



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER PO-2288

Appeal PA-030344-1

Ministry of Public Safety and Security



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NATURE OF THE APPEAL:

The Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection Privacy Act* (the *Act*) for access to the “officer’s notes and statements of all witnesses and involved parties” relating to an identified motor vehicle accident. The request was made by a representative for two individuals involved in the accident.

The Ministry located the responsive records and granted partial access to them. Access to the remaining portions of the records was denied on the basis of the exemptions found in sections 14(1)(l) (law enforcement), 49(a) (discretion to refuse requester’s own information), and section 49(b) (invasion of privacy) with reference to sections 21(2)(f) and 21(3)(a) and (b). The Ministry also identified that certain portions of the records at issue were not responsive to the request.

The requesters (now the appellants), through their representative, appealed the Ministry’s decision.

During mediation, the appellants’ representative confirmed that she was not pursuing access to non-responsive records, nor was she pursuing access to the “police codes” for which section 14(1)(l) and 49(a) were claimed. Accordingly, these issues and access to the records which were denied on the basis of them are no longer issues in this appeal.

Mediation did not resolve this file, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the Ministry, initially, and received representations in response. I then sent the Notice of Inquiry, together with a copy of the Ministry’s representations, to the appellants, who also provided representations through their representative.

RECORDS:

The records remaining at issue consist of portions of 14 pages of police officer’s notes.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, personal information is defined, in part, to mean recorded information about an identifiable individual, including information relating to the individual’s age (section 2(1)(a)), medical history (section 2(1)(b)), any identifying number, symbol or other particular (section 2(1)(c)), address (section 2(1)(d)), the personal opinions or views of that individual except where they relate to another individual (section 2(1)(e)), the views or opinions of another individual about the individual (section 2(1)(g)) or 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 (section 2(1)(h)).

The Ministry submits that the information remaining at issue contains the types of personal information set out in sections 2(1)(a), (b), (c), (d), (e), (g) and (h).

The appellants do not address this issue directly, but appear to concede that the records contain the personal information of other individuals.

I have reviewed the records remaining at issue and find that they contain information relating to the accident involving the appellants and others. It is my view that the records contain the personal information of the appellants. I also find that the severed portions of the police officer's notes all contain the personal information of identifiable individuals other than the two appellants.

INVASION OF PRIVACY

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 disclosure that limit this general right.

The Ministry relies on section 49(b) in conjunction with section 21 to support its denial of access to the records. More specifically, the Ministry relies on the "presumed unjustified invasion of personal privacy" at sections 21(3)(a) and (b) and the factor favouring privacy protection at section 21(2)(f).

These sections 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,

(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,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(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;

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the Ministry to exercise its discretion in this regard by balancing the appellants' right of access to their own personal information against other individuals' right to the protection of their privacy.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

In support of its position that section 21(3)(a) applies, the Ministry states:

...parts of the personal information remaining at issue contain medical information relating to another identifiable individual. The Ministry submits that release of this personal information would constitute an unjustified invasion of this other individual's personal privacy.

With respect to the section 21(3)(b) presumption, the Ministry submits, among other things:

The Ministry is of the opinion that the personal information remaining at issue consists of highly sensitive personal information that was compiled and is identifiable as part of an OPP investigation into a possible violation of law. The OPP is an agency that has the function of enforcing the laws of Canada and the Province of Ontario. ... Some of the duties of a police officer include investigating possible law violations, crime prevention and apprehending criminals and others who may lawfully be taken into custody.

The exempt information in part documents the law enforcement investigation undertaken by the OPP in response to the motor vehicle accident involving the [appellants]. The Ministry submits that the exempt personal information was compiled and is identifiable as part of an investigation into a possible violation of law. The circumstances of motor vehicle accidents in some instances can result in charges being laid under the *Criminal Code* or the *Highway Traffic Act*.

The Ministry then refers to Order PO-1728 issued by Senior Adjudicator Goodis in which the presumption in section 21(3)(b) was applied to personal information collected by the police during the course of a motor vehicle accident investigation. The Ministry also identifies that the application of section 21(3)(b) is not dependent on whether charges are actually laid (based on Orders P-223, P-237 and P-1225), and that neither section 21(4) nor section 23 of the *Act* operate to overcome the presumption in these circumstances.

The Ministry's representations were shared with the appellants. The appellants' representative provided submissions which do not directly address the issue of whether or not the presumption in section 21(3)(b) applies; rather, they focus on the reasons why the appellants require this information. More specifically, the appellants' representative identifies that legal action has been initiated, and that the disclosure of the information contained in the records will greatly assist the appellants. The appellants' representative also takes the position that disclosure of the records would assist the "course of justice". She also states:

...any invasion of privacy is justified under these circumstances and the public interest is served if all relevant information is made available in order for the Superior Court of the province to properly determine issues before it.

The proper administration of justice should out weigh any privacy concern grounded upon sensitivity and excessive personal distress.

Findings

I have found above that all of the records contain the personal information of the appellants. I have also determined that the severed portions of the records remaining at issue also contain the personal information of identifiable individuals other than the appellants.

In my view, all of the records remaining at issue, which consist of the severed portions of police officers' notebook entries, were compiled and are identifiable as part of an investigation into a possible violation of law. Accordingly, disclosing the records is presumed to constitute an unjustified invasion of privacy of identifiable individuals under section 21(3)(b). I also find that portions of the records (specifically, portions of pages 8 and 14) contain information about the medical condition of identifiable individuals. As a result, disclosing these portions of the records is presumed to constitute an unjustified invasion of privacy under section 21(3)(a).

Accordingly, I find that disclosing the information would constitute an unjustified invasion of personal privacy under section 49(b).

Exercise of Discretion

The section 49(b) exemption is discretionary and permits the Ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the Ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

Upon review of all of the circumstances surrounding this appeal and the Ministry's representations on the manner in which it exercised its discretion, I am satisfied that the Ministry has not erred in the exercise of its discretion not to disclose the remaining portions of the records under section 49(b).

Public Interest

Although the appellants' representative does not specifically refer to section 23 of the *Act*, she uses language that suggests that there is a compelling public interest in disclosure of the records. She states:

... any invasion of privacy is justified under these circumstances and the public interest is served if all relevant information is made available in order for the Superior Court of the province to properly determine issues before it.

The appellants' representative seems to suggest that, in these instances where matters are being brought before court, the public interest in ensuring that the relevant court has the requisite information overrides any privacy concerns.

Section 23 reads:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Previous orders have confirmed that, for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398]

I do not agree with the contention by the appellants’ representative that there exists any public interest, compelling or otherwise, in the disclosure of the remaining information contained in the records. The appellants’ interest in obtaining access to the undisclosed portions of the records is a purely private one. The accident described in the records relates to a private matter involving the appellants and the affected persons and does not include any aspect in which the public may have an interest.

With respect to the appellants’ position that there exists a public interest in ensuring that all relevant material is made available in a court proceeding, previous orders have established that, in normal circumstances, the discovery provisions in relation to civil proceedings are sufficient to meet this particular public interest (See, for example, orders M-539 and P-1551). I adopt the approach taken in these previous orders, and apply them in the circumstances of this appeal. The appellants have not provided me with sufficient information to take this case out of the norm, and I find that section 23 has no application in this appeal.

Accordingly, I find that disclosure of the records remaining at issue would result in an unjustified invasion of the personal privacy of the identifiable individuals referred to in the records, and that they are properly exempt under section 49(b) of the *Act*.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Frank DeVries
Adjudicator

_____ May 31, 2004