

**ORDER PO-2452**

**Appeal PA-050269-1**

**Ministry of Training, Colleges & Universities**

## NATURE OF THE APPEAL:

The Ministry of Training, Colleges & Universities (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), which read as follows:

... Please send me a copy of [my] complete file in regards to grant over payment, including who sent the anonymous letter and ... other pertinent information.

The Ministry responded to the request by identifying the responsive records, granting partial access to them, and denying access to the remaining portions on the basis of the exemption in section 21(1) of the *Act* (invasion of privacy).

The requester (now the appellant) appealed the Ministry's decision.

During the mediation stage of this appeal, the appellant narrowed the information sought to include only the withheld portion of the "anonymous letter" referred to in the request.

Following this narrowing of the request, the Ministry clarified that it was relying on the presumptions in sections 21(3)(d) and 21(3)(f) of the *Act* to deny access to the withheld information remaining at issue contained in the "anonymous letter".

Also during mediation the Ministry issued a subsequent decision to the appellant. In that decision, the Ministry indicated that it had also reviewed the record in light of the discretionary exemption found in section 49(b) of the *Act* (invasion of privacy), and determined that the record was exempt under that section. The Ministry stated:

The information that has been severed from the record at issue is a discrete portion of the record that relates ... to the third party who remains anonymous to the Ministry but who could be identified by [the appellant] if this personal information were disclosed.

...

Even if section 49(b) applies ... the Ministry would still withhold the severed portion of the record. The presumption against disclosure in section 21(3) applies ... and to our knowledge there is no compelling public interest in the disclosure of the severed portion of the record.

The Ministry then referred to the three-step process which it applies in circumstances where the discretionary exemption in section 49(b) is at issue, identified the nature of the information that was disclosed and the information that was withheld, and stated:

Thus, the Ministry has fairly balanced the access rights of [the appellant] against the privacy rights of the third party.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the appellant and, in response, received representations on the issues

in the appeal. In the circumstances, I decided that it was not necessary for me to seek representations from the Ministry.

## **RECORD:**

The record remaining at issue is the withheld portion of the anonymous letter dated January 5, 1989. The letter is addressed to the Ministry and is signed "anonymous". The letter identifies concerns the author has about the awarding of Ontario Student Assistance Program (OSAP) money to the appellant, and sets out in detail information about the appellant's financial situation. The withheld portion of the letter sets out some detailed information about the author.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the *Act*, personal information is defined, in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

...

- (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,

...

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry takes the position that the record contains the personal information of the appellant, her family members, and the author of the letter. Although the author of the letter is not named, the Ministry states that this individual could be identified by the appellant if the withheld personal information were disclosed.

The appellant affirms that the information at issue relates to her and her family members. The appellant also takes the position that, because the name of the author of the letter is not contained in the record, and because the record only contains information which “may or may not help [the appellant] to identify” the author, the withheld information should be disclosed.

I have carefully reviewed the record at issue and find that it contains detailed information about the finances of the appellant and her family members. I am satisfied that this information constitutes the personal information of the appellant and other identifiable individuals as defined in section 2(1)(b) and (h) of the *Act*.

I am also satisfied that the withheld information in the record contains the personal information of the author of the letter, as it contains educational or financial information relating to the author, as well as the author’s personal views or opinions. In addition, the record itself is correspondence sent to the Ministry by the author that is explicitly of a confidential nature. For these reasons, it constitutes the personal information of the author as defined in sections 2(1)(b), (e) and (f) of the *Act*. Furthermore, I am satisfied that it is reasonable to expect that the author of the record may be identified by the appellant if the withheld information is disclosed.

Accordingly, I find that the record contains the personal information of the appellant, the appellant’s family members, and the author of the record.

## **INVASION OF PRIVACY**

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from disclosure that limit this general right.

Under section 49(b), where a record relates to the requester but disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution may refuse to disclose that information to the requester.

Section 49(b) is a discretionary exemption. Even if the requirements of section 49(b) are met, the institution must nevertheless consider whether to disclose the information to the requester. In this case, section 49(b) requires the Ministry to exercise its discretion in this regard by balancing the appellant's right of access to her own personal information against another individual's right to the protection of their privacy.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The Ministry relies on section 49(b) to support its denial of access to the records. The Ministry relies on the "presumed unjustified invasion of personal privacy" at sections 21(3)(d) and (f), and has also referred to the sensitivity of the record, and the fact that it was written anonymously, which raise the factors favouring non-disclosure in sections 21(2)(f) and (h).

The appellant takes the position that access should be granted to the withheld information. She refers to the detailed information about her and her family which is contained in the record, and states that it is not fair that the author of the record could provide the Ministry with such detailed personal information, but have their identity protected. The appellant also submits that the author must have been close to the appellant or her family in order to possess that kind of detailed information, and that she would like to have the option of distancing herself from the author if there is still a connection between the author and the appellant. In addition, the appellant refers to whether she has any rights to the information in this matter, and in her original request refers to her appeal of the decision made by the Ministry relating to her grant application, thereby implicitly raising the possible application of the factor in section 21(2)(d).

The relevant sections of the *Act* read as follows:

49. A head may refuse to disclose to the individual to whom the information relates personal information,

- (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

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,

- (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;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

***Sections 21(3)(d) and (f): presumed unjustified invasion***

The Ministry takes the position that the withheld portion of the record contains information which falls within the presumptions found in sections 21(3)(d) and (f). On my review of the withheld portion of the record, I am satisfied that small portions of it contain information which may be considered the employment, educational or financial history of the author, and that disclosure of those portions would be presumed to constitute an unjustified invasion of privacy under sections 21(3)(d) and (f). However, not all of the withheld portion of the record contains information which falls within the presumptions.

***Section 21(2): factors weighing in favour of or against disclosure***

In order to determine whether disclosure would constitute an unjustified invasion of privacy, I must consider whether any of the factors under section 21(2) apply.

On my review of the withheld portion of the record, I am satisfied that the personal information of the author of the letter, which is contained in the withheld portion, is “highly sensitive” information. I find that disclosure of the information could reasonably be expected to cause excessive personal distress to the author (Orders M- 1053, PO-1681, PO-1736). Furthermore, based on the fact that the letter is signed “anonymous”, I find that the personal information has been supplied by the individual to whom the information relates in confidence within the meaning of section 21(2)(h). Both of these factors favour non-disclosure of the withheld portion of the record.

With respect to the possible application of the factor favouring disclosure found in section 21(2)(d), previous orders have stated that, in order for this section 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

(See 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.).]

Although the appellant refers to her rights with respect to access to the withheld information, and refers to her appeal of the decision made by the Ministry relating to her grant, I am not satisfied that the factor in section 21(2)(d) is relevant in these circumstances. The specific, detailed information contained in the record that reflects the finances of the appellant and her family members has been disclosed to the appellant. The information contained in the withheld portion of the record relates primarily to the author, and I am not satisfied that this personal information has any bearing or significance to the determination of the appellant’s appeal of the decision made by the Ministry relating to her grant.

The list of factors under section 21(2) is not exhaustive. However, in the circumstances, I am not satisfied that the other factors referred to by the appellant are relevant unlisted factors favouring disclosure. I appreciate the appellant’s interest in finding out who wrote the letter which affected her eligibility for OSAP assistance in the past; however, in the circumstances, I find that the

considerations the appellant identifies do not constitute relevant factors favouring disclosure of the withheld portion of the record.

### *Summary*

I have found that the identified presumptions, and two factors favouring non-disclosure, apply to the withheld information at issue. I have also found that none of the factors favouring disclosure applies. Accordingly, in the circumstances of this appeal, I am satisfied that the disclosure of the remaining information would constitute an unjustified invasion of privacy under section 49(b) of the *Act*.

### **The Ministry's Exercise of Discretion**

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the discretionary exemptions found in the *Act*. Because section 49(b) is a discretionary exemption, I must also review the Ministry's exercise of discretion in deciding to deny access to the record.

In the Ministry's second decision letter to the appellant, the Ministry identifies in detail the three-step process which it applies in circumstances where the discretionary exemption in section 49(b) is at issue. It then identifies the nature of the information that was disclosed and the information that was withheld, and takes the position that the Ministry has "fairly balanced the access rights of [the appellant] against the privacy rights of the third party [the author]".

Based on the factors set out in the Ministry's second decision letter, and based on the circumstances of this appeal (particularly the Ministry's decision to disclose the portions of the record relating to the appellant and her family members, but to deny access to the information relating primarily to the author of the record), I am satisfied that the Ministry properly exercised its discretion under section 49(b) of the *Act* to refuse to disclose the withheld portion of the record to the appellant.

### **ORDER:**

I uphold the decision of the Ministry.

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Order Signed By  
Frank DeVries  
Adjudicator

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February 24, 2006