Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2890

Appeals PA09-83 and PA09-197

Ministry of Transportation

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BACKGROUND:

The record at issue in this appeal is a letter received by the Ministry of Transportation (the Ministry) that refers to the requester.

The requester filed three related requests for access to information. The requests were filed with the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the Police under the *Municipal Freedom of Information and Protection of Privacy Act*, and the Ministry of Health and Long-Term Care under the *Personal Health Information Protection Act* (*PHIPA*).

Two of the requests described the letter in some detail, including information relating to the date, the alleged author, the contents the requester believes are contained in the letter, and the parties to whom it was addressed and copied. In each of the decisions issued in response to the requests, all of the institutions located a responsive record or records, and claimed that all or portions were exempt.

The requester appealed all three decisions to this office. This order involves the request made to the Ministry, and addresses Appeals PA09-83 and PA09-197. Appeal MA09-75 was opened for the appeal involving the Police, and complaint file HA09-12 was opened for the requester's *PHIPA* complaint involving the Ministry of Health and Long-Term Care. Order MO-2522, addressing Appeal MA09-75, is being issued concurrently with this order.

NATURE OF THE APPEAL:

As noted above, this order addresses the issues relating to the request to the Ministry under the *Act*. This request stated:

> I would like to request a copy of my entire Ministry of Transportation of Ontario file…. I am also specifically looking for a copy of a letter written by [named individual and city of residence] and addressed to the Registrar of Motor Vehicles Medical Report section. The letter was dated about November 27, 2008. It was sent to 2680 Keele Street in Downsview, Ontario.

The Ministry located records that it considered responsive and issued a decision letter granting access to a number of them in full. It also identified two responsive records that required consultations with parties outside of the Ministry, and it extended the time limit for providing a response on these records by an additional two weeks.

One of these parties objected to disclosure of the letter. In a supplementary decision, the Ministry denied access to the letter in its entirety pursuant to section 49(a), in conjunction with section 20 (danger to safety or health), and 49(b), with reference to sections 21(2) and (3) (personal privacy) of the *Act*. The other party consented to the disclosure of the information he had provided to the Ministry, and the record containing that particular information was disclosed to the requester.

The requester (now appellant) appealed the Ministry's denial of access and this office opened appeal PA09-83.

During mediation, the appellant confirmed that she is seeking access in full to the letter (the record). This is the only record that remains at issue.

Subsequently, the Ministry issued a revised decision to the appellant advising that it had decided to disclose a substantial portion of the record. The Ministry no longer relies on section 49(a), in conjunction with section 20, in this appeal. In addition, it no longer relies on section 49(b) for the parts of the record it has decided to disclose.

The Ministry still claims section 49(b) for a small amount of personal information within the record, namely, the affected party's title and contact details. Significantly, the Ministry decided to grant access to the appellant's personal information, and to the name of the affected party, and no longer claims that any of this information is exempt.

In addition, the Ministry issued a revised decision to the affected party advising him of its decision to grant partial access to the record. Subsequently, this individual (now the third party appellant) appealed the Ministry's decision to disclose parts of the record. This office opened appeal PA09-197 to process this third party appeal.

The appellant was not satisfied with the Ministry's revised decision and she advised the mediator that she continues to seek access to the entire record. The mediator contacted the third party appellant, who stated that the entire record should be withheld because it contains personal information whose disclosure would constitute an unjustified invasion of privacy (section 21(1)). The third party appellant also raised concerns about personal health and safety should the record be disclosed.

No further mediation was possible and, therefore, both files were transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. Between the two appeals, access to the entire record is at issue. This order addresses both appeals, and therefore deals with access to the entire record, which remains undisclosed.

The adjudicator initially assigned to the two appeals issued a Notice of Inquiry to the third party appellant inviting representations on the facts and issues set out in the notice. The third party appellant submitted representations. Subsequently, this file was assigned to me to complete the inquiry.

I issued a Notice of Inquiry to the Ministry, inviting its representations, and I provided a complete copy of the third party appellant's representations to the Ministry. I then received representations from the Ministry.

After reviewing the Ministry's representations, I decided that the third party appellant should have the opportunity to reply. I sent the third party appellant a letter inviting reply representations. As portions of the Ministry's representations met this office's confidentiality

criteria, only the non-confidential portions were shared with the third party appellant. I subsequently received reply representations from the third party appellant.

I then issued a Notice of Inquiry to the appellant, inviting representations on the facts and issues set out in the notice. I provided the non-confidential portions of the Ministry's representations to the appellant, and a summary of the third party appellant's position as set out in his initial and reply representations.

The appellant then provided representations.

Both the appellant and the third party appellant have expressed their desire that their representations not be shared with each other for reasons of confidentiality, and in the unique circumstances of this appeal, I will not make detailed reference to their representations in this order.

RECORD:

The record at issue is a letter dated November 27, 2008. The portions of the record at issue in Appeal PA09-83 comprise the address, e-mail address, title and telephone number of the third party appellant. The portions of the record at issue in Appeal PA09-197 consist of the third party appellant's name and the body of the letter. As noted, the two appeals, taken together, concern the issue of whether the appellant is entitled to receive access to the November 27, 2008 letter in its entirety.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) of the *Act*. The definition states, in part:

> "personal information" means recorded information about an identifiable individual, including,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (g) the views or opinions of another individual 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].

The third party appellant's representations do not specifically address the issue of whose personal information is contained in the records, but the Ministry does so in its representations. The Ministry's position is that the record contains the personal information of both the third party appellant and the appellant.

The appellant's representations also do not directly address this issue except to argue that information pertaining to the third party appellant is a matter of public record.

I find that the record contains the appellant's personal information, including the third party appellant's opinions or views about the appellant, her age, her medical history, and other information about her. Under subsection (e) and (g) of the definition, I note that the third party appellant's opinions or views about the appellant are not his personal information.

I also find that the record contains the personal information of the third party appellant, consisting of his name, his home address and other personal contact details including his e-mail address, and other information that would identify him.

The record contains the third party appellant's professional title. Section 2(3) of the *Act* refers to that type of information. It states:

> 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.

The Ministry submitted confidential representations in support of its argument that information described as the third party appellant's title is the personal information of the third party appellant and not business or professional information. As these representations are confidential, I am not able to refer to them in detail here. I do not, however, accept these arguments. Based on section 2(3), I find that the affected person's title is not his personal information and it is therefore not exempt under section 49(b).

To summarize, I find that the record contains the personal information of both the appellant and the third party appellant. I will now consider whether the small amount of information in the record that qualifies as the third party appellant's personal information is exempt under section 49(b).

PERSONAL 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 this right.

Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. 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). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div. Ct.)].

The Ministry submits that the third party appellant's title is subject to the presumption at section 21(3)(d), but I have already determined that the title is not personal information. Since only personal information can be exempt under section 49(b), I will not consider this submission any further.

In the circumstances of this appeal, and based on my review of the representations and the record, I find that none of the presumptions in section 21(3) apply. I therefore turn to consider the factors and circumstances in section 21(2).

Section 21(2)

This section lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. 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) [Order P-99].

The third party appellant's representations do not refer specifically to any of the factors set out in section 21(2), but the subjects dealt with in his representations raise the possible application of factors in sections 21(2)(e), (f) and (h).

In seeking to withhold the third party appellant's address and other contact details, the Ministry argues that none of the factors favoring disclosure of this personal information apply and that only factors favoring privacy protection apply to it. However, the Ministry does not refer to the specific factors in section 21(2).

The appellant's representations argue that the factor favouring disclosure in section 21(2)(d) applies.

Section 21(2) states, in part:

> 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;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

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

Factors favouring privacy protection

Section 21(2)(e): pecuniary or other harm

In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

The third party appellant's confidential representations refer to possible harm. I am unable to refer to these confidential representations in any detail, but in my view, they amount to no more than unsupported assertions and do not demonstrate that the harm envisioned by section 21(2)(e) is present or foreseeable.

The appellant argues that there is no evidence that the disclosure would cause any harm to the health or safety of the third party appellant.

Having reviewed the third party appellant's confidential representations, and in all the circumstances of this case, I am not satisfied, on the evidence before me, that this factor applies.

Section 21(2)(f) highly sensitive

To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

The Ministry states that it has an interest in protecting the personal information of members of the public who provide information of the kind at issue here. It refers to Order PO-1926, where it made this argument, and where its decision to refuse to confirm or deny the existence of a similar record was upheld by this office. However, it states that the circumstances in Order PO-1926 were quite different from the circumstances of this appeal.

In Order PO-1926, the appellant in that case sought access to any and all correspondence and submissions from a named doctor submitted to the Ministry regarding herself. The Ministry issued a decision refusing to confirm or deny the existence of the requested records pursuant to section 21(5) of the *Act*.

I agree with the Ministry that the circumstances in Order PO-1926 are different than the present case. One significant difference is that Order PO-1926 deals with a refusal to confirm or deny whether responsive records even exist, under section 21(5) of the *Act*. In this case, the Ministry has acknowledged that responsive records, including the letter that constitutes the remaining record at issue, exist. The Ministry does not rely on section 21(5).

The third party appellant's representations provide confidential evidence that the disclosure of his personal information would cause him significant personal distress, and I accept that evidence. I find that section 21(2)(f) applies. However, in the circumstances of this case, which I cannot explain further without disclosing the contents of the record and other confidential information from the representations, I find that this factor should be given low weight.

Section 21(2)(h): supplied in confidence

This section applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

With respect to this factor, the Ministry states that in view of the fact that the record is copied to parties other than the Ministry, there is a diminished expectation of confidentiality on the part of the third party appellant.

The third party appellant disagrees with the Ministry's position regarding the expectation of confidentiality and argues, in confidential representations, that the record was supplied with an expectation of confidentiality.

The record was not marked "confidential" or "private and confidential" and while the presence or absence of a confidentiality notation is not determinative of the issue [Order PO-1670], it is an appropriate factor to consider. I must also take into account the fact that the third party appellant sent the record to three different government institutions. On the other hand, in my view, the Ministry would normally have an interest in protecting the confidentiality of those who write to it with the type of information contained in the record, and such individuals would also have an interest in keeping their identity confidential.

Having considered the representations and the record itself, I find that the factor identified in section 21(2)(h) applies, but only to the name and other information that would identify the third party appellant. Given that the third party appellant sent the letter to three different addressees, and did not mark it "confidential," I would only give moderate weight to this factor.

Factors favouring disclosure

Section 21(2)(d): fair determination of rights

The section 21(2)(d) factor favours disclosure. 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

[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.)].

The appellant argues that she requires a copy of the record to support a civil claim. She provides confidential representations in this regard. Having reviewed the evidence provided to me by the appellant, I am not satisfied that she has met the criteria for the application of the factor favouring disclosure in section 21(2)(d).

The appellant provides little evidence to support the relevance of the record to the subject matter of her claim, and I do not find the evidence she did provide sufficiently persuasive to invoke this factor. In the context of a request under the *Act*, absent further evidence to demonstrate a direct link between the subject matter of the record and the civil claim, I am unable to find that this factor is established. I also note that if the record is relevant, it can be ordered to be produced in the trial of the civil claim.

I am therefore not satisfied, on the evidence presented to me, that section 21(2)(d) applies in the circumstances of this appeal.

Other factors/relevant circumstances

Where section 21(2) may apply, it requires consideration of "all the relevant circumstances" in deciding whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

In this case, the Ministry changed its access decision and decided to disclose not only the appellant's personal information, but also the identity of the third party appellant, and the reasons given for this decision are highly significant. I cannot reveal the basis for this decision without disclosing confidential information, but in my view, it is a relevant circumstance favouring disclosure. I also note that the basis for the Ministry's decision to disclose this information is clearly known to the third party appellant.

In Order MO-2522, being issued concurrently with this order, I addressed the application of the absurd result principle in that case, stating as follows:

> Based on the unique circumstances of this appeal, including the confidential representations of the appellant, the contents of one of the records at issue, and information from one of the related matters before this office, which was passed on to the Police when I invited their reply representations, I conclude that there is persuasive evidence to support the application of the absurd result principle to the entire contents of the letter, except for the affected party's e-mail address. It is also clear that the affected party is aware of the basis for finding that this principle applies.
>
> In addition, I find that this result is not inconsistent with the purpose of the section 38(b) exemption. In the unique circumstances of this case, denying access to the letter will not protect the privacy of any individual. I am not able to elaborate further without disclosing confidential information.

In my view, those same considerations are a relevant circumstance favouring disclosure in this case. So is the reasoning behind the Ministry's decision to change its position and grant access to most of the record, including the third party appellant's identity, which I cannot describe in more detail without disclosing confidential information. These circumstances favour disclosure of all of the third party appellant's personal information in the record except for his e-mail address. Moreover, in the circumstances of this case, these factors carry significant weight, particularly in view of the fact that, if I were considering this under the "absurd result" heading, I would order this information disclosed on that basis alone, as I have done in Order MO-2522.

Conclusion

Under section 49(b), the parties resisting disclosure have an onus to prove that disclosure *would* constitute an unjustified invasion of personal privacy. I have found, above, that the factor favouring privacy protection in section 21(2)(f) (highly sensitive) applies, but accorded it low weight. I also found that the factor favouring privacy protection in section 21(2)(h) (information provided in confidence) applies, and accorded it moderate weight. Balancing these factors against the relevant circumstances favouring disclosure that I have outlined above, I find that the latter are more compelling and outweigh the factors favouring non-disclosure, except with respect to the third party appellant's e-mail address. Again, in making this finding, I refer to the fact that if I were considering this under the heading of absurd result, I would order the information, other than the e-mail address, disclosed on that basis alone, as I did in Order MO-2522.

Accordingly, I find that disclosure of the third party appellant's personal information in the record, except the e-mail address, is not an unjustified invasion of personal privacy. On this basis, only the e-mail address is exempt under section 49(b). In this regard, it is important to bear in mind that I have also found the remainder of the record, which consists of the appellant's personal information and not that of the third party appellant, is also not exempt under this provision.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/THREAT TO SAFETY OR HEALTH

In this appeal, the Ministry initially claimed the application of the discretionary exemption in section 20 of the *Act*, but subsequently withdrew its reliance on it. However, because the third party appellant's representations raised the possible application of section 20, I decided to address it.

Previous orders of this office have found that it is only in unusual circumstances that an affected party would be entitled to claim the application of an exemption other than section 21(1) (personal privacy) or section 17(1) (third party information). As a result, I also made the third party appellant's entitlement to claim section 20 an issue in this appeal.

However, as set out below, I have concluded that section 20 does not apply to the information I have found not to be exempt under section 49(b). Consequently it is not necessary for me to make a determination on the question of whether or not the third party appellant should be entitled to claim the exemption.

Section 49(a)/20

Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, **20** or 22 would apply to the disclosure of that personal information.

Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information [Order M-352]. Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the institution or party asserting the application of the exemption must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, there must be evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated [*Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office*

of the Worker Advisor) (1999), 46 O.R. (3d) 395 (C.A.)]. An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption [Order PO-2003].

As the Ministry withdrew its reliance on section 20 prior to the submission of representations in this appeal, it did not submit any representations on this issue. For reasons cited in confidential representations, the appellant disputes that the disclosure of this record presents a threat to the health or safety of the third party appellant.

Having carefully considered the third party appellant's representations, I find that the evidence does not support a finding that there is a reasonable basis for believing that a serious threat to the safety or health of the third party appellant will result from disclosure. For the reasons I have already described in finding that in these appeals, the factors and circumstances favouring disclosure are more compelling than those favouring privacy protection, and based on all the evidence and argument provided to me, I conclude that there is no reasonable basis for believing that disclosure of the information that I have found not to be exempt under section 21(1) will result in a serious threat to the safety or health of any individual. Accordingly, I find that the exemption in section 49(a) in conjunction with section 20 does not apply.

EXERCISE OF DISCRETION

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.

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 and/or it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

I need only consider the Ministry's exercise of discretion in relation to the information that I have found to be exempt under section 49(b), which is the e-mail address of the third party appellant.

I have considered the circumstances surrounding this appeal, and its parties' representations and I am satisfied that the Ministry has not erred in the exercise of discretion under section 49(b) in connection with the information that I have found to be exempt. I also conclude that the Ministry's exercise of its discretion to disclose most of the record was not in error, and I agree with the Ministry's reasons for doing so that were set out in its representations.

DECISION CITED BY THE APPELLANT

In her appeal letter, the appellant refers to the Supreme Court of Canada's decision in *McInerny v. MacDonald*, [1992] 2 S.C.R. 138, which affirms the right of patients to examine and copy

information in medical files held by their doctors in the absence of a legislative mechanism for such access. In my view, this decision does not extend to records such as the one at issue here, which does not exist in the context of a doctor-patient relationship, and in any event, access to medical records in Ontario is now provided for by *PHIPA*. More importantly, in this order I am requiring disclosure of any and all contents of the record which relate to medical information about the appellant.

ORDER:

1. I order the Ministry to disclose the record at issue to the appellant, except the third party appellant's e-mail address, by sending a copy to the appellant not later than **June 23, 2010** and not earlier than **June 18, 2010**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records as disclosed to the appellant.

Original signed by: May 19, 2010
John Higgins
Senior Adjudicator