



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

ORDER PO-2290

Appeal PA-030359-1

**Ministry of Community Safety and Correctional
Services**

NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "... a complete copy of any technical investigations and any photos, officer's notes, witness statements, and any documentation ..." with respect to a specified motor vehicle accident. The request was made by one of the drivers involved in the accident.

The Ministry located responsive records and denied access to them, claiming the application of the following exemptions contained in the *Act*:

- sections 14(1)(a) and (b) – law enforcement;
- section 14(1)(f) – right to a fair trial;
- section 14(1)(l) – facilitate commission of an unlawful act;
- section 19 – solicitor-client privilege;
- section 49(a) – discretion to refuse requester's own information; and
- section 49(b) – invasion of privacy – in conjunction with the factor in section 21(2)(f) (highly sensitive information) and the presumptions in sections 21(3)(a) (medical information) and (b) (information compiled as part of an investigation into a possible violation of law).

The Ministry also took the position that some of the information contained in the records was not responsive to the request.

The requester, now the appellant, appealed the Ministry's decision.

Mediation of the appeal was not successful. At the conclusion of mediation, the Ministry provided this office with an additional four pages of records comprising the notebook entries of the investigating police officer. These pages were designated as Records 37-40.

I provided the Ministry with a Notice of Inquiry setting out the facts and issues in the appeal. The Ministry provided me with a new decision letter that it had sent to the appellant on April 5, 2004. In that decision, the Ministry disclosed certain additional records, and parts of records to the appellant, and withdrew its reliance on sections 14(1)(a), (b) and (f).

I then provided the appellant with a Notice of Inquiry, along with the complete representations of the Ministry. The appellant also provided submissions in response to the Notice and indicated that she is no longer seeking access to the "ten codes" withheld under sections 14(1)(l) and 49(a). As a result, the section 14(1)(l) exemption is no longer at issue in this appeal.

RECORDS:

The records remaining at issue consist of the following:

Page Number	Description of the records	Withheld in full or in part Exempted	Exemptions Claimed
1-2	Motor Vehicle Accident Report	Withheld in part	49(b)
7-22	Crown Brief	Withheld in part	19, 49(a) and (b)
28-32	Duplicate hand-written copy of pages 17-22	Withheld in full	19, 49(a) and (b)
33-40	Police officer notebook entries	Withheld in part	49(b)

DISCUSSION:

PERSONAL INFORMATION

General principles

The section 49 personal privacy exemption applies only to information that qualifies as “personal information”. That term 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 where 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;

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 [Order 11].

“Identifiable”

To qualify as personal information, it must be reasonable to expect that an individual may be identified from the information [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Findings

I have reviewed the remaining records and parts of records and make the following findings:

- Records 1-2, 8, 9, 11, 12, 20, 21, 28, 29, 34, 35 and 38 contain information which qualifies as the personal information of the appellant and other identifiable individuals. This information relates to their age, sex and family status (section 2(1)(a)), medical history (section 2(1)(b)), identifying numbers assigned to them (section 2(1)(c)), their address and telephone numbers (section 2(1)(d)) and the individuals' names along with other personal information about them (section 2(1)(h)); and
- Records 7, 17, 18, 19, 22, 30, 31, 32 and 40 contain only the personal information of individuals other than the appellant, including information relating to their age and sex (section 2(1)(a)), medical history (section 2(1)(b)), identifying numbers (section 2(1)(c)), addresses and telephone numbers (section 2(1)(d)) and their names along with other personal information (section 2(1)(h)).

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 exceptions to this general right of access.

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Where, however, a requester seeks personal information of another individual, section 21(1) of the *Act* prohibits an institution from releasing this information unless the disclosure does not constitute an unjustified invasion of personal privacy under section 21(1)(f).

Because I have found that Records 1-2, 8, 9, 11, 12, 20, 21, 28, 29, 34, 35 and 38 contain information which qualifies as the personal information of the appellant and other identifiable individuals, I will determine whether they are exempt from disclosure under section 49(b). However, since Records 7, 17, 18, 19, 22, 30, 31, 32 and 40 contain only the personal information of individuals other than the appellant, I will review whether they are exempt under section 21(1).

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

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 the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

A section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 21 exemption [Order PO-1764].

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

The Ministry relies on the “presumed unjustified invasion of personal privacy” in sections 21(3)(a) (information relating to an individual’s medical history) and (b) (information compiled as part of a law enforcement investigation) and the factor listed under section 21(2)(f) (highly sensitive information). The appellant relies on section 21(2)(d). These sections 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,
 - (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
 - (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;

The Ministry takes the position that the information contained in the undisclosed records, or portions of records, is highly sensitive within the meaning of section 21(2)(f) and contains information relating to an individual’s medical history, thereby falling within the ambit of the presumption in section 21(3)(a). It also argues that the personal information remaining at issue was compiled as part of an investigation by the Ontario Provincial Police (the OPP) into a possible violation of law, and that this information falls within section 21(3)(b). The Ministry relies on the decision in Order PO-1728 in which Senior Adjudicator David Goodis found that information compiled as part of a police investigation into a motor vehicle accident falls within the scope of the section 21(3)(b) presumption.

The appellant submits that the disclosure of the information in the records is relevant to a fair determination of her rights, as contemplated by section 21(2)(d). She suggests further that:

Any expectation of privacy was lost when the information was provided for use in possible legal proceedings. It was a reasonable expectation that this information would make its way into the hands of outside parties. There is no expectation of privacy in this situation.

In my view, the information contained in the records was compiled and is identifiable as part of an investigation into a possible violation of law. As a result, it falls within the ambit of the presumption in section 21(3)(b). In addition, Records 17-19 and 30-32 contain information

relating to the medical history of one of the individuals identified therein. I find that the presumption in section 21(3)(a) applies to that information. The appellant relies on the consideration listed in section 21(2)(d). However, as noted above in my reference to the *John Doe* decision, the section 21(2) factors, taken singly or in combination, cannot rebut the application of a presumption under section 21(3).

Because I have found that the remaining information in the records is subject to either of the presumptions in sections 21(3)(a) or (b), I conclude that its disclosure would constitute a presumed unjustified invasion of the personal privacy of individuals other than the appellant. Therefore, subject to my findings below with respect to section 23, I find that the undisclosed personal information in Records 1-2, 8, 9, 11, 12, 20, 21, 28, 29, 34, 35 and 38 qualifies for exemption under section 49(b) while the personal information in Records 7, 17, 18, 19, 22, 30, 31, 32 and 40 is exempt under section 21(1). The Ministry has provided me with representations respecting the manner in which it has exercised its discretion to deny access to certain records under section 49(b). Based on my review of those submissions, I find no reason to disturb the Ministry's decision.

Having found that all of the remaining undisclosed information is exempt under either section 21(1) or section 49(b), it is not necessary for me to determine whether it also qualifies for exemption under sections 19 and 49(a).

PUBLIC INTEREST IN DISCLOSURE

The appellant takes the position that there exists a public interest in the disclosure of the remaining information in the records and that it is sufficiently compelling to override the privacy protection provisions in sections 21(1) and 49(b). The appellant submits that the information ought to be disclosed to her pursuant to section 23, which 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.

She goes on to add that:

Here, the Appellant was involved in a tragic motor vehicle collision. The Ministry concedes that information compiled does relate to this accident. The Appellant submits that the public interest demands that an innocent victim of a violation of law, who is seriously injured as a result, be made privy to the information collected. Such disclosure enables and assists this innocent victim in pursuing their own rights and compensation. Justice demands that the Appellant receive disclosure of this information.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in 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 considering whether there is a “public interest” in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government.

A public interest will be found not to exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439].

The word “compelling” has been defined in previous orders as “arousing strong interest or attention” [Order P-984].

In the present situation, I find that there does not exist a public interest, compelling or otherwise, in the disclosure of the remaining information at issue. In my view, the interest being served by any such disclosure would be a private one. In addition, I find that the appellant has now received a significant amount of information relating to the motor vehicle accident which will enable her to pursue her rights to compensation before the courts. Further, I find that the appellant, in pursuing her remedies through a civil proceeding for damages, will have available to her the alternative disclosure mechanisms available to litigants. As a result, the appellant will not be without a remedy in pursuing access to the remaining information.

I conclude by finding that section 23 has no application in the circumstances of this appeal.

ORDER:

I uphold the Ministry’s decision.

Original signed by: _____
Donald Hale
Adjudicator

_____ June 9, 2004