

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3180

Appeal PA11-283

Ministry of the Attorney General

March 25, 2013

**Summary:** The appellant requested e-mail correspondence between a journalist (the affected party) and ministry representatives. The ministry withheld the requested information pursuant to section 21(1) (personal privacy) of the *Act*. In this order the adjudicator determines that the information in the records relates to the affected party in his professional capacity and orders that it be disclosed to the appellant. The adjudicator also considered section 2(b) of the *Charter of Rights and Freedoms* and found that her decision was consistent with the meaning of that section. The adjudicator also addressed several preliminary matters raised by the affected party relating to the nature of the records and custody and/or control.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) definition of personal information, 10(1); *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, section 2(b).

### OVERVIEW:

[1] The appellant submitted a request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

... all correspondence, information, documents that [the ministry] holds in their communications with [a named individual], journalist, formerly with [a named media outlet], including, but not limited to, correspondence

from about May 13, 2010, from the media spokesperson for the Attorney General to [the named individual].

[2] The ministry located responsive records and denied access to them pursuant to the mandatory exemption in section 21(1) (personal privacy) of the *Act*.

[3] The appellant appealed the ministry's decision.

[4] During mediation, the mediator contacted the named individual (the affected party) to obtain his views regarding disclosure of the records at issue in this appeal. The affected party objected to the release of any responsive records.

[5] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the ministry, the affected party and the appellant. The representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] In this order, I find that the records at issue do not contain the personal information of the affected party or any other person. Accordingly, I find that section 21(1) cannot apply and the records should be disclosed to the appellant. I also consider section 2(b) of the *Charter of Rights and Freedoms (Charter)* and find that my decision is consistent with the meaning of that section. In addition, I address several preliminary matters raised by the appellant.

## **Preliminary matters**

### ***Purpose of the Act and the meaning or the word "record"***

[7] The affected party argues that the request at issue in this appeal was for communications between him and the ministry. He states that he is a private citizen and not a "state actor," and that the *Act* is being used in this case to try to obtain the "confidential work product of a private citizen." He then argues that this purpose does not accord with the goal and purposes of the *Act*, which is the increased transparency of public institutions. He states:

The purpose of freedom of information legislation, both provincially and federally in Canada is to provide the public with access to "government information," as made clear by Letourneau J.A. in the majority decision of the Federal Court of Appeal in *Canada Post Corp. v. Canada* [1995] 2 FC 110.

[8] The affected party also questions whether records of this nature ought to be covered by the *Act*, and suggests that any determination that makes it easier to access

inquiries made by private citizens about the conduct of government ought to be made cautiously.

[9] In addition, the affected party states that the definition of "record" in the *Act* is "extremely broad," referring to "any record of information" however recorded. He then states that this definition "must be read as referring to a record of government information," and that, otherwise, the *Act* would purport to govern private communications in the province.

[10] Section 10(1) of the *Act* reads, in part:

... every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious

[11] Under section 10(1), the *Act* applies to records that are in the custody or under the control of an institution. The *Act* does not distinguish between records created by government organizations or members of the public. Once a record comes within the government's custody or control, it falls within the purview of the *Act*, subject to the exemptions referred to in section 10(1)(a) or the exclusions set out in section 65.

[12] Accordingly, the records are covered by the *Act* if they are in the custody or control of the ministry, notwithstanding the affected party's position that they ought not to be covered by the *Act* because of their nature.

### ***Custody and control***

[13] The affected party argues that, although the ministry has possession of the emails, it does not have control of the records. He states:

While the e-mails are in the possession of the Ministry, they cannot be said to be under its "control" as set out in the *Act*. Control requires the "power of directing, command," *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 (par. 48). It cannot be said that I have ceded formal control over the content of the emails, simply by sending them to government.

[14] As I indicated above, under section 10(1) of the *Act*, the *Act* applies only to records that are in the custody or under the control of an institution. A record will be

subject to the *Act* if it is in the custody or under the control of an institution; it need not be both.<sup>1</sup>

[15] The courts and this office have applied a broad and liberal approach to the custody or control question.<sup>2</sup>

[16] The records at issue in this appeal are email messages sent to and from a ministry staff person in the course of their employment with the ministry, and relate to ministry matters. I do not accept the affected party's position that these records are not in the custody or under the control of the ministry because he did not "cede formal control" of them to the ministry. These records are clearly in the custody and under the control of the ministry as they are contained in the ministry's record holdings, and were used by the ministry to communicate with the affected party on ministry matters.

### ***Section 2(b) Charter rights***

[17] The affected party provides brief representations in which he argues that my analysis in this appeal must also "consider the freedom of expression guarantees" contained in the *Charter* because the records requested in this appeal are "inquiries made by a journalist of a state actor or public institution." He states:

If these inquiries can be obtained by other individuals through [the *Act*], it would have a chilling effect on journalists and freedom of expression guarantees. I understand that the Commissioner does not have the jurisdiction to grant any Charter remedy. However, the Ontario Court of Appeal made clear that an adjudicator has a responsibility to balance "Charter values" when "exercising statutory powers." *R. v. N.S.*, 2010 ONCA 670 (par. 31).

[18] The affected party's reference to freedom of expression is found in section 2(b) of the *Charter* which reads:

Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

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<sup>1</sup> Order P-239, *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>2</sup> *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072 *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), and Order MO-1251.

[19] I note that the affected party does not take the position that section 10(1), or any other part of the *Act*, is constitutionally invalid as conflicting with a *Charter* right. His argument, in effect, is that “*Charter* values” should inform my interpretation of the *Act*. The Supreme Court of Canada has made it clear that if there is a “*Charter* values” interpretive principle, such principle can only apply in circumstances of genuine ambiguity in the legislation at issue.<sup>3</sup> There is no such ambiguity here, and no competing interpretations.

[20] The decision on which the affected party relies (which incidentally was upheld by the Supreme Court in *R. v. N.S.*<sup>4</sup>) does not assist the affected party here as it dealt with the application of the *Charter* to the development of common-law rights, and not with statutory rights.

[21] In considering the affected party’s submissions, I also note that the courts have consistently recognized that expressive activity includes the act of gathering information, and that the denial of access to information can infringe freedom of expression. In *Edmonton Journal v. Alberta (A.G.)*,<sup>5</sup> the Supreme Court of Canada held that “... as listeners and readers, members of the public have a right to information pertaining to public institutions ....” In *CBC v. Lessard*,<sup>6</sup> that same court stated that “the freedom to disseminate would be of little value if the freedom under s. 2(b) did not also encompass the right to gather news and other information without undue government interference.” In *CBC v. New Brunswick (A.G.)*,<sup>7</sup> it also affirmed that:

The full and fair discussion of public institutions, which is vital to any democracy, is the *raison d’être* of the s. 2(b) guarantees. Debate in the public domain is predicated on an informed public.... Essential to the freedom of the press to provide information to the public is the ability of the press to have access to this information.

[22] The Supreme Court of Canada stated this principle concisely in *Toronto Star Newspapers v. Ontario*<sup>8</sup> as follows:

Section 2(b) of the Charter guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest.

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<sup>3</sup> See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at para.62.

<sup>4</sup> *R. v. N.S.*, 2012 SCC 72.

<sup>5</sup> [1989] 2 S.C.R. 731 at 752.

<sup>6</sup> [1991] 3 S.C.R. 421 at 429-430.

<sup>7</sup> [1996] 3 S.C.R. 480 at paras. 23-24.

<sup>8</sup> [2005] 2 S.C.R. 188 at para. 2.

[23] The appellant in this appeal is requesting information in the custody and control of the ministry. The cases cited above suggest that the *Charter* rights in section 2(b) refer to public access to public information. The purposes of the *Act* include providing the public, including journalists, with a right of access to information in the custody of government institutions in accordance with the principles that (i) information should be available to the public and (ii) necessary exemptions from the right of access should be limited and specific. Given the nature of the information at issue in this appeal discussed below, (including the number of emails, their age, and the nature of the information contained in them), and even if I may resort to "*Charter* values" in my analysis, I am satisfied that my findings in this order are consistent with the rights and principles referenced above.

## **RECORDS:**

[24] The records at issue in this appeal were initially identified as 38 pages of emails. I have reviewed the records, all of which are emails or email strings, and note that many of these emails are duplicated in other email strings contained on other pages of the records. In the circumstances, I find there is no need to review duplicate copies of emails, and I have removed the duplicate copies from the scope of this appeal.

[25] As a result, the records remaining at issue consist of a total of 17 pages of email messages and email chains between the affected party and staff at the ministry, dealing with 6 separate issues, sent between May to September of 2010. I note that a number of these emails do not contain substantive information, and consist of brief acknowledgments of receipt or clarifications about timing.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) apply to the information at issue?

## **DISCUSSION:**

### **A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[26] 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;

[27] 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.<sup>9</sup>

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

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<sup>9</sup> Order 11.

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(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.

[29] 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.<sup>10</sup>

[30] 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.<sup>11</sup> Order PO-2225 sets out the two-part test used by this office to assist in determining whether information is about an individual acting in a business capacity as opposed to a personal capacity:

... the first question to ask in a case such as this is: *"in what context do the names of the individuals appear?"* Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ....

The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?"* Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?<sup>12</sup>

[31] The information at issue in this appeal consists of copies of communications between a named journalist with a media outlet and the ministry, including its media spokesperson.

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<sup>10</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>11</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>12</sup> See also: Orders MO-2342 and PO-2934.



## ***Representations***

[32] The ministry provides brief representations on this matter, and refers to previous orders of this office which found that correspondence between an institution and a reporter is not the reporter's personal information.<sup>13</sup>

[33] The affected party takes the position that the requested information constitutes his personal information. He seems to acknowledge that the request is for information relating to him in his professional capacity, stating that the request was for communication between him "acting in [his] capacity as a reporter with [a named media outlet] and the ministry ...." However, he also argues that the email communications are "personal information" as defined in paragraph (f) of the definition because the correspondence is "implicitly or explicitly of a private or confidential nature" for the purpose of that paragraph of the definition.

[34] In addition, the affected party takes the position that disclosure of the records would reveal something of a personal nature about him. He states: "Disclosure of this communication would reveal the stories I was working on as a journalist and constitute an unjustified intrusion into my ability to carry out my duties as a reporter."

[35] Lastly, the affected party argues that the orders referred to by the ministry are not determinative of whether the records at issue in this appeal constitute his personal information, and that they can be distinguished from the current appeal. He reviews each of the referenced orders in some detail, and his representations on three of these orders can be summarized as follows:

- Order P-1113 - This matter dealt with a request for correspondence between a reporter and the Office of the Public Trustee that related to its conduct in dealing with the estate of a specific individual. The factual circumstances are different than the current appeal, as the person seeking the records, was making a request related to a specific case - one that had already been reported widely in the media. The purpose of the request was to learn more about the actions of the government agency – and was not a blanket request for communications by a reporter over a lengthy time frame.
- Order PO-2221-I - This involved a request for all video footage and photos taken by the OPP during the 1995 protest at Ipperwash Provincial Park, and the only finding with respect to media, was whether reporters at the protest, whose images can be seen on the police videos/photos, should receive notice in the appeal. The principles in this case, are not the same as determining whether any and all inquiries made by a reporter to a

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<sup>13</sup> The ministry references Orders P-1113, P-172, PO-2221-I and MO-2374.

government ministry, can be accessed through the *Act*.

- MO-2374 - This was a ruling about requests for an audit report commissioned after the anonymous release of e-mails sent by the mayor of Vaughan. Information that related to a reporter who received a copy of the e-mails, was ordered disclosed. The requests for information in that case were about a potential improper release of communication by a public official - again, not for the wholesale communications made by a reporter.

[36] The affected party summarizes his position by stating that these referenced orders do not assist in the determination that must be made by the Commissioner in this appeal.

### ***Analysis and findings***

[37] In addressing the issue of whether the records contain "personal information" as defined in section 2(1), I adopt the two-part test from Order PO-2225 set out above, and will review the information in light of that test.

*1: in what context does the name of the affected party appear?*

[38] In this appeal the request is for communications between the ministry and a named journalist with a named media outlet. The named journalist is the affected party.

[39] As noted above, the affected party appears to acknowledge that the request is for information relating to him in his professional context, stating that the request was for communication between him "acting in [his] capacity as a reporter with [a named media outlet] and the ministry ...".

[40] On reviewing the email communications at issue in this appeal, I note that all of them include both the affected party's name as well as the media outlet he works for in the address line.

[41] In the circumstances, I find that the communications involve the affected party in his professional capacity. It is clear that, in communicating with the ministry, he was making inquiries and gathering information in his capacity as a journalist for a media outlet. There is nothing in the records or in the representations to support a finding that the affected party was communicating with the ministry in his personal capacity.

[42] I also find that orders referenced by the ministry support such a finding. Order P-1113 also dealt with a request for correspondence between a reporter and an institution, and determined that, because the reporter was acting in his professional

capacity, the records did not constitute his personal information. Both Orders PO-2221-I and MO-2374 also found that information about reporters acting in their professional capacity did not constitute the personal information of those individuals.

[43] The appellant attempts to distinguish these orders from the current appeal because of the fact situations in each of them. In my view, however, these orders clearly support a finding that a journalist, corresponding with an institution in his capacity as a journalist, is not communicating with the institution in his personal capacity.

[44] Lastly, the affected party argues that the email communications are "personal information" as defined in section 2(1)(f) because the correspondence is "implicitly or explicitly of a private or confidential nature" for the purpose of that paragraph of the definition. However, because I find that the information is associated with the affected party in his professional capacity, it is not considered to be "about" the affected party for the purpose of the definition.<sup>14</sup>

[45] Accordingly, I find that the answer to the first part of the test is that the affected party's name appears in the record in his professional context.

*2: is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual.*

[46] The affected party's primary argument in support of his position that disclosure of the communications would reveal something of a personal nature about him is that the disclosure of the requested records would reveal information about his work, and may therefore affect him personally. He states: "Disclosure of this communication would reveal the stories I was working on as a journalist and constitute an unjustified intrusion into my ability to carry out my duties as a reporter."

[47] I have considered the affected party's arguments as well as the specific records at issue in this appeal. I recognize that there may be situations where the disclosure of records responsive to a comprehensive or ongoing request for information relating to an individual in their professional capacity may reveal something of a personal nature about the individual, as suggested by the affected party in his submissions.

[48] However, given the records at issue in this appeal including the nature of the information contained in them, I am not satisfied that disclosure of these records would reveal something of a personal nature about the affected party. As I noted above, the records at issue pertain to matters discussed between the affected party and ministry representatives in 2010. In addition, a number of these emails do not contain substantive information, and consist of brief acknowledgments of receipt or

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<sup>14</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

clarifications about timing. I also note that they appear to relate to matters that the affected party was writing about or which were of interest to him around that time.

[49] Although disclosure of the records would identify the particular matters about which the affected party communicated with the ministry during this particular period of time, I am not persuaded that disclosure of these records would result in revealing anything of a personal nature about the affected party. The affected party has not suggested that he has some current or future personal interest in the information contained in these records that could be jeopardized by disclosure, whether premature or not. Other than asserting that disclosure would impact on his ability to carry out his duties as a reporter, the affected party does not elaborate on how this would occur.

[50] Accordingly, I find that there is nothing about the information at issue that, if disclosed, would reveal something of a personal nature about the affected party. As a result, this information does not qualify as the personal information of the affected party within the meaning of that term as defined in section 2(1).

[51] As a final matter, the affected party argues that the records may contain the personal information of other identifiable individuals. He states:

Disclosure of these communications may also inadvertently infringe the privacy rights of innocent parties. As a reporter, it may be necessary to include confidential information about third parties in communications with the Ministry, in order to ask the proper questions about its actions. It is implicit in these communications that they are confidential, because these questions are asked, before any story is written in a newspaper or on its website. If the e-mails are disclosed, it could make public information that was intended to remain confidential.

[52] On reviewing the records with this in mind, I note that there are several references to individuals in their personal capacity. However, the appellant has responded to this concern in her representations. She states, "[t]he Requester herein, has never sought any private, individual information in her request for these responsive records. Any confidential, private, individual information can be severed." Based on the appellant's representations, I find that the references to individuals in their personal capacity are not at issue in this appeal, and can be severed from the records.

[53] I find that the remaining records and parts of records do not contain the personal information of any other identifiable individuals as defined in section 2(1) of the *Act*.

[54] As a result of the above, I find that the records do not contain the personal information of any identifiable individual. Because of this finding, the exemption in section 21(1) of the *Act* cannot apply to the records. In the absence of any other

exemption claims for the records, I will order that they be disclosed. I have highlighted the information that pertains to the information that is not at issue (the names of individuals in their personal capacity) on the copies of these pages that I am sending to the ministry along with this order. The highlighted information should not be disclosed.

**ORDER:**

1. I order the ministry to disclose the records to the appellant by **May 1, 2013** but not before **April 26, 2013**, except for those passages that are highlighted in yellow on the copies of the records that I am enclosing with the copy of this order.
2. The highlighted portions of the records are not at issue and should not be disclosed.
3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant pursuant to order provision 1.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ March 25, 2013