

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3214

Appeal PA13-16

Ministry of Community Safety and Correctional Services

June 12, 2013

Summary: An insurance company made a request for the names and other information of individuals charged with the theft of a motor vehicle. The ministry denied access to the information on the basis of the mandatory exemption in section 21(1) (personal privacy) of the *Act*. In this order, the ministry's decision to deny access to the requested information under section 21(1) is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 21(3)(b).

Cases Considered: *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

OVERVIEW:

[1] 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*) from an insurance company for information relating to the theft and subsequent recovery of a particular vehicle. Specifically, the requester sought access to the "names of the persons charged, date of birth, current address and driver license number."

[2] The ministry issued a decision advising that access to the requested information was denied on the basis of the exemptions in sections 14(1)(l) and 14(2)(a) (law enforcement) and section 21(1) (personal privacy), with reference to the factor in section 21(2)(f) and the presumption in section 21(3)(b) of the *Act*. The ministry also indicated that non-responsive information had been removed from the record.

[3] The appellant appealed the ministry's decision.

[4] During mediation, the insurance company's representative (the appellant) clarified that she is pursuing access to the information about the persons charged (the affected parties), including their names, dates of birth, current addresses and driver's license numbers. She also confirmed that she is not seeking access to the remaining portions of the record, and section 14(1)(l) is, therefore, not at issue in this appeal. In addition, the appellant stated that the requested information is relevant to a fair determination of rights, referring to the factor in section 21(2)(d) of the *Act*.

[5] Also during mediation, the ministry advised that it had notified the affected parties at the request stage, but had not received any responses from them. The mediator, after confirming that the appellant could be identified as an insurance company's representative, then sent correspondence to two affected parties, notifying them of the appeal. One of the affected parties contacted the mediator and indicated that he objected to the disclosure of his personal information. The other affected party did not respond to the correspondence.

[6] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. Because of the nature of the information remaining at issue, I sent a Notice of Inquiry to the appellant, initially. The appellant provided representations in response. In light of the information received from the appellant, I decided it was not necessary to invite representations from the ministry or the affected parties.

Preliminary matter

[7] As a preliminary matter, the appellant is an insurance company that identifies itself as the company that provides insurance coverage to the victim of the theft of the vehicle, and that it has "paid out" certain amounts under the terms of the policy. It also states that it has the "subrogated right of recovery" and is, therefore, pursuing the information in the record.

[8] Although the appellant insurance company may have subrogated rights of recovery under the insurance policy, this does not necessarily mean that the company stands in the shoes of the individual insured person for the purposes of the *Act*. I note, for example, that in Order M-855, Adjudicator Cropley considered the rights of an insurer, and stated:

I note that counsel has stated that his law firm was retained by the appellants' insurers to bring a subrogated claim in respect of the fire damage which was done to the appellants' home. *However, the appellants have provided signed authorizations for the disclosure of their personal information to counsel which also indicate that he is acting on their behalf for the purposes of this access request.* Accordingly, I am satisfied that counsel is representing the interests of the appellants in this appeal. ... [emphasis added]

[9] In this appeal, no signed authorization was provided by the appellant insurer which would authorize the appellant to represent any named individual for the purpose of this appeal. In the absence of any such clear authorization, I will not consider the appellant to be representing any named insured person in this appeal, but to be bringing this appeal in its own right.

RECORD:

[10] The record remaining at issue consists of portions of an Occurrence Summary, specifically, the names, dates of birth, addresses and driver's license numbers of two affected parties.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1)?
- B. Does the information in the records qualify for exemption under section 21(1) of the *Act*?

DISCUSSION:

Issue A. Does the record contain "personal information" as defined in section 2(1)?

[11] 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), in part, 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, ...

(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;

[12] The appellant did not directly address this issue in its representations.

[13] The request in this appeal is for the name, date of birth, address and driver's license number of the persons charged. This information clearly constitutes the personal information of those individuals for the purpose of sections (a), (b), (c), (d) and/or (h) of the definition of personal information in section 2(1) of the *Act*.

[14] In addition, because the appellant is an insurance company, and does not represent the named insured individual for the purpose of this appeal, the record does not contain the personal information of the appellant.

Issue B. Does the information qualify for exemption under section 21(1) of the *Act*?

[15] Where an appellant seeks the personal information of other individuals, section 21(1) of the *Act* prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) through (f) of section 21(1) applies.

[16] The appellant has referred to the exception that could apply in paragraph 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

[17] Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information the disclosure of which 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 section 21(2).¹

[18] In its decision letter, the ministry relies on the “presumed unjustified invasion of personal privacy” at section 21(3)(b) of the *Act* in support of its decision that section 21(1) applies. This section reads:

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;

[19] Previous orders have established that, even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply; the presumption only requires that there be an investigation into a possible violation of law.² In addition, the presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.³

[20] Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law.⁴

[21] The record remaining at issue consists of portions of an Ontario Provincial Police (OPP) Occurrence Summary relating to an identified occurrence which contains the personal information of the persons charged. On its face, this information fits within the presumption in section 21(3)(b), as this information was clearly compiled and is identifiable as part of an investigation into a possible violation of law. The appellant does not address this presumption in her representations.

[22] As set out above, the Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a

¹ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

² See Orders P-242 and MO-2235.

³ Orders MO-2213, PO-1849 and PO-2608.

⁴ Orders M-734, M-841, M-1086, PO-1819 and PO-2019.

combination of the factors set out in section 21(2).⁵ Accordingly, having found that disclosure of the requested information would constitute an unjustified invasion of privacy under section 21(3)(b), the information qualifies for exemption under the mandatory exemption in section 21(1).

[23] Having made that finding, it is not necessary for me to review the possible application of the factors in section 21(2). However, the appellant has argued that the factor in section 21(2)(d) applies. That section reads:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

[24] The appellant's representations focus on her interest in obtaining the information in the record in order to allow the insurance company to recover the amounts of money paid out by it in this matter. The appellant states:

The appeal is necessary as we are trying to obtain the name of the person charged including their date of birth and driver licence number. We have a subrogated right of recovery and are therefore seeking 100% recovery from the responsible party.

[25] The appellant also provides documentation supporting its position.

[26] Previous orders have confirmed that, for section 21(2)(d) to apply, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

⁵ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.⁶

[27] With respect to the application of this factor, I note that previous orders have considered its application when personal information is sought in order to pursue legal remedies. These orders have confirmed that section 21(2)(d) does not automatically apply to situations where a requester seeks names or addresses in order to locate defendants or potential defendants, particularly where alternative methods for obtaining the information may be available.⁷ I also note the following excerpt from Order PO-1833, where Senior Adjudicator David Goodis made a finding regarding the application of section 21(2)(d):

I am not persuaded that the appellant's submissions with respect to the determination of the accused's rights meet the threshold under section 21(2)(d) ... [w]hile some of the personal information in the records may be relevant to the issues to be determined in the civil litigation, the appellant has not provided a sufficient basis for me to conclude that this information is required in order to prepare for the proceeding or to ensure an impartial hearing. The appellant has retained specialized insurance litigation counsel for the purpose of those proceedings, and I am not convinced that discovery mechanisms available to the appellant would be insufficient to ensure a fair hearing.

[28] However, as noted above, because the presumption in section 21(3)(b) applies to the information, and it cannot be rebutted by the factors in section 21(2), no useful purpose would be served in reviewing the possible application of section 21(2)(d) to the information at issue in this appeal.

ORDER:

I uphold the ministry's decision to deny access to the records, and I dismiss this appeal.

Original signed by: _____
Frank DeVries
Adjudicator

June 12, 2013 _____

⁶ Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

⁷ See, for example, Orders M-1146, MO-1436 and PO-2026.