

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3586

Appeal PA15-40

Ministry of Community Safety and Correctional Services

March 11, 2016

Summary: The ministry received a request under the *Act* for access to records related to an OPP investigation into a motorcycle accident. The ministry granted partial access to the responsive records which consist of police notes and witness statements. In this order, the adjudicator finds that some of the information that has been withheld qualifies as the personal information of the appellant and should be disclosed to him. However, with respect to the remaining information she upholds the ministry's claim that its disclosure would amount to an unjustified invasion of personal privacy of identifiable individuals other than the appellant pursuant to the discretionary personal privacy exemption at section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 21(1)(f), 21(2)(d) and (f), 21(3)(b), and 49(b).

Orders and Investigation Reports Considered: Order PO-3273.

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*) for access to records relating to an investigation undertaken by the Ontario Provincial Police (the OPP) into the circumstances surrounding a motorcycle accident involving the appellant. Specifically, the appellant sought access to any notes or witness statements recorded by the investigating officer.

[2] The ministry located responsive records and granted partial access to them.

Access to some of the records and portions of the records were denied on the basis that they were exempt from disclosure under the discretionary personal privacy exemption in section 49(b), read in conjunction with the presumption at section 21(3)(b) (compiled as part of a law enforcement investigation) and taking into consideration the factor in section 21(2)(f) (highly sensitive) of the *Act*. Additionally, the ministry severed police administrative codes from the records under the law enforcement exemption in section 14(1)(l) (facilitate commission of an unlawful act).

[3] During mediation, the appellant advised that he was not seeking access to the police codes which were the only information subject to the section 14(1)(l) exemption claim. As a result, the severed police codes and section 14(1)(l) are no longer at issue. The mediator also contacted two individuals who provided witness statements (the affected parties) as their interests may be affected by the disclosure of the records. The affected parties did not consent to the disclosure of their personal information to the appellant.

[4] As no further mediation was possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought representations from the ministry and the affected parties initially. The affected parties chose not to submit representations.

[5] In accordance with this office's *Practice Direction 7*, the ministry's representations were shared with the appellant, in their entirety. The appellant provided representations in response that raised new issues to which the adjudicator believed that the ministry should be given an opportunity to reply. The ministry provided representations in reply.

[6] The appeal was then transferred to me. In this order, I uphold the ministry's decision in part. Specifically, I find that some of the information that has been withheld qualifies as the personal information of the appellant and should be disclosed to him. However, I find that the remaining information is properly withheld pursuant to the discretionary exemption at section 49(b) and uphold the ministry's decision not to disclose it.

RECORDS:

[7] The records consist of portions of police officer notes and two witness statements provided by the two affected parties. The information that remains at issue are the undisclosed portions, with the exception of police codes which have been removed from the scope of the appeal.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

- B. Does the discretionary exemption at section 49(b) apply to the information at issue?
- C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the records contain “personal information” as defined in section 2(1) and, if so, to whom does it relate?

[8] Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester.¹ Where the records contain the requester’s own personal information, access to the records is addressed under Part III of the *Act* and the discretionary exemptions at sections 49 may apply. Where the records contain the personal information of individuals other than the requester but do not contain the personal information of the requester, access to the records is addressed under Part II of the *Act* and the mandatory exemption at section 21(1) may apply.

[9] In order to determine which sections of the *Act* 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). The portions that are relevant in the circumstances of this appeal are the following:

“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,

...

(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 view of the individual except where they relate to another individual,

...

¹ Order M-352.

(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,

[10] 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.²

[11] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.³ Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁴

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁵

Representations

[13] The ministry submits that the records contain the personal information of both the affected parties, including their names, telephone numbers, and addresses, as well as their personal opinions, views, and observations. The ministry further submits that disclosure of this information would identify the affected parties and "link them to their involvement in the OPP investigation."

[14] The appellant submits that as he is unable to view the records he cannot directly comment on what specific personal information might be contained within them. However, he submits that the witness statements, which have been withheld in full, would presumably contain his own personal information. He further submits that he does not dispute that the statements would also contain the affected party's names, telephone numbers and address information and accepts that this information qualifies as their "personal information" within the meaning of that term as defined by the *Act*. The appellant explains that he does not seek access to the names, telephone numbers or address information of the affected parties but that he does seek access to the content of the statements themselves as they relate directly to him and amount to his own personal information. He submits that if the "personal information" of the affected parties' is severed from the records they would no longer be identifiable and therefore,

² Order 11.

³ Orders P-257, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁴ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁵ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

the content of their statements would not qualify as their "personal information."

[15] On reply, the ministry submits that it disagrees with the appellant's position that the content of the affected parties' witness statements are about the appellant and do not amount to the affected parties' personal information. The ministry submits that the definition of "personal information" in section 2(1) of the *Act* expressly includes "personal opinions or views." The ministry takes the position that the affected parties' witness statements contain their own personal opinions or views as well as information about their own involvement in an incident that was subsequently investigated by the police. The ministry also submits that the appellant may already know the identities of the affected parties and that as a result, the disclosure of their statements can be construed as the disclosure of the personal information of identifiable individuals.

Analysis and findings

[16] Having reviewed all of the responsive records, I find that all of them contain the personal information of one or other of the affected parties', as well as that of the appellant.

[17] The personal information relating to the affected parties includes their family status (paragraph (a)), address and telephone number (paragraph (d)), their personal opinions or views where they do not relate to another individual (paragraph (e)), or their name, where it appears with other personal information about them (paragraph (h)).

[18] The records also contain the personal information of the appellant including his age and sex (paragraph (a)), his driver's licence number, which qualifies as an "identifying number...assigned to the individual" (paragraph (c)), his address and telephone number (paragraph (d)), the views or opinions of other individuals about him (paragraph (g)), and his name, where it appears with other personal information relating to him (paragraph (h)).

[19] However, I find that some portions of the witness statements can be severed in accordance with section 4(2) of the *Act*. Disclosure of these portions would provide the appellant with access to his own personal information, and would not disclose the personal information of the witnesses. These portions of the statements contain only factual observations made by the witnesses about the accident. In my view, these portions of the witness statements are not so intermingled with the affected parties' personal information that they cannot be severed in a manner that protects the affected parties' personal information. Additionally, I do not accept that the disclosure of the specific portions, which I find amount to the appellant's personal information only, would render the affected parties identifiable.

[20] Although I acknowledge that the ministry submits that the appellant may be aware of the identities of the affected parties, I am not convinced that even if this is the case, the disclosure of the portions of the witness statements that I find qualify as the appellant's personal information only would enable the appellant to determine which

affected party made which statement. Even if the affected parties could be identified from the disclosure of the limited portions of their statements that I find amounts to the appellant's personal information, under the *Act* "personal information" is defined as "recorded information about an identifiable individual" [emphasis added]. With respect to the specific portions of the witness statements that I find contain the personal information of the appellant, I do not accept that any of the information contained within those portions can be described as information *about* either of the affected parties, nor do I accept that it would reveal any information *about* the affected parties.

[21] Accordingly, I find that portions of the witness statements at issue in this appeal contain information that qualifies as the appellant's personal information and that this information can be severed from the records in a manner that does not disclose the personal information of the affected parties. I will order that information be disclosed to the appellant.

[22] With respect to the remaining information, as I find that all of the records at issue contain the "personal information" of both the appellant and that of other identifiable individuals within the meaning of that term at section 2(1) of the *Act*, as explained above, Part III of the *Act* applies, and I must consider whether the information is properly exempt pursuant to the discretionary exemptions set out in section 49 of the *Act*. In the circumstances of this appeal, the ministry submits that section 49(b) applies to exempt portions of the records remaining at issue, from disclosure.

B. Does the discretionary exemption at section 49(b) apply to the information at issue?

[23] 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.

[24] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

[25] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. The information at issue in this appeal does not fit within any of paragraphs (a) to (e) of section 21(1).

[26] The factors and presumptions in sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f). That sections reads:

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

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

[27] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the personal information is presumed to amount to an unjustified invasion of personal privacy. This presumption can be overcome if any of paragraphs (a) to (c) of section 21(4) apply or if, under section 23, a compelling public interest in the disclosure of the personal information can be established. Neither section 23 nor any of paragraphs (a) to (c) of section 21(4) apply in the circumstances of this appeal.

[28] Section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.⁶

[29] For records claimed to be exempt under section 49(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interest of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁷

Representations, analysis and findings

[30] The ministry claims that the discretionary personal privacy exemption at section 49(b) applies to the information that it has severed from the records at issue and its disclosure would consist of an unjustified invasion of the affected parties' personal privacy. As I have found that some of the information previously at issue should be disclosed to the appellant as it consists of his own personal information, it remains only to be determined whether section 49(b) applies to the remaining information.

[31] As noted above, in this appeal, to determine whether an unjustified invasion of personal privacy in section 49(b) has been established with respect to the personal information at issue, I must consider the possible application of the presumptions at section 21(3) and the factors at section 21(2).

Section 21(3)(b) – compiled as part of an investigation into a possible violation of law

[32] The only presumption in section 21(3) that the ministry has claimed, and the only presumption that appears to apply to the information at issue in this appeal, is set out in section 21(3)(b). This presumption relates to records compiled as part of an investigation into a possible violation of law.

[33] Even if no criminal proceedings were commenced against any individuals, section

⁶ Order P-239.

⁷ Order MO-2954.

21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.⁸ The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.⁹

[34] The ministry submits that section 21(3)(b) applies to exempt the records at issue as they were all compiled and are identifiable as part of an OPP investigation into a possible violation of law arising out of a motor vehicle accident. The ministry highlights that the fact that no charges were laid in this case does not prohibit the application of section 21(3)(b) and submits that if "the evidence had pointed in a different direction, charges could have been laid by investigating members of the OPP" under either the *Criminal Code* or the *Highway Traffic Act*.

[35] To support its position, the ministry relies on paragraph 48 of Order PO-3273, where Adjudicator Daphne Loukidelis found that motor vehicle accident records compiled by the OPP were exempt under section 21(1) as the presumption in section 21(3)(b) applied to the withheld information. It submits that the reasoning applied by Adjudicator Loukidelis should be followed in this appeal.

[36] Finally, the ministry submits that none of the exceptions set out in section 21(4) apply in the circumstances of this appeal, nor does the compelling public interest override apply to overcome the application of the section 21(1) exemption.

[37] The appellant submits that although the ministry relies on paragraph 48 of Order PO-3273, the facts in that appeal are distinguishable from those before me here. He submits that in that appeal, a father was seeking disclosure of police records into the OPP's investigation of an accident in which his son was killed. The appellant submits that Adjudicator Loukidelis applied the mandatory exemption at section 21(1) to the records as they did not contain the father's own "personal information." This differs, the appellant states, from the current appeal where he seeks his own information and section 49(b) applies.

[38] The appellant further submits that in Order PO-3273, the records being sought included information belonging to a second driver who might have been at fault, as opposed to the current appeal where investigation into a possible violation of law was an investigation into the appellant himself. He submits that as the investigation applied to him alone and no other identifiable individual, aside from the name and contact information of the witnesses (information that he submits can be easily redacted) the only personal information in the witness statements belongs to himself alone.

[39] I have already found that portions of the witness statements contain only the personal information of the appellant and should be disclosed to him. Therefore, remaining at issue is the other information that has been severed from the records that consists of the personal information of the affected parties. From my review of the records, the police notes and the witness statements, I find that it is clear that they

⁸ Orders P-242 and MO-2235.

⁹ Orders MO-2213, PO-1849 and PO-2608.

were compiled by the OPP in the course of an investigation into the motor vehicle accident that is the subject of the records. I accept that their investigation into the matter could have given rise to charges under either the *Criminal Code* or the *Highway Traffic Act*. Accordingly, I find that all of the information remaining at issue falls under the presumption for information compiled as part of an investigation into a possible violation of law as contemplated in section 21(3)(b) of the *Act*. As a result, I accept that its disclosure constitutes a presumed unjustified invasion of the personal privacy of the identifiable individuals to whom the information relates. With the exception of the information that I have previously found to amount to the personal information of the appellant, I find that section 21(3)(b) applies to the information for which it has been claimed.

Section 21(2) – Factors weighing for or against disclosure

[40] Section 21(2) lists some factors for the ministry to consider in making a determination on whether the disclosure of personal information would result in an unjustified invasion of the affected parties' personal privacy. The list of factors at section 21(2) is not exhaustive. The ministry must also consider any circumstances that are relevant, even if they are not listed under section 21(2).

[41] The ministry submits that the factor at section 21(2)(f), weighing against disclosure, is relevant in the circumstances of this appeal. The appellant submits that the factor at section 21(2)(d), weighing in favour of disclosure, is relevant. Those sections read:

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 make the request;

...

(f) the personal information is highly sensitive.

Section 21(1)(d) – fair determination of rights

[42] For the factor at section 21(2)(d) to apply, previous orders have stated that an 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.¹⁰

[43] In his representations, the appellant submits that he “cannot properly assess the merits of his claim without reviewing the contents of the witness statements” and that the ministry failed to consider this factor when denying him access to that information.

[44] Although the appellant’s representations appear to suggest possible civil litigation, they do not provide me with sufficient evidence to support a conclusion that the factor at section 21(2)(d) is relevant. They do not specifically identify a right in question that is being determined, whether that right relates to a proceeding that is either existing or contemplated and not already completed, whether the information contained in the witness statements is significant to the determination of the right in question and whether the information is required in order to prepare for that proceeding or to ensure an impartial hearing.

[45] It should be noted that even if the information may be subsequently disclosed in a civil trial, disclosure under the *Act* is a process that is separate and distinct from that which occurs in the context of a legal dispute and raises different concerns and considerations. Also, it has previously been held that for the purposes of civil litigation, it may be that the discovery mechanisms available to the requester in that litigation will be sufficient to ensure a fair hearing.

[46] Accordingly, I have not been provided with sufficient evidence to establish that section 21(2)(d) is a relevant factor that should be given any weight in the circumstances of this appeal.

Section 21(2)(f) – highly sensitive

[47] The ministry claims that the factor at section 21(2)(f) is a relevant consideration as the personal information remaining at issue is “highly sensitive.” To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹¹

[48] The ministry submits that in Order PO-1618 former Assistant Commissioner Tom Mitchinson found that the personal information of individuals who are “complainants, witnesses or suspects” is “highly sensitive” within the meaning of section 21(2)(f). The ministry further submits that the affected parties were consulted and specifically declined to consent to the disclosure of their personal information. It takes the position

¹⁰ 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.).

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

that in order for consent to be meaningful, the wishes of the affected parties should be respected as it would cause them significant distress were they to find out that their personal information was disclosed, contrary to their express request.

[49] The appellant also argues that the police inappropriately considered the factor at section 21(2)(f) as, he submits, the affected parties could not have had any real expectation of privacy with respect to their witness statements. He submits:

[The affected parties] were aware that they could be compellable witnesses to any trial related to offences under the *Highway Traffic Act* or *Criminal Code* and, as such, their identities would be disclosed to any person or persons charged and to the public at large should the matters proceed to trial.

[50] Although, I acknowledge the appellant's argument that the affected parties were aware that if charges were laid with respect to the incident they could be compellable witnesses, that was not the case as charges were not laid and it is not the context in which the information before me appears. As previously noted, disclosure under the *Act* is a process that is separate and distinct from that which occurs in the context of a legal dispute and raises different concerns and considerations. The information that remains at issue, which amounts to the affected party's personal information, is subject to the *Act*. Despite consultation, the affected parties have expressly stated that they do not consent to its disclosure. I accept that, given the character and quality of the specific information that remains at issue, its disclosure can be considered to be "highly sensitive" within the meaning of section 21(2)(f) and that its disclosure could reasonably be expected to result in significant personal distress to the individuals about whom it relates. Accordingly, I find that this factor weighing against disclosure is relevant.

Summary

[51] As noted above, for information claimed to be exempt under section 49(b), this office will consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would amount to an unjustified invasion of personal privacy.¹² Accordingly, in conclusion, I must consider the interests of the parties in light of the presumption at section 21(3)(b) and the factor at section 21(2)(f), both of which I have found to apply in the circumstances of this appeal.

[52] I have found that the presumption against disclosure at section 21(3)(b) applies to the personal information that remains at issue as it was compiled as part of an investigation into a possible violation of law. Accordingly, the disclosure of this information is presumed to result in an unjustified invasion of the personal privacy of identifiable individuals other than the appellants. I have also found that the factor weighing against disclosure at section 21(2)(f) is a relevant consideration as the

¹² Order MO-2954.

disclosure of the specific information that remains at issue could reasonably be expected to be considered “highly sensitive” by the individuals to whom it relates. However, I have been provided with insufficient evidence to support a conclusion that any factors or criteria weighing in favour of the disclosure of the personal information of individuals other than the appellant might apply.

[53] As a result, I find that the disclosure of the information remaining at issue would constitute an unjustified invasion of the individuals to whom it relates, the affected parties, and that the discretionary exemption at section 49(b) applies to it. Accordingly, subject to my discussion below on the ministry’s exercise of discretion, I uphold their decision not to disclose it.

C. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[54] 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.

[55] In addition, 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.

[56] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ This office may not, however, substitute its own discretion for that of the institution.¹⁴

[57] The ministry submits that it exercised its discretion not to disclose portions of the records at issue appropriately, in accordance with the following considerations:

- the affected parties were notified and did not consent to the disclosure of their personal information;
- the personal information at issue presumptively constitutes an unjustified invasion of the affected parties’ privacy because it was compiled and is identifiable as part of an OPP law enforcement investigation;
- the ministry is concerned that witnesses would cease to cooperate with the OPP during law enforcement investigation, out of concern that their

¹³ Order MO-1573.

¹⁴ Section 54(2).

personal information would be disclosed, even if they did not consent, and,

- the OPP treated the records in accordance with its usual practices.

[58] The ministry submits that no further severances can be made to the records without disclosing personal information belonging to the affected parties.

[59] The appellant disputes the ministry's position that it treated the records in accordance with its usual practices. He submits that his counsel has made a significant number of requests for similar information in the past and "the usual practice is for the OPP to redact the name/address/phone number of witnesses who did not consent to the release of their personal contact information but to disclose the content of the witness statements."

[60] I have ordered disclosure of the portions of the witness statements that, in my view, contain only the appellant's personal information. The information that remains at issue is that which contains the personal information of both the appellant and the affected parties. Considering the circumstances, as well as the specific information that remains at issue, I am satisfied that the ministry exercised its discretion in good faith and for a proper purpose. I accept that they did not err in exercising their discretion to deny the appellant access to the information that I have found subject to the discretionary personal privacy exemption at section 49(b). Accordingly, I uphold the ministry's exercise of discretion.

ORDER:

1. I order the ministry to disclose to the appellant the portions of the witness statements which contain only his own personal information. This information should be disclosed by **April 18, 2016** but **not** before **April 12, 2016**. For the sake of clarity, I have enclosed a copy of the relevant pages with the information that **should be disclosed**, highlighted in green.
2. I uphold the ministry's decision to deny access to the information that remains at issue.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant.

Original Signed By: _____
Catherine Corban
Adjudicator

_____ March 11, 2016