

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3581

Appeal PA14-374

Ministry of Community Safety and Correctional Services

February 29, 2016

**Summary:** The appellant made a request for records relating to a motor vehicle accident in which she was involved. The sole record at issue in this appeal is a statement made by a witness to the accident, which the ministry withheld in full under section 49(b) of the *Freedom of Information and Protection of Privacy Act*. In this order, the adjudicator upholds the ministry's decision to withhold the record in full.

**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(2)(d), 21(3)(b), 49(b).

### OVERVIEW:

[1] The appellant made 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 access to records relating to a motor vehicle accident in which the appellant was involved. In response, the ministry granted the appellant full access to her own statement, and partial access to notes of the investigating officer. The ministry denied access, in full, to the statement of another individual who was present at the accident, whom the ministry identified as an affected party. In denying the appellant access to her own personal information in these records, the ministry relied on the exemption at section 49(b) (denial of own information) of the *Act*, with reference to the presumption against disclosure at section 21(3)(b). The ministry also indicated that some information is not responsive to the appellant's request.

[2] The appellant appealed the ministry's decision to this office.

[3] During the mediation stage of the appeal process, the appellant confirmed that she seeks access only to the interview report of the affected party.

[4] The affected party did not consent to disclosure of the interview report.

[5] As no mediation was possible, the appeal was transferred to the adjudication stage of the appeal process for a written inquiry under the *Act*. The adjudicator formerly assigned to this appeal sought and received representations from the ministry, the affected party and the appellant.

[6] This file was then transferred to me to dispose of the issues. In this order, I uphold the ministry's decision to withhold the record in full.

## **RECORD:**

[7] The record is the interview report of the affected party, who was a witness to the motor vehicle accident involving the appellant.

## **ISSUES**

**A. Does the record contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom does it belong?**

**B. Does the discretionary exemption at section 49(b) apply to the record? Did the ministry exercise its discretion under section 49(b)?**

## **DISCUSSION:**

[8] The ministry has withheld the record in full on the basis of section 49(b).

[9] Section 47(1) of the *Act* gives a requester a general right of access to her 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 personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, an institution may refuse to disclose that information to the requester.

[10] To determine whether section 49(b) applies, it is first necessary to determine whether the record contains "personal information" as defined in the *Act*, and, if so, to determine to whom the personal information relates.

**A. Does the record contain "personal information" as defined in section 2(1) of the *Act*, and, if so, to whom does it belong?**

[11] Section 2(1) of the *Act* sets out a definition of "personal information" that reads,

in part:

“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,

(e) the personal opinions or views of the individual except where they relate to another individual,

(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[.]

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under the various paragraphs of section 2(1) may still qualify as personal information.<sup>1</sup>

[13] The record at issue contains the affected party’s account of the motor vehicle accident in which the affected party and the appellant were involved. The record contains the personal information of the affected party within the meaning of sections 2(1)(a), (e) and (h). The record also contains the appellant’s personal information within the meaning of section 2(1)(g).

[14] As the record contains the personal information of both the appellant and the affected party, the next question is whether the exemption at section 49(b) applies.

**B. Does the discretionary exemption at section 49(b) apply to the record? Did the ministry exercise its discretion under section 49(b)?**

[15] By withholding the record under section 49(b), the ministry submits that its disclosure would be an “unjustified invasion” of the personal privacy of the affected party. In making its claim, the ministry relies on the presumption at section 21(3)(b) and the factor at section 21(2)(f).

[16] The affected party makes representations in support of withholding the record from the appellant.

[17] The appellant makes brief representations that allude to the factor at section 21(2)(d).

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<sup>1</sup> Order 11.

[18] Sections 21(1) to (4) of the *Act* provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b). In determining whether section 49(b) applies, this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.<sup>2</sup> 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 under section 49(b). Section 21(4) also lists situations where disclosure is not an unjustified invasion of personal privacy.

[19] The following subsections of section 21 are relevant in this appeal:

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

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

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

(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,

(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[.]

[20] In this appeal, I find that the presumption against disclosure at section 21(3)(b) is applicable. The record was prepared by an investigating officer attending the accident scene in the course of a law enforcement investigation. The presumption at section 21(3)(b) requires only that there be an investigation into a possible violation of law; even if no criminal proceedings were commenced against any individuals, section

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<sup>2</sup> Order MO-2954.

21(3)(b) may still apply.<sup>3</sup>

[21] I find inapplicable the factor weighing in favour of disclosure at section 21(2)(d). The appellant alludes in her representations to her search for a legal remedy, and her concern that without access to the record, her right to compensation may be prejudiced.

[22] 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
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.<sup>4</sup>

[23] I find that the appellant has not provided sufficient information to show that any of these criteria has been met. The appellant's reference to seeking compensation or other legal remedy, without more, does not establish that disclosure of the record is necessary to ensure a fair determination of the appellant's legal rights in an existing or contemplated proceeding.

[24] I also find that none of the exceptions in section 21(1) or 21(4) applies. In particular, I note the affected party has not consented to disclosure of his personal information to the appellant.

[25] Given the application of the presumption against disclosure at section 21(3)(b), and the inapplicability of any factors favouring disclosure, it is unnecessary to address the ministry's additional argument for the application of the factor weighing against disclosure at section 21(2)(f).

[26] I find the record qualifies for exemption under section 49(b). I note that this finding is consistent with many other orders of this office addressing access to third-party witness statements.<sup>5</sup> I also find that the record, comprising in whole the witness statement of the affected party, is not reasonably severable within the meaning of

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<sup>3</sup> Orders P-242 and MO-2235.

<sup>4</sup> 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.).

<sup>5</sup> Orders MO-3036, MO-2777, PO-3160 and many others.

section 10(2).

[27] Finally, I uphold the ministry's exercise of discretion under this section. The ministry disclosed other information to the appellant to satisfy her request for records relating to the motor vehicle accident in which she was involved. The ministry indicates that in withholding the remaining record at issue, it considered the public policy interest in protecting personal information belonging to third parties that is contained in law enforcement investigation records. It balanced these interests against the appellant's right of access to records of her own personal information. In the circumstances, I find the ministry exercised its discretion under section 49(b), and did so appropriately, taking into account relevant factors and not taking into account any irrelevant factors.

[28] In light of all the above, I dismiss the appellant's appeal.

**ORDER:**

I uphold the ministry's decision and I dismiss the appeal.

Original Signed By: \_\_\_\_\_  
Jenny Ryu  
Adjudicator

February 29, 2016 \_\_\_\_\_