Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3897

Appeal PA17-105

Ministry of Community Safety and Correctional Services

October 31, 2018

Summary: 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 the complete Ontario Provincial Police (OPP or the police) report, complete officer's field notes, and all witness statements relating to a motor vehicle accident in which the appellant suffered injuries, including memory loss. At the close of mediation only the ministry's decision to rely on the discretionary exemption at section 49(b) (personal privacy) of the *Act* to withhold certain information in a General Occurrence Report and four Interview Reports (witness statements) remained at issue. In this order, the adjudicator finds that the withheld information qualifies for exemption under section 49(b) of the *Act* and that the records cannot be disclosed in an anonymized or severed form without revealing exempt information. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (personal information), 10(2), 21(2)(a), 21(2)(f), 21(3)(b) and 49(b).

Orders Considered: Orders P-230, P-1014, P-1618, PO-2811 and PO-3766.

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* or *FIPPA*) for access to the complete Ontario Provincial Police (OPP or the police)

report, complete officer's field notes, and all witness statements relating to a motor vehicle accident in which the appellant suffered injuries, including memory loss.

[2] The ministry identified responsive records and granted partial access to them, relying on the discretionary exemption at section 49(b) (personal privacy) of the *Act* to deny access to the portions it withheld. The ministry also took the position that certain information in the records was not responsive to the request.

[3] The requester (now appellant) appealed the ministry's decision.

[4] During the course of mediation, the appellant advised the mediator that he did not take issue with the severance made in the General Occurrence Report at the top of page 5 and that he is no longer pursuing access to the withheld information in the Occurrence Summary, Supplementary Occurrence Report, police officer's notes or to the information the ministry viewed as being non-responsive. Accordingly, that severance, the Occurrence Summary, the Supplementary Occurrence Report, the police officer's notes and the information the ministry viewed as non-responsive are no longer at issue in the appeal.

[5] Also during mediation, the mediator attempted to contact a number of individuals whose interests may be affected by the disclosure of the information remaining at issue (the affected parties). Two affected parties consented to the ministry releasing information relating to them and the ministry issued a supplementary decision letter releasing that information to the appellant. The appellant maintained his request for access to the remaining withheld information in the records remaining at issue.

[6] Mediation did not fully resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[7] I commenced my inquiry by seeking representations from the ministry and four affected parties on the facts and issues set out in a Notice of Inquiry. Only the ministry provided representations. I then sent a Notice of inquiry to the appellant along with the ministry's representations. The appellant provided responding representations which were shared with the ministry for a reply. The ministry's reply representations were shared with the appellant for sur-reply. The appellant provided sur-reply representations.

[8] In this order, I find that the withheld information in the General Occurrence Report and the four Interview Reports qualifies for exemption under section 49(b) of the *Act* and that the records cannot be disclosed in an anonymized or severed form without revealing exempt information. The appeal is dismissed.

RECORDS:

[9] Remaining at issue in this appeal are a General Occurrence Report (pages 3 and

4) and Interview Reports (witness statements) (pages 14 to 22).

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. Can the records reasonably be severed without revealing exempt information?

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

DISCUSSION:

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

[10] The ministry relies on the discretionary personal privacy exemption in section 49(b) to deny access to the information remaining at issue. The ministry submits that the records remaining at issue are law enforcement investigation records containing personal information belonging to affected third party individuals. The ministry submits that the personal information in the records consists of the names of affected third party individuals, their addresses and telephone numbers, and related personal information the police collected about them as part of their law enforcement investigation. The ministry submits that this related personal information describes their actions and observations about the events that precipitated the investigation.

[11] The appellant states that he does not seek any personal information of the witnesses who provided witness statements or of anybody else mentioned in records that could identify them. He states that he is only concerned with information that pertains to him and the events that relate to him. He states that he has no issue with people's names, dates of birth or contact information being withheld. He adds that the information he is seeking is a narrative of the events that led up to, took place during, and after the accident that has severely impacted his life.

[12] However, as discussed below, the appellant argues that any personal identifiers, such as names, can be severed or replaced by neutral descriptors, and the records can thereby be disclosed without revealing any information that may qualify for exemption under the *Act*. Accordingly, the appellant submits that disclosing the records in a severed or anonymized form could not, therefore, result in an unjustified invasion of personal privacy under section 49(b).

[13] In order to determine which sections of the *Act* may apply, it is necessary to decide whether a 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 if they relate to another individual,
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> (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 if 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;

[14] 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.[1]

[15] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

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[1] Order 11.

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[16] 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.[2] 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.[3] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

Analysis and finding

[17] Having carefully reviewed the records at issue, I find that the information at issue, which consists of the observations, views and opinions of the driver and other affected parties about the events that transpired that night, their roles in it, their observations of the injuries sustained by the appellant as well as their personal identifiers, is recorded information about them and the appellant. I find that the records remaining at issue (in their original form) therefore contains the personal information of the driver, other affected parties and the appellant within the meaning of the definition of personal information at section 2(1) of the *Act*.

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

[18] 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.

[19] 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, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption

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[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

is discretionary, the institution may also decide to disclose the information to the requester.[5]

[20] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[6] However, 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.[7]

[21] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. 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). Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure. Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[22] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy 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.[8] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[9] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[10]

[23] The ministry claims that the withheld information falls within the scope of the presumption at section 21(3)(b) and the factor at section 21(2)(f). The appellant takes issue with the application of those sections. His representations also question the conduct of the police investigation, thereby raising the factor at section 21(2)(a). His representations also focus on how the disclosure of the withheld information will assist him in understanding what occurred to him, in light of his memory loss. In my view, this concern represents a relevant unlisted factor to be considered.

[24] Sections 21(2)(a), 21(2)(f) and 21(3)(b) read:

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[5] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).
[6] Orders M-444 and MO-1323.
[7] Orders MO-1323, PO-2622 and PO-2642.
[8] Order MO-2954.
[9] Order P-239.
[10] Order P-99.

> 21(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,
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> > (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
> >
> > (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;

The ministry's representations

[25] The ministry submits that the records were created by the OPP for the purpose of conducting a law enforcement investigation and fall squarely within the mandatory presumption in section 21(3)(b) of the *Act*.

[26] The ministry submits that in Order PO-3766, which related to similar policing records in the custody of the OPP, Adjudicator Alec Fadel found that the presumption in section 21(3)(b) applied to records compiled in the course of its investigation into a possible violation of law and that the personal information was "highly sensitive." The ministry submits this same reasoning should apply to the records at issue in this appeal. The ministry adds that the records reveal that a charge was laid, thereby further supporting its position that section 21(3)(b) of the *Act* applies. The ministry also references Order P-1618, where former Assistant Commissioner Tom Mitchinson found that the personal information of individuals who are "complainants, witnesses or suspects" as part of their contact with the OPP is "highly sensitive" for the purpose of section 21(2)(f). The ministry submits that this reasoning should also apply to the withheld information, as the affected third party individuals who provided the information could be characterized as witnesses or suspects.

[27] The ministry submits that it is not clear how much knowledge the appellant has of the contents of the responsive records but in any event, the absurd result principle does not apply because disclosure would be inconsistent with the purpose of the exemption.[11]

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[11] The ministry relies on Order PO-3013 in support of its position.

The appellant's representations

[28] The appellant asserts that contrary to the position of the ministry:

> … no actual investigation was conducted by the attending OPP officer in regards to the accident or possible criminal acts as dictated by the proper rules and procedures of policing, meaning any records created as a result are not considered as part of an investigation.

[29] The appellant takes the position that the end result of a criminal proceeding involving the driver of the vehicle demonstrates that no investigation was properly conducted resulting, in his view, that there was no investigation at all.

[30] The appellant submits that:

> The OPP might have acted in accordance with their usual procedure in severing requested information, however they failed to follow their own procedures in doing their job and protecting the public safety as evidenced by their inability to locate and properly charge the Driver of the motor vehicle. As such, the release of the requested records is the only way for me to understand how the OPP failed to protect my rights.

[31] He further asserts that the narrative of events contained in the witness statements would not be deemed "highly sensitive" regarding anyone other than the appellant because it contains a recorded account of what happened to him.

[32] He further argues that not disclosing the information is causing him significant personal distress and:

> It is not causing anyone else any distress of any kind because if the idea of the release of the narrative of events on the night of the accident was, the affected 3rd parties would step forward and object with their own representations. It also cannot be of a distressing nature because the information was provided to a police officer and the only reason information provided to a police officer would be distressing is if the information was untrue.
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> I make the argument that as the complainant from the accident I want the release of the information as it is significantly distressing not knowing what transpired the night of the accident due to severe head injuries and memory loss. …

[33] The appellant takes the position that it would be absurd to withhold the information as he does not have the factual details of the events of that day and has no memory of it, and the sole purpose of the appeal is to obtain information that he does not have. He states:

> Prior to this appeal, I have been told approximately six different versions of events from people that had no association to the recreation facility, but were told by people that were there, such as doctors and my parents. I was also told different versions of events from people connected to the recreation facility but who fully admitted that they were not there the night of the accident but they were told the story by someone else, rendering their version as hearsay. From all the various versions of events that I have been told, there are similarities in all versions that I have been told.

[34] He adds:

> [T]he Absurd Result Principle does apply because I do not have any first hand knowledge of the information contained in the requested records and I do not have any knowledge of who the information sources are of the information in the records. I do however have a vague inference of what the records say due to being told various versions of events from the night of the accident from various people.

Analysis and findings

Section 21(2)(a): public scrutiny

[35] This section contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.[12] Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 21(2)(a).[13]

[36] In Order P-1014, Adjudicator John Higgins concluded that public policy supported "proper disclosure" in proceedings such as the workplace harassment investigation at the centre of that appeal, and that the support was grounded in a desire to promote adherence to the principles of natural justice. Adjudicator Higgins agreed with the appellant in that appeal that "an appropriate degree of disclosure to the parties" involved in such investigations was a matter of considerable importance. However, on the facts of that appeal, Adjudicator Higgins concluded that "the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one." Accordingly, because the appellant in that matter wished to review the records for himself to try to assure himself that "justice was done in this particular investigation, in which he was personally involved," Adjudicator Higgins found that the factor at section 21(2)(a) did not apply.

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[12] Order P-1134.
[13] Order P-256.

[37] Although the records in the current appeal are not related to an investigation into a complaint of workplace harassment, in my view, the analysis of Adjudicator Higgins provides some guidance in the matter before me. In this regard, I am not satisfied that the appellant's motives in seeking access to the records are more than private in nature; rather he wishes to satisfy himself that the conduct of the OPP in relation to him and the investigation of the matters involving him were appropriate. In my view, this is a private interest, and I therefore find that section 21(2)(a) is not a relevant consideration. Accordingly, I find that the factor in section 21(2)(a) does not apply to the information in the records that remains at issue.

Section 21(2)(f): highly sensitive

[38] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[14] Based on my review of the records at issue and the representations, I find that due to its subject matter and the context in which it was gathered, the personal information remaining at issue is inherently highly sensitive and, therefore, that the factor at section 21(2)(f) is relevant to the determination of whether or not it should be disclosed. Regarding the failure of some of the affected parties to provide representations, it should be noted that not providing representations is different from consenting to disclosure. In my view, this factor applies in this case and is a factor weighing against disclosure.

Section 21(3)(b): investigation into violation of law

[39] 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.[15] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[16]

[40] The ministry submits that the presumption against disclosure in section 21(3)(b) applies to the remaining information at issue because it was gathered as part of investigations into possible violations of law, namely the *Criminal Code of Canada*. The appellant takes the position that because the investigation was inadequate, it is as if no investigation ever occurred.

[41] I accept the ministry's position. Even if the appellant takes issue with its adequacy, based on the content of the records, it is clear that the remaining undisclosed personal information was compiled by the OPP and is identifiable as part of their investigation into possible violations of law. I therefore find that this personal information fits within the ambit of the presumption against disclosure in section 21(3)(b).

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[14] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[15] Orders P-242 and MO-2235.
[16] Orders MO-2213 and PO-1849.

Unlisted Factor weighing in favour of disclosure

[42] The appellant submits that he has sustained memory loss and that disclosure of the information to him will allow him to understand what occurred. In my view, the disclosure of the withheld information will assist the appellant in understanding what occurred to him, in light of his memory loss. I accept that the concerns raised by the appellant represent a relevant unlisted factor weighing in favour of disclosure.

Weighing the factors and presumption and balancing the interests of the parties

[43] As set out above, in determining whether the disclosure of the remaining undisclosed personal information in the records would be an unjustified invasion of personal privacy under section 49(b), I must consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.

[44] I have found that the presumption at section 21(3)(b) and the factor at section 21(2)(f) favour non-disclosure. I have also found that the disclosure of the withheld information will assist the appellant in understanding what occurred to him, in light of his memory loss, which weighs in favour of disclosure. Considering and weighing the factor and presumption with the unlisted relevant factor raised by the appellant and balancing the interests of the parties, however, I find that, in the circumstances of this appeal, including the importance of protecting personal information in the law enforcement context, and the highly sensitive nature of the information, the presumption at section 21(3)(b) and the factor at section 21(2)(f) outweigh the unlisted favouring disclosure. Accordingly, I find that disclosure of the remaining personal information at issue would be an unjustified invasion of personal privacy under section 49(b).

Issue C: Can the records reasonably be severed without revealing exempt information?

[45] Where a record contains exempt information, section 10(2) of the *Act* requires the ministry to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[17] In this appeal the issue is whether, in the unique circumstances before me, an individual would be identifiable if the witness statements are disclosed with personal identifiers severed or replaced by neutral descriptors.

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[17] Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

The appellant's representations

[46] The appellant submits that due to the injuries he suffered as a result of the accident, he has absolutely no memory of anything that happened or of anybody that was in attendance at the recreational facility two days prior to the incident and that due to new information that has been brought to his attention, his memory impairment might in fact extend to up to 2 weeks before the date of the incident. He submits therefore that by removing the personal identifiers from the witness statements he would not be able to connect any person to the statements they gave. That said, he does acknowledge that he knows the name of the driver of the vehicle, as he has a claim against the driver's insurance company.

[47] The appellant provided a medical report, which was not shared due to confidentiality concerns, to demonstrate the severity of his memory loss.

[48] In his representations, he provides examples of how the General Occurrence Report and the Interview Reports could be anonymized by substituting the names of individuals with appropriate neutral descriptors to preserve an individual's personal privacy and to make the narrative comprehensible. He submits that with the neutral descriptors substituted into the requested records, even if the names of the affected parties were ever discovered, the information contained in the requested records would not possibly be capable of being connected to any single individual.

[49] He submits that if this were done, the remaining information would not constitute personal information because it would not leave any identifiable information about the information source. He adds that:

> … as spelled out in *FIPPA* section 2(1)(e), any personal opinions or views contained in those records concerning the events prior, during, and after the accident is exempted from being considered as personal information because they concern/relate to another individual (Me).

[50] The appellant does not deny the possibility that he might have previously known the affected parties if they were described to him. However:

> … in the time I spent at the recreational facility where the accident happened, I met and interacted with in excess of over 250 different people over the course of 3 months. Some were one-time attendees and others were regulars. Due to my [injury] I do not have the memory recall or ability to identify who was there the night of the accident unless a person told me, or the ministry or IPC told me.

[51] He submits that granting him access to the requested information would not be an unjustified invasion of anyone's privacy:

> … because their identifying personal information will have been removed, meaning all that would be left in the General Occurrence Report and Interview Reports would be a story of what was going on, what happened, and what was done. It would be the equivalent of a Newspaper story written by an Investigative Reporter.

[52] The appellant submits that:

> … by removing the identifiable information, the information that remained would only be a narrative of events that occurred and not classified as personal information, meaning it would be the equivalent of water cooler gossip about a social event people attended.

The ministry's representations

[53] With respect to anonymizing the records by removing the information suggested by the appellant, the ministry submits:

> … that due to the subject matter of the records (an OPP investigation where the appellant appears to know all or most of the affected third party individuals), even if identifying information such as the names were removed from the records, it is reasonable to expect that the affected third party individuals could still be identified if the information in the records were disclosed. Therefore, we are of the view that none of the personal information should be disclosed.

[54] With respect to the appellant's request that the ministry substitute the names of affected third party individuals with neutral descriptors, it submits in reply that it is under no obligation to create new records, which is what it says the appellant requests. It adds that there is no obligation in *FIPPA* for the ministry to substitute personal information with anonymized data.

Analysis and finding

[55] Previous orders have determined that in order to qualify as "personal information", the fundamental requirement is that the information must be "about an identifiable individual" and not simply associated with an individual by name or other identifier.[18]

[56] In Order P-230, former Commissioner Tom Wright set out the basic requirements of identifiability as follows:

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[18] PO-2063-R.

> If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.

[57] The Divisional Court has explained the relationship between "personal information" and identification in the following terms:

> The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the records. See Order P-316, [1992] O.I.P.C. No. 74; and Order P-651, [1994] O.I.P.C. No. 104.[19]

[58] A number of past orders of this office have recognized that the question of whether it is reasonable to expect that an individual can be identified from information involves a consideration of a number of circumstances including, for example, the information in the record, the size of the group to which the individual belongs, and what information is already available in the public domain or known to those familiar with the particular circumstances or events contained in the record.[20] In every case, the decision on this question is based on its own facts.

[59] A specific determination of identifiability of information considering the size of the group of individuals from which the identification could be made, otherwise referred to as a "small cell" count, was described by former Senior Adjudicator John Higgins in Order PO-2811:

> the term "small cell" count refers to a situation where the pool of possible choices to identify a particular individual is so small that it becomes possible to guess who the individual might be, and the number that would qualify as a "small cell" count varies depending on the situation.[21]

[60] In orders predating Order PO-2811, it had been accepted that anonymized information relating to a group of five or fewer individuals could reasonably result in the identification of one of the individuals.[22] At issue in this appeal is information sourced from or pertaining to five affected parties, including the driver of the vehicle, with differing roles in the events that unfolded that night.

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[19] *Ontario (Attorney General) v. Pascoe*, 2001 CanLII 32755 (ON SCDC).
[20] See, for example, Orders MO-1708, MO-1472-F, PO-3189 and PO-3345.
[21] Order PO-2811 at page 8. Order PO-2811 was upheld in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.
[22] See Orders P-644 and MO-1415.

[61] The appellant takes the position that if the names and personal identifiers are removed, disclosing the balance of the records at issue would not reveal personal information. However, he also acknowledges that he is aware of the identity of the driver and his representations indicate that he is aware of some of the occurrences that night as well as events that unfolded thereafter, although from other sources. For example, he states:

> Prior to this appeal, I have been told approximately six different versions of events from people that had no association to the recreation facility, but were told by people that were there, such as doctors and my parents. I was also told different versions of events from people connected to the recreation facility but who fully admitted that they were not there the night of the accident but they were told the story by someone else, rendering their version as hearsay. From all the various versions of events that I have been told, there are similarities in all versions that I have been told.

[62] Considering the authorities above and the circumstances before me, given the small number of individuals whose information remains at issue, as well as the appellant being aware of the identity of the driver and some of the circumstances of that night, I conclude that, even if the personal identifiers were removed, or other neutral descriptors substituted, the anonymized records would still contain the personal information of identifiable individuals, because it is reasonable to expect that an individual could be identified as a result of the disclosure of the remaining information.

[63] Accordingly, I find that the records cannot reasonably be anonymized or severed without disclosing the information that I have found to qualify for exemption under section 49(b) of the *Act*.

Issue D: Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[64] 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.

[65] 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.

[66] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[23] This office may not, however, substitute its own discretion for that of the institution.[24]

The ministry's representations

[67] The ministry submits that it appropriately exercised its discretion in withholding the information at issue in the appeal. The ministry submits that in exercising its jurisdiction it considered the following principles:

a. The public policy interest in safeguarding the privacy of affected third party individuals, and in particular those whose personal information is collected as part of law enforcement investigations;

b. The concern that the disclosure of the records would jeopardize public confidence in the OPP, especially in light of the expectation that information the public provides to the police during a law enforcement investigation will be kept confidential; and,

c. The OPP has acted in accordance with its usual practices, in severing law enforcement records containing affected third parties' personal information.

[68] The ministry submits in reply that it provided many of the responsive records to the appellant, which reveal the narrative or story that the appellant is seeking and it only withheld those portions of the records which contain exempt third party personal information.

The appellant's representations

[69] The appellant submits that the ministry's concern that releasing the information will cause the public to lose trust in the OPP is exaggerated and that the information that the ministry disclosed does not provide a sufficient narrative. He submits in reply that:

> … The provided narrative/story does not provide the circumstances of what I was doing immediately prior to the accident, it does not provide how and why I was injured in the accident, and it does not provide what the response/reaction to me becoming injured in the accident was.

[70] Based on the appellant's education and his consultations with certain individuals, he submits that the General Occurrence Report should contain a considerably more detailed account of what happened and that if witness statements were taken,

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[23] Order MO-1573.
[24] Section 54(2) of the *Act*.

everything together "should provide a clear play by play breakdown of everything that happened prior to, during, and after the accident. And as such that is what I want access to." He argues that the ministry's disclosure is inadequate:

> I argue that the ministry has not provided any of the important information to the narrative/story of events that happened. Mainly because nowhere does it show how or why I was put in a situation where I could be injured. Nowhere does it show what caused me to become injured. Nowhere does it show what the attending OPP officers did to investigate the accident. Nowhere does it show what the reaction/response was to the accident by other people in attendance.

[71] He submits that the following purposes of the *Act* should be considered:

- Information should be available to the public,
- Individuals should have a right of access to their own personal information (meaning any information about me, be it others' personal opinions or observations),
- Exemptions from the right of access should be limited and specific.

Analysis and finding

[72] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.[25] It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion.[26]

[73] I have considered the arguments of the appellant for the exercise of discretion in his favour. However, I find that there is no evidence before me to establish that the ministry exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations or that the ministry was withholding the information for a collateral or improper purpose. I note that a great deal of information relating to the events involving the appellant was disclosed to him.

[74] With respect to other relevant considerations, I am satisfied that the ministry took into account the wording of the personal privacy exemption and the interests it seeks to protect, that the request was for the appellant's personal information, the context in which the information was collected, its historic practice with respect to similar information, the reason for the request, why the appellant wished to obtain the

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[25] Order MO-1287-I.
[26] Order P-58.

information and his arguments why it should be disclosed. In all the circumstances, and for the reasons set out above, I uphold the ministry's exercise of discretion.

ORDER:

I uphold the decision of the ministry and dismiss the appeal.

Original Signed by: October 31, 2018

Steven Faughnan
Adjudicator