(2)(a), 21(3)(b)
300-301	Witness Statement	14(2)(a), 21(3)(b)
302-303	Witness Statement	14(2)(a), 21(3)(b)
304	Fax transmittal dated December 27, 1992 from Inspector York Regional Police to SIU	14(2)(a)

<b>RECORD NUMBER(S)</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTIONS OR OTHER SECTION(S) CLAIMED</b>
305	Duplicate of 284	
306	York Regional Police Force Media Release with handwritten notes	13(1), 14(2)(a), 21(3)(b)
307-308	Occurrence report to file dated December 27, 1992 from SIU	14(2)(a), 21(3)(b)
309	Confidential issue sheet prepared by Director SIU	13(1), 14(2)(a)
310-311	MTO Printout of Driving Record	14(2)(a), 21(3)(b)
312-313	Fax cover sheet and memo, July 28, 1993 from Chief Investigator, SIU to Date Management Section, MTO	14(2)(a), 21(3)(b)
314	MTO statement of driving record	14(2)(a), 21(3)(b)
315	MTO printout of driving record	14(2)(a), 21(3)(b)
316-344	Handwritten notes related to trial by Chief Investigator, SIU	14(2)(a), 21(3)(b)