

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3051

Appeal PA10-157

Ministry of Community and Social Services

February 10, 2012

Summary: The appellant made a request to the Family Responsibility Office for access to portions of her file. Access was granted, in part. During the mediation stage of this appeal, the appellant took issue with the way in which the ministry defined the scope of the request. In this order, the adjudicator finds that the scope of the request is limited to that agreed upon by the institution and the appellant during the request stage. In addition, the adjudicator finds that the records contain the personal information of the appellant and an affected party and upholds the application of the personal privacy exemption to the records. The Family Responsibility Office's exercise of discretion is also upheld and the appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 21(1)(f), 21(2)(a) – (d), 21(2)(f), 21(2)(h), 21(3)(d), 21(3)(f), 24, 49(b).

Orders Considered: P-134, P-880, PO-2518, PO-2910.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made to the Ministry of Community and Social Services' (the ministry) Family Responsibility Office (the FRO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for:

... access to own personal information regarding [a specified case

number] court file No's [four specified numbers] and two parental support workers, with regards to the support payments and arrears by ex-spouse [a named individual]. I am requesting complete file re: notice to file financial statement dated January 14, 1993, which was sent to the FSP Director on January 17, 1994, by [individual named above] lawyer.

[2] The FRO issued a decision granting partial access to the 27 pages of records identified as responsive to the request. Access to the remaining records was denied pursuant to section 49(a), in conjunction with sections 14(1)(a) and (l) (law enforcement), 19 (solicitor-client privilege), and 20 (threat to health or safety); as well as section 49(b), in conjunction with section 21(1) (personal privacy).

[3] The requester, now the appellant, appealed this decision to this office. During the mediation stage of the appeal, the FRO issued a revised decision, withdrawing its claim of section 19 and instead applying section 49(b), in conjunction with section 21(1) to those records. The FRO also clarified that it was relying on the presumptions in sections 21(3)(d) and 21(3)(f) in denying access to the records.

[4] Following further mediation, the FRO issued a second revised decision and disclosed additional records to the requester. At that time, the FRO advised the mediator that it was also relying on the factors favouring privacy protection in sections 21(2)(f) and 21(2)(h) in withholding all of the records which are at issue in this appeal.

[5] The appellant then contacted the mediator seeking assurances that the searches conducted had identified all of the records in her FRO file. In addition to searching for any other documents that may be contained in her FRO file, she specifically wanted to ensure that the FRO searched for a November 23, 1989 divorce judgment. The FRO was apprised of these concerns and responded that it only searched for the specific records that were contained in the appellant's request. The FRO took the position that the remainder of the records in the appellant's FRO file, including the November 23, 1989 judgment, were outside the scope of her request.

[6] When advised of the FRO's position respecting the scope of her appeal, the appellant stated that her request was intended to include her "complete file", and that, therefore, the FRO should have searched for all the records contained in her FRO file, including the November 23, 1989 divorce judgment. She requested that this issue be included in this appeal. Accordingly, the scope of the request has been added as an issue to the appeal.

[7] The appeal was then transferred to the adjudication stage of the process, where an adjudicator conducts an inquiry. The adjudicator assigned to this appeal sought and received representations from the FRO and the appellant. The FRO's representations were shared with the appellant in accordance with the IPC's *Practice Direction 7*. In its representations, the FRO withdrew its claim that section 49(a) in conjunction with

sections 14 and 20 of the *Act* apply to the withheld information. Therefore, sections 14 (law enforcement) and 20 (threat to health or safety) are no longer at issue in this appeal.

[8] The appeal was then transferred to me for final disposition. For the reasons that follow, I uphold the FRO's decision and dismiss the appeal.

RECORDS:

[9] There are 10 pages of records remaining at issue. These consist of one internal form, one court document, and correspondence.

ISSUES:

- A. What is the scope of the request? What records are responsive to the request?
- B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?
- D. Did the FRO exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

Issue A: What is the scope of the request? What records are responsive to the request?

[10] This issue was raised by the appellant and canvassed by the parties during the mediation stage of the appeal. The FRO was advised in its Notice of Inquiry that the appellant takes the position that the scope of her request encompassed her complete file with the FRO, including the divorce judgment, and was not limited to the records otherwise specifically identified in the request.

[11] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[12] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.¹

[13] To be considered responsive to the request, records must "reasonably relate" to the request.²

[14] The FRO states that it is a program within the ministry whose role, among others, is to collect and pay spousal and child support payments pursuant to a positive duty under the *Family Responsibility and Support Arrears Enforcement Act, 1996 (FRSAEA)*.

[15] The FRO submits that in early 2010, the appellant made an access request related to specific records from her FRO file, which had been closed since 1995. During the mediation stage of this appeal, the appellant claimed that she originally requested her entire FRO file, including a 1989 divorce judgment. However, the FRO states that the appellant's request was for access to her own personal information regarding a particular case file number and various court file numbers, including the complete file regarding a notice to file a financial statement, which was sent to the FRO in 1994 by her ex-spouse's legal counsel.

¹ Orders P-134 and P-880.

² Orders P-880 and PO-2661.

[16] Following receipt of the access request, the FRO states, staff from its office wrote to the appellant, seeking clarification of the request, because:

- The request was for the appellant's own personal information but then referred to accessing her ex-spouse's legal counsel's correspondence to FRO;
- The request appeared to be related to information housed within the Ontario Court of Justice (General Division)'s file and not within the FRO's file;
- The four different court file numbers referred to in the request would be either housed at the Courts or within the ministry, but not at the FRO; and
- The complete file regarding the notice to file a financial statement relates to a court proceeding between the payor, the recipient and the ministry, and not the FRO. As a result, all of the information related to that proceeding would be contained within the Court's file or the ministry's file rather than within the FRO's file.

[17] The FRO submits that the appellant wrote back, but that the request remained unclear. After several unsuccessful attempts, staff from the FRO was able to contact the appellant by telephone on May 18, 2010. During the conversation, the FRO submits, the appellant clarified her request to be limited to the following records in her FRO file:

- Specific records from 1994, which form pages 1 to 18 of the records;³
- A letter from two named individuals, dated March 1995, which form pages 19-22 of the records;⁴
- Any records to demonstrate whether there were dependents, which forms page 23 of the records;⁵
- Records regarding the assignment of the case, which form pages 24 to 27 of the records;⁶ and
- Records from a third named individual. There were no responsive records found in regard to this individual.

[18] The FRO argues that at no time did the FRO staff interpret the request to include the entire FRO file, and that the appellant did not refer to or request her entire FRO file during this telephone conversation. In addition, the FRO states, the appellant did not request a copy of her 1989 divorce judgment. Instead, the appellant confirmed that she was seeking the specific documents listed above. The FRO provided its evidence regarding the scope of the request by way of an affidavit sworn by the staff member who participated in the telephone conversation with the appellant.

³ Pages 2, 5-7, 9, 11, 14 and 18 were disclosed to the appellant.

⁴ This letter was disclosed, in full, to the appellant.

⁵ This page was disclosed, in full, to the appellant.

⁶ These pages were disclosed, in full, to the appellant.

[19] The appellant submits that she believes there are more records in the FRO file and that the FRO should release all records in their custody or control. The appellant also states that she believes that she has been the victim of identity theft and mortgage fraud by her ex-spouse and that she is seeking the records in order to clear her name. The appellant's representations do not specifically address her discussions with the FRO regarding clarifying her request.

[20] In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[21] In Order P-134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 24(2), stating, among other things:

...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the *Act* compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[22] In Order PO-1897-I, commenting on the above orders, Adjudicator Sherry Liang noted that in the appeal under consideration in Order P-134, the request was somewhat vague, and that the institution had genuine difficulty in interpreting its scope. She pointed out, however, that "even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request".

[23] In this case, the appellant's original request was for:

... access to own personal information regarding [a specified case number], court file No's [four specified numbers] and two parental

support workers, with regards to the support payments and arrears by ex-spouse [a named individual]. I am requesting complete file re: notice to file financial statement dated January 14, 1993, which was sent to the FSP Director on January 17, 1994, by [individual named above] lawyer.

[24] Upon receiving the request, the FRO contacted the appellant to clarify the request. The evidence submitted by the FRO indicates that there was discussion between the FRO and the appellant regarding narrowing of the scope of the request, and that the appellant was in agreement that her request was limited to a particular set of records. The majority of the records that were responsive to the narrowed request were then disclosed to her. The records that were not disclosed to the appellant form the subject matter of this appeal.

[25] The appellant now takes the position that her request was for her complete file, including a 1989 divorce judgment.

[26] I do not accept the appellant's position that her request was for her complete FRO file and that the documents relating to her 1989 divorce judgment are caught within the scope of the request. In my view, although her original request was not clear, in a subsequent discussion with the FRO staff, the appellant narrowed the scope of her request to the specific records that were disclosed to her and to the records that are the subject matter of this appeal.

[27] Therefore, I uphold the FRO's decision that the records at issue, rather than the appellant's complete file at the FRO, fall within the scope of the request.

PERSONAL INFORMATION

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

[28] 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) 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,
- (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;

[29] 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.⁷

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

(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.

⁷ Order 11.

[31] 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.⁸

[32] 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.⁹

[33] The FRO submits that the records at issue contain the personal information of the support payor, her former spouse, (the affected party). In this appeal, the FRO argues, all of the pages at issue, with the exception of pages 1 and 4, are correspondence from the affected party’s legal counsel to the FRO. In support of its position, the FRO cites section 60 of the *FRSAEA*, which states:

Anything that this Act requires to be signed or done by a person, or that is referred to in this Act as signed or done by a person, may be signed or done by a lawyer acting on the person’s behalf.

[34] As a result of section 60 of the *FRSAEA*, the FRO submits, correspondence from a support payor’s legal counsel should be considered to be the support payor’s correspondence. In addition, the FRO argues, in Order PO-2910, the IPC found that correspondence from a support payor to the FRO constituted that support payor’s personal information.

[35] The FRO also states that the information contained at page 1 of the records relates to the affected party’s employment and finances. The FRO takes the position that support payors’ employment or financial information is considered personal information in this context due to the nature of the relationship between support payors and support recipients.

[36] Lastly, the FRO submits that page 4 of the records is a court form that was completed by the affected party and served on the FRO by his legal counsel. Given that it is the affected party’s correspondence to the FRO, it argues, this record should be considered to be his personal information.

[37] The appellant’s representations do not address whether the records contain personal information.

⁸ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁹ Orders P-1409, R-980015, PO-2225 and MO-2344.

[38] In my view, all of the records contain personal information relating to the affected party, as defined in the *Act*.

[39] In particular, all of the records, with the exception of Record one, contain the affected party's name along with information about his marital status and finances, which fall within the ambit of paragraphs (a) and (b) of the definition of that term in section 2(1) of the *Act*, respectively.

[40] Record one contains contact information relating to the affected party's place of business (employer name). In my view, this type of information also qualifies as his personal information. In Order PO-2910, Adjudicator Daphne Loukidelis found that a support payor's employment information was personal information. She stated:

I accept the ministry's submission that the context in which the affected party's employment information appears is relevant. In my view, the context in which this information appears – his involvement with the Family Responsibility Office - relates to, and identifies, this individual in a personal, not business, capacity. In the circumstances, I find that this particular information about the affected party qualifies as his personal information according to the definition in section 2(1) of the *Act*.

[41] Similarly, in this appeal, the information in Record one relates to the affected party's place of business. Applying Adjudicator Loukidelis' reasoning to the facts of this appeal, I find that the information contained in Record one constitutes the affected party's personal information.

[42] In addition, I find that the records, with the exception of Record one, also contain the personal information of the appellant, specifically, her name along with information about her marital status and finances, which also fall within the ambit of paragraphs (a) and (b) of the definition of that term in section 2(1), respectively.

PERSONAL PRIVACY

Issue C: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

[43] 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.

[44] 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.

[45] 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.

[46] Under section 21, where a record contains personal information only of an individual other than the requester, the institution must refuse to disclose that information unless disclosure would not constitute an “unjustified invasion of personal privacy”.

[47] In both these situations, sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

[48] The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 21(1)(f).

[49] Section 21(1)(f) of the *Act* states:

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

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

[50] 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.¹⁰ In this appeal, I find that none of the limitations listed in section 21(4) apply to the records at issue.

[51] The FRO claims that disclosure of the records would be an unjustified invasion of the affected party’s privacy and, that consequently, the records should be exempt from disclosure under section 21(1) of the *Act*. In particular, the FRO claims that the presumptions in paragraphs 21(3)(d) and 21(3)(f) apply to the personal information of

¹⁰ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

the affected party in Record one. In addition, the FRO claims that the factors in sections 21(2)(f) and 21(2)(h) favour the non-disclosure of all of the records to the appellant.

[52] Sections 21(3)(d) and 21(3)(f) of the *Act* state:

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;

Record one – section 21(3)(d): employment or educational history

[53] Information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.¹¹

[54] Information contained in resumes¹² and work histories¹³ also falls within the scope of section 21(3)(d).

Record one - 21(3)(f): finances

[55] To qualify under this section, information about an asset must be specific and must reveal, for example, its dollar value or size.¹⁴

[56] Lump sum payments that are separate from an individual's salary have consistently been found not to fall within section 21(3)(f).¹⁵

¹¹ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050. See also Orders PO-2598, MO-2174 and MO-2344.

¹² Orders M-7, M-319 and M-1084.

¹³ Orders M-1084 and MO-1257.

¹⁴ Order PO-2011.

¹⁵ Orders M-173, MO-1184, MO-1469, MO-2174 and MO-2318.

[57] Contributions to a pension plan have been found to fall within section 21(3)(f).¹⁶

[58] The FRO submits that Record one contains both employment and financial information related to the affected party's employment history and finances, as it reveals the names of the corporations in which the affected party had, and may still have, an interest.

[59] The appellant states that disclosure of the records would not be an unjustified invasion of privacy, as she is the victim of identity theft and mortgage fraud and that access to the information will assist her health and safety.

[60] Respecting section 21(3)(d), past orders of this office have held that a person's name, occupation, location and employer do not, without more detail, attract the application of the presumption in section 21(3)(d).¹⁷ In this appeal, where the FRO has claimed section 21(3)(d) in relation to this same information about the affected party, I find that it does not constitute a sufficiently detailed description of his "employment history" to fit within the presumption in section 21(3)(d).

[61] For section 21(3)(f) to apply, the personal information must describe an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. In my view, record one merely refers to financial information, without more detail. Accordingly, this cannot be said to "describe" the affected party's finances for the purpose of section 21(3)(f), and I find that the presumption does not apply to this information.

[62] Consequently, I find that none of the presumptions at section 21(3) apply to record one. If no section 21(3) presumption applies, section 21(2) of the *Act* lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹⁸ In this case, the FRO is claiming that the factors in sections 21(2)(f) and 21(2)(h) are applicable factors that favour the non-disclosure of the records.

[63] Section 21(2)(f) and (h) of the *Act* states:

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,

...

¹⁶ Orders M-173, P-1348 and PO-2050.

¹⁷ Orders P-219, PO-2298 and PO-2877.

¹⁸ Order P-239.

(f) the personal information is highly sensitive;

...

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

...

[64] The FRO submits that given the relationship between support payors and support recipients, and the fact that FRO acts as a buffer between them, the affected party's personal information should be considered highly sensitive. It submits that disclosure could reasonably be expected to cause significant personal distress to him and also that communications passing between the FRO and the affected party are treated confidentially.

[65] The FRO also cites Order PO-2910 in which Adjudicator Loukidelis found that a support payor's correspondence to the FRO was highly sensitive and was supplied in confidence to the FRO for the purposes of a determination under section 21(1)/49(b).

[66] In addition, the FRO states:

. . . [T]he FRO relies heavily on information provided to it by both the support payor and the support recipient in order to properly enforce support orders. If the IPC were to order a support payor's correspondence to be released to the respective support recipient, or vice versa, there will certainly be a chilling effect regarding information that support payors and support recipients provide to the FRO. This will hinder the FRO's ability to ensure that child support and spousal support is being paid, and thus hinder its ability to fulfil its mandate.

[67] The appellant addressed a number of the factors enumerated in section 21(2) of the *Act*, which she argues weigh in favour of disclosure, as follows:

- The appellant has a legal right related to a contemplated proceeding. She is seeking access to information required in order to prepare for an investigation and in order to ensure a fair determination of her rights;¹⁹
- It would not be harmful for the FRO to disclose the records and would assist the appellant in her dealings with the Canada Customs and Revenue Agency;²⁰

¹⁹ Section 21(2)(d).

²⁰ Section 21(2)(e).

- The appellant does not know if the information is highly sensitive;²¹
- The appellant believes the information is not accurate or reliable;²²
- The appellant has been the victim of identity theft, which has been a very difficult situation for her. The appellant states that she put her trust in the FRO, the ministry and their respective employees;²³ and
- The appellant believes that her reputation has been unfairly damaged.²⁴

[68] I will now review the factors in section 21(2) favouring disclosure and those favouring privacy protection that have been claimed by the FRO in relation to the personal information contained in the records.

[69] I find that the public scrutiny consideration in section 21(2)(a) is not a relevant factor weighing in favour of disclosure on the facts of this appeal before me. In my view, the appellant's interest in seeking the personal information of the affected party is to assist her in understanding the FRO's involvement and resolving issues around her possible identity theft. The appellant's interests, in my view, represent private interests. I agree with past orders of this office that have established that disclosure for the purpose of ensuring that justice is done in a private civil proceeding does not promote the objective of the factor in section 21(2)(a) of ensuring public scrutiny of government activity.²⁵

[70] Turning to the factors at section 21(2)(b) and (c), I find that neither of these factors is relevant in this appeal. The disclosure of the records will not, in my view, promote public health and safety, nor will it promote informed choice in the purchase of goods and services.

[71] With respect to the factor at section 21(2)(d), the appellant must satisfy four requirements to establish its relevance.²⁶ In the circumstances of this appeal, and with regard to the personal information at issue, I am not satisfied that any of the elements

²¹ Section 21(2)(f).

²² Section 21(2)(g).

²³ Section 21(2)(h).

²⁴ Section 21(2)(i).

²⁵ Order P-1014.

²⁶ For section 21(2)(d) to apply, the appellant must establish that: (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; (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.)).

of the test are established. The appellant believes that she has been the victim of identity theft. However, there is no evidence of a contemplated proceeding or that the information contained in the records is required for a proceeding. Therefore, I find that the factor at section 21(2)(d) does not apply.

[72] The FRO relies on the factors in sections 21(2)(f) and (h) in this appeal in support of protecting the privacy of the affected party. As previously set out, the FRO submits that given the relationship between support payors and support recipients, and given that FRO acts as a buffer between them, the affected party's personal information should be considered highly sensitive, as the disclosure could reasonably be expected to cause significant personal distress to him. In addition, the FRO states that communications between the FRO and support payors are treated confidentially. In the circumstances, I agree that the factors in sections 21(2)(f) and 21(2)(h) are relevant considerations in this appeal.

[73] I am satisfied that the disclosure of some of the personal information remaining at issue could reasonably be expected to result in significant personal distress to the affected party given the circumstances. In Order PO-2518, former Senior Adjudicator John Higgins considered the issue of what evidence is required to bring personal information within the ambit of section 21(2)(f). Noting that past orders had found that for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause "excessive" personal distress to the subject individual, he found instead that "a reasonable expectation of 'significant' personal distress is a more appropriate threshold in assessing whether information qualifies as 'highly sensitive'."²⁷ In this appeal, I accept the FRO's argument that the information and the context in which it was gathered are inherently sensitive. I find that disclosure of some, but not all, of the affected party's personal information would result in a reasonable expectation of significant personal distress and, therefore, this factor weighs in favour of the protection of privacy, and I find that it should be accorded moderate weight.

[74] I also find that the factor in section 21(2)(h) weighs in favour of protecting the privacy of the affected party's personal information. In my view, the context and the surrounding circumstances of this matter are such that a reasonable person would expect that information supplied by his legal counsel to FRO would be subject to a degree of confidentiality.²⁸ However, I also acknowledge that some degree of disclosure of the affected party's personal information is to be expected in any court proceeding involving the appellant, the affected party and the FRO. Balancing these considerations, I find that section 21(2)(h) carries moderate weight in favour of protecting the privacy of the affected party.

²⁷ See also Orders PO-2617, MO-2262 and MO-2344.

²⁸ PO-1910.

[75] Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of the affected party, I find that the disclosure of the remaining personal information in the records, relating to the affected party is either "highly sensitive" or "supplied in confidence," would constitute an unjustified invasion of the affected party's personal privacy under section 49(b) of the *Act*.

[76] Therefore, subject to the possible application of the absurd result principle and my review of the FRO's exercise of discretion below, I find that the discretionary exemption at section 49(b) applies to the affected party's personal information.²⁹

Absurd Result

[77] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.³⁰

[78] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement³¹
- the requester was present when the information was provided to the institution³²
- the information is clearly within the requester's knowledge.³³

[79] 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.³⁴

[80] The FRO states that although it acts with due diligence to ensure that documents are identified appropriately in each file, it is not always possible to identify the origin of a document. The FRO, it argues, does not disclose information where that information is highly sensitive, includes personal information or where there are issues about the integrity of a document.

[81] The appellant submits that it would be absurd to withhold the information, as she is trying to clear her name from the identity theft she was subject to.

²⁹ See also Order PO-2910.

³⁰ Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.

³¹ Orders M-444 and M-451.

³² Orders M-444, P-1414 and MO-2266.

³³ Orders MO-1196, PO-1676, PO-1679, MO-1755 and MO-2257-I.

³⁴ Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642.

[82] The appellant appears to have misunderstood the concept of absurd result. In order for this principle to apply, the information at issue in this appeal must have been supplied by the appellant or is within her knowledge, neither of which is the case in this appeal. Therefore, I find that the absurd result principle does not apply.

EXERCISE OF DISCRETION

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

[83] 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.

[84] 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.

[85] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.³⁵ This office may not, however, substitute its own discretion for that of the institution.³⁶

[86] The FRO submits that it has considered all of the relevant factors, has not acted in bad faith or for an improper purpose and has, accordingly, properly exercised its discretion under section 49(b). The FRO states that the Director of the FRO took the following factors into consideration in exercising his discretion:

- the purpose of the *Act*, namely that information should be available to the public and that exemptions should be limited and specific to only those records that would interfere with the program's ability to meet its statutory obligations to enforce support orders, or would disclose the personal information of another individual;
- the principle that the appellant should have access to her own personal information;

³⁵ Order MO-1573.

³⁶ Section 54(2).

- the highly sensitive nature of the personal information in the FRO files;
- the negative implications of disclosure of enforcement methods on the FRO's ability to enforce support orders and on the public's confidence in the operations of the institution;
- there may be records which the appellant can access from other sources, such as the courts; and
- the fact that the FRO has disclosed several records to the appellant and withheld only those that contain the personal information of the affected party.

[87] The appellant submits that she is going through a difficult experience because she is the victim of identity fraud and she requires the records to assist in clearing her name.

[88] While I am sympathetic to the appellant's concerns, I accept the FRO's representations that it considered the particular and specific circumstances of this case and made decisions regarding disclosure based on a defensible balancing of the rights of the appellant to access her personal information and the affected party's right to privacy. In addition, many records have already been disclosed to the appellant, and I am satisfied that efforts were made by the FRO to maximize the amount of disclosure, while at the same time considering the nature and type of personal information contained in the withheld portions of these records. I suggest that the appellant may wish to consider seeking access to court records directly from the court.

[89] Consequently, I uphold the FRO's exercise of discretion. Having found that the records contain personal information and that they are exempt from disclosure under section 49(b) of the *Act*, I uphold the FRO's decision and dismiss the appeal.

ORDER:

1. I uphold the FRO's decision and dismiss the appeal.

Original signed by: _____
Cathy Hamilton
Adjudicator

February 10, 2012 _____