



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2742**

## **Appeal PA07-331**

### **Ministry of Community Safety and Correctional Services**



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## **NATURE OF THE APPEAL:**

An individual injured in a motor vehicle accident submitted a request to the Ministry of Community Safety and Correctional Services (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for “a copy of the statements given by the drivers and any witnesses with respect to this accident ...”

The Ministry located three interview reports that the Ontario Provincial Police (OPP) compiled after interviewing witnesses to the accident. It then issued a decision letter that denied the requester access to these records pursuant to the discretionary exemption in section 49(b) (personal privacy) of the *Act*, in conjunction with the factor in section 21(2)(f) (highly sensitive) and the presumptions in sections 21(3)(a) (medical history) and 21(3)(b) (investigation into violation of law). The Ministry further stated that it attempted to contact three affected parties to determine whether they would consent to disclosure of their interview reports to the requester. None of the affected parties responded to the Ministry.

The requester (now the appellant) appealed the Ministry’s decision to this office. During the mediation stage of the appeal process, the mediator contacted the three affected parties to determine whether they would consent to disclosure of their interview reports to the appellant. Two affected parties refused to provide consent, and one affected party did not respond.

In addition, the Ministry informed the mediator that it had a copy of the appellant’s interview report and had decided to disclose it to her.

This appeal was not settled in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry to the Ministry, which submitted representations in response. I then sent the same Notice of Inquiry to the appellant, along with the complete representations of the Ministry. The appellant did not submit any representations in response.

## **RECORDS:**

The records remaining at issue in this appeal are three interview reports that the OPP compiled after interviewing witnesses to the motor vehicle accident.

## **DISCUSSION:**

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. 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].

The Ministry submits that the three interview reports contain the personal information of the three witnesses and the appellant:

... the requested police interview reports contain the types of personal information listed above with respect to the three affected parties. It is the position of the Ministry that the requested interview reports in their entirety contain the personal views of the individuals being interviewed by the police in relation to the circumstances of the motor vehicle accident. The requested interviews also contain observances made by the affected parties in relation to the requester and/or her vehicle.

I have carefully reviewed the three interview reports and agree with the Ministry that these records contain the personal information of the three witnesses and the appellant, who was injured in the motor vehicle accident. However, I note that at least one of the reports also contains the personal information of another individual injured in the accident. I find that the

information in these records falls within paragraphs (a), (c), (d), (g) and (h) of the definition of “personal information” in section 2(1) of the *Act*.

I will now consider whether the personal information in the three interview reports qualifies for exemption under the discretionary exemption in section 49(b) of the *Act*.

## **PERSONAL 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 this right.

Under section 49(b), where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an “unjustified invasion” of the other individual’s personal privacy, the institution may refuse to disclose that information to the requester.

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met.

If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt from disclosure under section 49(b). I find that none of the paragraphs in section 21(1) apply in the circumstances of this appeal.

Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

As noted above, the three interview reports contain the personal information of the witnesses to the motor vehicle accident, the appellant and the other accident victim. The Ministry submits that the presumption in section 21(3)(b) of the *Act* applies to this information. This provision states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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;

The Ministry submits that this presumption applies in the circumstances of this appeal:

The exempt personal information documents the law enforcement investigation undertaken by the OPP into the circumstances of a motor vehicle accident involving the requester. 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* and the *Highway Traffic Act*.

I agree with the Ministry's submissions on this point. I find that the OPP was called to investigate the motor vehicle accident and created the three interview reports after interviewing witnesses. The personal information of the three witnesses, the appellant and the other accident victim that appears in the interview reports was compiled by the OPP and is identifiable as part of its investigation into possible violations of both the *Criminal Code* and the *Highway Traffic Act*. Consequently, I find that the section 21(3)(b) presumption applies to this personal information.

The Divisional Court has stated that once a presumed unjustified invasion of personal privacy is established under section 21(3), it can only be overcome if section 21(4) or the "public interest override" at section 23 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. I have considered the exceptions in section 21(4) of the *Act* and find that the personal information in the three interview reports does not fall within the ambit of this section. Moreover, the "public interest override" in section 23 does not apply, because the appellant has a private, not a public interest, in seeking access to the records at issue.

In short, I find that disclosure of the personal information in the three interview reports is presumed to constitute an unjustified invasion of personal privacy under section 21(3)(b). Once established, the section 21(3)(b) presumption cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. As a result, it is not necessary to consider the Ministry's submission that the factor in section 21(2)(f) weighs in favour of withholding the three interview reports.

As noted above, if any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). Consequently, I find that the personal information in the three interview reports qualifies for exemption under section 49(b) of the *Act*, subject to my review of the absurd result principle and whether the Ministry exercised its exercise discretion properly in applying this exemption.

### **ABSURD RESULT**

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

As noted above, the appellant did not submit any representations in this appeal. The Ministry submits that the absurd result principle does not apply to any of the personal information in the three interview reports:

... the Ministry has given this factor careful consideration in relation to the affected parties' interview reports. The Ministry notes that the appellant has been provided with total access to [her] own interview report. The Ministry is of the view that in the circumstances of this particular request, disclosure on the basis of the absurd result principle would be inconsistent with the privacy exemption that has been applied.

The appellant has not provided me with any evidence to show that she was present when the three witnesses provided their statements to the OPP, or that the information in the three interview reports is clearly within her knowledge. In such circumstances, I find that the absurd result principle does not apply to the personal information in these records.

### **EXERCISE OF DISCRETION**

The section 49(b) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

The Commissioner 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
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The Ministry submits that it exercised its discretion properly in withholding the personal information in the three interview reports under section 49(b) of the *Act*:

The Ministry considered whether disclosure of the withheld interview reports in response to the appellant's request [under the *Act*] would increase public confidence in the delivery of public services. The Ministry did not find that release of the withheld records was necessary for this purpose.

The Ministry considered whether release of the requested police interview reports could lead to a general inhibition of the sharing of information between the police and individuals interviewed in the course of a law enforcement investigation that is critical to the necessary to ensure the effective investigation of incidents. The Ministry considered this factor in its exercise of discretion.

The Ministry is aware that there may be potential benefits to the requester should additional information be disclosed. The Ministry is also aware that should litigation ultimately be pursued by the appellant in relation to the motor vehicle accident involving the requester, the appellant may seek to access to information in accordance with that process. In this regard, section 64 of [the *Act*] provides that [the *Act*] does not impose any limitation on the information otherwise available by law to a party to litigation and does not affect the power of a court or tribunal to compel a witness to testify or compel production of a document.

The Ministry ultimately came to the conclusion in its exercise of discretion that the release of additional information in the circumstances of the appellant's request was not appropriate.

In my view, the Ministry exercised its discretion based on proper considerations. I am not persuaded that it failed to take relevant factors into account or that it considered irrelevant factors in withholding the personal information in the three interview reports under the discretionary exemption in section 49(b). I find, therefore, that its exercise of discretion was proper.

## **ORDER:**

I uphold the Ministry's decision to deny access to the three interview reports.

Original Signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

December 10, 2008 \_\_\_\_\_