

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-3452

Appeal PA13-345

Human Rights Tribunal of Ontario

January 26, 2015

**Summary:** The Human Rights Tribunal (the tribunal) received a request under the *Freedom of Information and Protection of Privacy Act* for access to another individual's (the affected party's) application file. The tribunal denied access to the records, relying on the mandatory personal privacy exemption at section 21(1) of the *Act*. The requester appealed the tribunal's decision. The adjudicator finds that one record is non-responsive to the request and upholds the ministry's decision to withhold it. The adjudicator further orders that two records be disclosed on the basis that they do not contain any personal information, but upholds the tribunal's decision to withhold the remainder of the records pursuant to the personal privacy exemption at section 21(1) of the *Act*.

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

**Orders and Investigation Reports Considered:** Orders PO-2728, PO-2572, P-364, P-705, M-720, P-721, P-312, P-1622 and PO-1912.

**Cases Considered:** *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.) and *Vaughan (City) v. Ontario (Information & Privacy Commissioner)*, 2011 ONSC 7082 (Div. Ct.).

## **OVERVIEW:**

[1] The appellant submitted a request to the Human Rights Tribunal of Ontario (the tribunal) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

... a copy of the pleadings (both application and response) for the court case commenced by [a named individual], resident at that time at [a particular address]. I believe the file number for the HRTO is [a file number].

[2] The tribunal located records in response to appellant's request, consisting of the information found in the tribunal's "application file". It issued a decision denying access to the records pursuant to the mandatory personal privacy exemption found at section 21(1) of the *Act*, on the basis that the records contain the personal information of a number of individuals other than the appellant, and that disclosure of the records would constitute an unjustified invasion of the personal privacy of those individuals. The tribunal further advised that it had considered whether it could sever the records in accordance with section 10(2) of the *Act*, but found that "the personal information contained in the records is sufficiently extensive and integrated throughout the records that it is not feasible to provide partial access to the records."

[3] The appellant appealed the tribunal's decision to this office. He explained to the mediator appointed by this office that he is a defendant in a civil action at the Superior Court of Justice, and that the action involves<sup>1</sup> the applicant in the tribunal proceeding (the affected party in the present appeal). The appellant believes that he should be granted access to the requested information as it is relevant to a fair determination of his rights in the civil action, so that the factor favouring disclosure at section 21(2)(d) of the *Act* applies. He also stated that he is aware of the issues in the affected party's human rights application and that he has, in fact, seen the tribunal file. He believes that he should be granted access to the records as he was aware of the nature of the claim and several details about the affected party. The appellant stated that he does not believe that the contents of the records can be considered personal, if he could demonstrate that he was aware of their details.

[4] The tribunal had not provided notice to the individuals whose personal information is contained in the records; however, at the appellant's request, the mediator attempted to seek consent from the affected party to the disclosure of his personal information. The affected party did not respond to the mediator's notice.

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<sup>1</sup> While it appears from the appellant's representations that the affected party is the plaintiff in the civil action, he does not explicitly state that to be the case.

[5] As no mediated resolution was possible, the file was forwarded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. I sought representations from the tribunal, the affected party and the appellant. The affected party did not file representations, but representations were received from the tribunal and the appellant. These representations were shared in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure* and *Practice Direction 7*, with portions of the tribunal's representations being withheld as they met the confidentiality criteria set out in *Practice Direction 7*.

[6] In this order, I find one of the records at issue is not responsive to the request and, on that basis, I uphold the tribunal's decision to withhold it. I find that two of the records at issue do not contain any personal information and, as no other exemption has been claimed for them, I order them to be disclosed. I find that the remaining records contain the personal information of individuals other than the appellant and the mandatory exemption at section 21(1) of the *Act* applies to them. I further find that none of the information in those records can be reasonably severed so as to allow for partial disclosure. As a result, I uphold the tribunal's decision to withhold those records, in their entirety.

## **RECORDS:**

[7] The records at issue consist of the application before the tribunal, the response, various forms and schedules, and correspondence between the tribunal, the applicant and the respondent in the tribunal proceeding.

[8] The tribunal provided this office with an index of records, which was not shared with the appellant, as it would reveal the content of the records. A modified version of that index is set out below. While the tribunal's index was not numbered, I have assigned numbers 1 through 27 to the records listed by the tribunal. The records that the tribunal provided to this office also included three additional records that were not listed in its index. These are listed in the index below as records 28-30.

[9] As will be explained in more detail later in this order, some of the "records" listed below are, in fact, comprised of more than one record, and, conversely, some of the listed "records" are not, in fact, separate records.

Record Number	Number of Pages
1	1
2	2
3	2
4	6
5	2
6	2

7	6
8	1
9	3
10	1
11	4
12	11
13	Cover/index and 17 tabs
14	2
15	12
16	11
17	Cover/index and 17 tabs
18	4
19	1
20	23
21	2
22	1
23	2
24	4
25	1
26	2
27	5
28	3
29	1
30	2

**ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act* and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) of the *Act* apply to the information at issue?
- C. Can the records reasonably be severed pursuant to section 10(2) of the *Act*?

**DISCUSSION:**

**Preliminary Issue**

[10] Record 19 appears to have found its way into the affected party's tribunal file in error, as it relates to a different tribunal file number and names parties other than those set out in the appellant's request for information. Record 19 is, therefore, not responsive to his request and, on that basis, should not be disclosed. Given my finding,

I do not need to consider whether the personal privacy exemption at section 21(1) applies to this record.

## **Background**

[11] In his representations, the appellant explains that the affected party is a former employee or subcontractor of the appellant's company. According to the appellant, there is a pending action in the Ontario Superior Court of Justice that involves the appellant and the affected party. The appellant seeks access to the affected party's tribunal file as he believes it will assist the trial judge in making a "more appropriate decision". The appellant has not elaborated on the nature of that action or the relevance of the affected party's tribunal file to the issues in that action.

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

[12] 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;

[13] 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>2</sup>

[14] 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.

[15] 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>3</sup> However, 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>4</sup>

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>5</sup>

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<sup>2</sup> Order 11.

<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>5</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

## ***Representations***

[17] The tribunal submits that the records contain the personal information of the affected party, the individual respondent to the tribunal application, an employee of the corporate respondent to that application and other individuals.

[18] The tribunal submits that the records contain information relating to the affected party's medical, education and employment history and financial transactions, within the meaning of paragraph (b) of the definition of personal information. Further, the tribunal submits that the records include the affected party's opinions, pursuant to paragraph (e) of the definition of personal information, as well as the views and opinions of other individuals about the affected party, as contemplated by paragraph (g).

[19] The tribunal submits that the information in the records is associated with the affected party in his personal capacity. It also argues that, to the extent that any information in the records relates to the affected party in his capacity as the sole proprietor of a cleaning company, that information appears in the records in the context of the tribunal file containing allegations of a personal nature, and therefore reveals personal information about him.

[20] The tribunal further submits that the records contain the personal information of the individual respondent against whom the affected party made allegations to the tribunal, within the meaning of the definition of personal information found at paragraphs (b) (employment history), (e) (personal views of the individual), and (g) (personal views of another person about that individual). The tribunal submits that although the record includes information about this individual that is associated with her in a business or professional capacity, the information is extensively intertwined with information that relates to her in her personal capacity, and further, that the information contains serious allegations of wrong-doing against this individual.

[21] The tribunal relies on Order PO-2728, where it was held that allegations of wrongdoing, even if the information appears in what may otherwise be considered a business context, reveal something of a personal nature about an individual. The tribunal submits that even if this person's name were redacted, it is reasonable to assume that the appellant would be able to identify her, given the appellant's assertion that he already knows some of the information included in the records.

[22] Finally, the tribunal submits that the records contain the personal information of an employee of the corporate respondent to the application, pursuant to paragraphs (b) and (e) of the definition of personal information, again arguing that information relating to the employee in a business capacity cannot be revealed without revealing his personal information, and that the appellant would be able to identify this individual even if his name were redacted.

[23] Although the appellant's representations do not specifically address the question of whether the records contain personal information, he advised the mediator that his position is that the records cannot be considered personal if he is already aware of their contents.

### ***Analysis and conclusion***

[24] Before I turn to the possible application of the personal privacy exemption at section 21(1) to the records remaining at issue, the record numbers need to be clarified as follows:

- Records 13 and 17 (which are duplicates of one another) are briefs of documentary evidence submitted by one of the parties to the tribunal proceeding. Each is comprised of a cover/index page and 17 documents, separated by numbered tabs. Having reviewed these, I find that each tab contains a separate record. While, for convenience, I refer at times to "record" 13 or 17, it should be understood that each of these "records" is, in fact, made up of several records. I will assess the records at each tab for their possible exemption from disclosure under the *Act*.
- Records 6 and 7 consist of a pleading form filed with the tribunal and the attached pleading particulars. Together, they form the party in question's pleading. For this reason, I find that they should not be viewed as separate records, but as one record, which I will refer to as record 6/7.
- For the same reason, records 11 and 12 should not be viewed as separate records, but as one record, which I will refer to as record 11/12, and records 15 and 16 are together one record, which I will refer to as record 15/16.
- The tribunal provided the following three records that were not listed in its index, and which I have listed above as records 28 through 30:
  - An email chain ending with an email dated October 4, 2011 12:17 P.M. (3 pages) – record 28
  - An email dated September 16, 2011 (1 page) – record 29
  - A letter dated September 15, 2011 (2 pages) – record 30

[25] Having reviewed the records at issue, I find that none of them contain any personal information of the appellant. For the following reasons, I find that all of them,



with the exception of the records at tabs 13 and 14 of records 13 and 17 (which do not contain any information that qualifies as "personal information"), contain the personal information of individuals other than the appellant.

*Records 1-12, 13 (cover/index page), 14-16, 17 (cover/index page), 18, and 20-30*

[26] All of these records, which consist of forms, correspondence and pleadings, name either the affected party or the individual respondent, and in most cases, both individuals, as parties to an application before the tribunal. The records also contain information about the stage of the tribunal proceeding. This information constitutes personal information both under the introductory wording of the definition, as well as paragraph (h), as it consists of an individual's name together with other personal information about the individual. In addition, the grounds for the application appear in records 26 and 27; this information falls within the definition of personal information at paragraphs (a) and (b) (medical history). I am not able to be more specific in this regard without disclosing the contents of the records.

Records 6/7, 11/12, 15/16 and 20

[27] These records set out, in detail, the nature of the allegations before the tribunal and the response to those allegations. In addition to containing personal information for the reasons described above, they also contain information that relates to the affected party's education, medical and employment history, thus falling within paragraph (b) of the definition of personal information. The information in these records also qualifies as personal information under paragraph (a) of the definition. I am unable to be more specific in this regard without disclosing the context of the records. Finally, the records contain the views and opinions of the affected party about others, including the individual respondent to the application, and vice-versa. According to paragraph (g) of the definition, these views constitute the personal information of the individual subjects of these views and opinions.

[28] Human rights proceedings are inherently personal in nature. Although the tribunal proceeding at issue in this appeal relates to alleged events taking place in a business context, the fact of the proceeding, and the allegations revealed in the tribunal file, reveal something of a personal nature about the parties to that proceeding. The information does not merely identify the individuals in question in their professional capacities. I agree with Order PO-2572 that information that pertains to a complaint under the *Human Rights Code* qualifies as personal information even though the individuals are referred to in their professional capacities.<sup>6</sup>

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<sup>6</sup> See also Order PO-2728.

*Records 13 and 17*

[29] As noted above, these records, which are duplicates of one another, are each in fact comprised of several records, compiled into a brief and submitted to the tribunal in the context of the human rights application.

[30] The brief consists of a cover page and 17 tabs. I have found above that the cover page contains the personal information of the affected party and the individual respondent to the application before the tribunal.

[31] The records at tabs 1 and 16 contain information pertaining to the affected party's employment history, which constitutes his personal information pursuant to paragraph (b) of the definition of personal information in section 2(1).

[32] The records at tabs 2 and 3 are licensing documents for the affected party's business. Although this type of record might not generally be found to contain any personal information, because it identifies an individual in his or her professional and not personal capacity, I find that, in the specific circumstances of this appeal, disclosure of these records would reveal personal information about the affected party. Specifically, their disclosure would reveal information that constitutes personal information under paragraphs (a) and (b) of the definition of personal information. I am unable, however, to be more specific in that regard without disclosing the content of the records.

[33] The records at tabs 4, 5, 6, and 17 contain information pertaining to financial transactions in which the affected party has been involved. Therefore, I find that they contain his personal information pursuant to paragraph (b) of the definition of personal information in section 2(1). While some of this information pertains to the affected party's sole proprietorship, I find that its disclosure would describe the personal financial circumstances of the affected party.

[34] The records at tabs 7, 8, 9 and 10 are correspondence and emails relating to the work performance of the affected party and another named individual. I agree with previous orders of this office that when information involves an evaluation of an individual's work performance, that information identifies the individual in a personal capacity rather than a business capacity, and, therefore, qualifies as his or her personal information under the introductory wording of the definition.<sup>7</sup>

[35] The record found at tabs 11 and 12 consists of two pages of a cellular telephone bill belonging to an employee of the corporate respondent to the human rights application. The bill contains standard telephone bill information, including whether the calls were outgoing or incoming, the telephone numbers of the other parties, the date,

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<sup>7</sup> See, for example, Orders M-720 and P-721.

time and duration of the calls, and the charges for the calls. I find that this record contains the personal information of that individual under the introductory wording of the definition of personal information, as it consists of recorded information about this individual as well as his telephone number. It also contains his financial information, which constitutes his personal information under paragraph (b) of the definition of personal information. Although it is clear from my review of other records that some of the information in the record may relate to this individual's business use of the telephone, I am unable to ascertain, based on my review of the records and the representations before me, which portions relate to business use and which relate to personal use. Accordingly, I find it is appropriate to treat the entire record as containing personal information.<sup>8</sup>

[36] Tabs 13 and 14 consist of generic human resource documents of the corporate respondent to the human rights application. They do not contain any personal information. As no other exemption has been claimed by the tribunal for these records, I will order them disclosed to the appellant.

[37] Tab 15 is an attendance register for staff at a particular work site in 2003. I find that this record goes beyond identifying these named individuals in their business capacities. The record discloses the number of hours actually worked by the individuals on particular dates, for a particular company, at a particular site. Moreover, the attendance register establishes the employment history of the named individuals therein since it shows that they worked for a specified company in 2003. As such, I find that this record contains the personal information of the staff in question under paragraph (b) of the definition of personal information.

[38] To summarize, record 19 is not responsive to the request and, on that basis, should not be disclosed. The records contained at tabs 13 and 14 of records 13 and 17 do not contain personal information. As the tribunal has not claimed any other exemption for these records, I will order them disclosed. The remainder of the records contain the personal information of individuals other than the appellant, and I will now consider whether they are exempt from disclosure under the mandatory personal privacy exemption at section 21(1) of the *Act*.

**B. Does the mandatory exemption at section 21(1) apply to the information at issue?**

[39] I found above that all of the records at issue,<sup>9</sup> with the exception of the records at tabs 13 and 14 of records 13 and 17, contain the personal information of individuals other than the appellant.

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<sup>8</sup> See *Vaughan (City) v. Ontario (Information & Privacy Commissioner)*, 2011 ONSC 7082 at para. 9 (Div. Ct.).

<sup>9</sup> As noted above, Record 19 is not responsive to the request.

[40] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. If the information fits within any of paragraphs (a) to (f) of section 21(1), it is not exempt from disclosure under section 21.

[41] The section 21(1)(a) to (e) exceptions are relatively straightforward. The tribunal submits, and I find, that none of the exceptions in sections 21(1)(a) to (e) are applicable in this appeal. The only basis upon which these records might not be exempt from disclosure, therefore, is if I find that the exception in section 21(1)(f) applies; that is, if disclosure of the records would not be an unjustified invasion of personal privacy.

[42] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, the information is not exempt from disclosure. Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. The tribunal submits, and I find, that none of the situations outlined in the section 21(4) exceptions apply in the present appeal.

[43] 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.<sup>10</sup> Section 21(3) states, in part:

- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
  - (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
  - (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;

[44] If no presumptions apply, the factors set out in section 21(2) are weighed in order to determine if disclosure would be an unjustified invasion of personal privacy. Section 21(2) states, in part:

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<sup>10</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

### ***Representations***

[45] The tribunal submits that disclosure of the records at issue would result in an unjustified invasion of personal privacy. It submits that the presumptions at sections 21(3)(a), 21(3)(d) and 21(3)(f) apply because the records contain information about the medical, employment/educational and financial history, respectively, of individuals other than the appellant.

[46] The tribunal further submits that, should I find that the above presumptions do not apply, the following factors in section 21(2) weigh in favour of the non-disclosure of the records:

- It is possible that the appellant is seeking a financial judgment against the affected party, so the affected party might be exposed unfairly to pecuniary harm as a result of disclosure, and the factor at section 21(2)(e) applies;
- Because the information in the records is highly sensitive, the factor at section 21(2)(f) applies;

- Given that the information consists of allegations, it is reasonable to expect that the personal information contained in the records is neither accurate nor reliable. As a result, the factor at section 21(1)(g) applies; and
- Because disclosure of the records has the potential to unfairly damage the reputations of the affected party and another individual, the factor at section 21(1)(i) applies.

[47] The tribunal also submits that, although the appellant relies on section 21(2)(d), stating that the records are relevant to a fair determination of his rights, he has not demonstrated that the information in the records is required to prepare for the civil proceeding or to ensure that he receives an impartial hearing.

[48] The tribunal acknowledges that the information in the records cannot be said to have been supplied in confidence, because the tribunal forms that the parties to the tribunal proceeding signed include a declaration that information could become public at a hearing. As such, the tribunal concedes that the factor at section 21(2)(h) (information supplied in confidence) does not apply.

[49] During the course of mediation in this appeal, the appellant advised that he is a defendant in the civil action. In his representations, he submits:

As I have mentioned on my appealing letter I have demonstrated that I have enough personal knowledge on the matter since I have personal connections with the people involved. I have seen the file and the reason why I have asked of a copy of my own is for the reason I also outline on my appealing letter – there is an ongoing case on the Superior Court of Brampton where [the affected party] is involved and it seems that a trial will be inevitable and I truly believe in order for the judge to make a more appropriate decision there are facts that he/she should be aware of which are contents in the files I am requesting along with you for.

The case in the Superior Court of Brampton involves [the affected party] and [a named individual]. [The affected party] is a former employee/subcontractor of my company. I have been given all this information by the employee of [the corporate respondent in the tribunal application], who is one of the 2 defendants on the file. We are trying to name her a witness on the case but I must show to the Courts that there is enough grounds for my request.

### ***Analysis and Conclusion***

[50] For the following reasons, I find that disclosure of the records remaining at issue would result in an unjustified invasion of personal privacy.

*Records 6/7, 11/12, 15/16, 20*

*Records 13 and 17: tabs 1, 2, 3, 4, 5, 6, 11, 12, 15, 16 and 17*

*Records 26 and 27 (discrete portions)*

[51] I have found above that these records contain the affected party's medical, employment, and education history, and/or information about his financial activities. The tribunal argues that the presumptions at sections 21(3)(a), (d) and/or (f) apply to those records. I agree. As there are no section 21(4) exceptions that apply to those records, I conclude that their disclosure would constitute an unjustified invasion of the affected party's personal privacy, and I uphold the tribunal's decision to withhold them pursuant to section 21(1) of the *Act*.

*Records 1-5, 8-10, 14, 18, 21-30*

*Records 13 and 17: tabs 7-10*

[52] None of the presumptions at section 21(3) argued by the tribunal apply to these records, (with the exception of a limited portion of each of records 26 and 27). If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>11</sup>

[53] In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.<sup>12</sup>

[54] The list of factors under section 21(2) is not exhaustive. The institution must also consider any additional circumstances that are relevant, even if they are not listed under section 21(2).<sup>13</sup>

[55] I will address each of the factors in favour of non-disclosure raised by the tribunal and then turn to the factors in favour of disclosure raised by the appellant.

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<sup>11</sup> Order P-239.

<sup>12</sup> Orders PO-2267 and PO-2733.

<sup>13</sup> Order P-99.

Does the factor at section 21(2)(e) apply because disclosure might subject the affected party unfairly to pecuniary harm?

[56] The tribunal argues that disclosure could result in a monetary judgment against the affected party in the court proceedings before the Superior Court of Justice. However, according to the appellant, the affected party is the plaintiff in that action, and not the defendant. In any event, this factor only applies where the purported pecuniary harm is "unfair". A judgment rendered by the judge in a civil proceeding is not considered to be "unfair" within the meaning of section 21(2)(e).<sup>14</sup> I find that this factor does not apply.

Does the factor at section 21(2)(f) apply because the records are highly sensitive?

[57] I find that the information in these records is not highly sensitive. The details of the allegations in the tribunal application are found in records that I have already found above to be subject to one of the presumptions at section 21(3). I find that release of the information in the remaining records would not result in significant personal distress.

[58] I conclude that the factor at section 21(2)(f) does not apply to these records.

Does the factor at section 21(2)(g) apply because the personal information in these records is likely to be inaccurate or unreliable?

[59] Unlike the records to which I have found presumptions to apply, these records do not set out in detail the allegations of the parties to the application. I find that the personal information contained in these records is not likely to be inaccurate or unreliable.

[60] I conclude that the factor at section 21(2)(g) does not apply to these records.

Does the factor at section 21(2)(i) apply because disclosure of the records has the potential to unfairly damage the reputations of the affected party and the individual respondent to the application?

[61] Again, these records do not contain details of the allegations of the parties. The individual named as a respondent is identified in many of these records, and on that basis, I find that they may have the potential to unfairly damage her reputation. However, I find that, in light of the absence of the particulars of the allegations, this factor, while relevant, does not weigh strongly in favour of privacy protection.

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<sup>14</sup> See Orders P-1622 and PO-1912.



[62] As noted above, in order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances *favouring* disclosure in section 21(2) must be present. The appellant argues that he has already seen the file, and that the records are relevant to a fair determination of his rights, as contemplated by the factor at section 21(2)(d).

Does the unlisted factor that the appellant has seen the file weigh in favour of disclosure?

[63] As mentioned above, the institution must consider any relevant circumstances, even if they are not listed in section 21(2).

[64] In his representations, the appellant states:

As I have mentioned on my appealing letter I have demonstrated that I have enough personal knowledge on the matter since I have personal connections with the people involved. I have seen the file and the reason why I have asked of [sic] a copy of my own is for the reason I also outlined on my appealing letter...

[65] In his letter of appeal, the appellant sets out the extent of his purported knowledge of the affected party's medical and employment history and the nature of the allegations that were the subject of the tribunal application.

[66] The records at issue contain only the personal information of individuals other than the appellant. In my view, this is a highly relevant fact that diminishes the significance of the fact that the appellant may already be aware of some of the information contained in the records.

[67] I am also not satisfied that the appellant has, in fact, seen the records in their entirety. Although the appellant asserts that "I have seen the file", he has not provided sufficient explanation as to how this would be the case. He was not a party to the tribunal application. While he has stated that "I have been given all this information by the employee of [the corporate respondent in the tribunal application], who is one of the 2 defendants on the file", this statement is not sufficient for me to conclude that he has seen all of the records at issue. Further, I cannot determine from this statement which records he may have seen.

[68] I conclude that this consideration raised by the appellant does not apply as a factor favouring disclosure under section 21(2).

Does the factor at section 21(2)(d) apply because the records are relevant to a fair determination of the appellant's rights?

[69] In Order P-312,<sup>15</sup> former Assistant Commissioner Tom Mitchinson held that, in order for section 21(2)(d) to be a relevant consideration, it must be established that:

- The right in question is a legal right based on the concepts of common law or statute and not a non-legal right based on morality or ethics;
- The right relates to an existing or contemplated proceeding, not one that has been completed;
- The personal information being sought has some significance to the determination of the right; and
- The personal information is necessary for the individual in question to prepare for the proceeding or to ensure an impartial hearing.

[70] In this instance, I am not satisfied that the third or fourth criteria required to establish the application of section 21(2)(d) have been met. Although the appellant has stated that he is involved in a civil action with the affected party, he has not explained the significance of the records to the determination of his rights in that action, nor has he described how the information is necessary for him to prepare for the proceeding or to ensure an impartial hearing. While he states that the records will establish why he needs to call a certain individual as a witness, he has not provided any information as to what the action relates to, why he wants this individual to attend as a witness, or how the records at issue will establish the necessity of calling that witness.

[71] I also consider it relevant that the appellant has alternate means of seeking the information in question, such as by way of a motion for production from the affected party in the civil action. While the availability of alternative means of disclosure does not preclude disclosure under the *Act*, I find the fact that there is another possible means of disclosure particularly relevant in a case such as the present one, where I have very little information about the nature of the civil action in question.

[72] I conclude that the factor at section 21(2)(d) does not apply as a factor favouring disclosure.

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<sup>15</sup> Upheld on judicial review in *Ontario (Minister of Government Services) v. Mitchinson*, [1994] O.J. No. 4280 (Ont. Div. Ct.).

Is the fact that the parties were aware that the information might be made public an unlisted factor weighing in favour of disclosure?

[73] Although not raised by the appellant, I have also considered the fact that, as acknowledged by the tribunal, parties to a tribunal application are aware that the information they submit might become public at a hearing, in a written decision, or in accordance with tribunal policies.

[74] Balancing the competing values of transparency in the decision-making of administrative tribunals on one hand, and the right to privacy on the other, engages issues regarding open justice, *Charter* rights and the protection of personal information of individuals. However, absent a *Charter* challenge to the privacy protection provisions in the *Act* as they relate to administrative tribunals, a discussion of these issues is beyond the scope of this inquiry. As I have not been provided with information suggesting that the information in the records did, in fact, become public in this case, I find that this factor does not apply in favour of the disclosure of the records.

Conclusion

[75] Since none of the factors favouring disclosure in section 21(2) are present, I conclude that disclosure of these records would be an unjustified invasion of personal privacy, and I uphold the tribunal's decision to withhold them pursuant to section 21(1) of the *Act*.

**D. Can the records reasonably be severed pursuant to section 10(2) of the *Act*?**

[76] Section 10(2) of the *Act* obliges an institution to disclose as much of any responsive records as can reasonably be severed without disclosing material which is exempt.

***Representations***

[77] The tribunal submits that the records include administrative documents which could potentially be disclosed with any personal information severed. The tribunal submits, however, that disclosing these records would reveal minimal information. It further submits that the personal information appearing in other documents, such as the Application form and the Response, is extensive and is intertwined with any non-exempt information. It submits that if the exempt information is removed from these records, all that would remain would be disconnected snippets that would not be of value to the appellant. The tribunal relies on Orders PO-2778, PO-2922 and PO-3236.

[78] The appellant's representations do not address the severance issue.

### ***Analysis and conclusion***

[79] For the following reasons, I find that, although severing the non-exempt material from the exempt material might be technically feasible, such severances would not be reasonable.

[80] In *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*,<sup>16</sup> the Ontario Divisional Court quoted with approval the following passage from the Federal Court of Appeal decision *Montana Band of Indians v. Canada (Minister of Indian & Northern Affairs)*,<sup>17</sup> which addressed the analogous severance provision in the federal *Access to Information Act*<sup>18</sup>:

To attempt to comply with s. 25 would result in the release of an entirely blacked-out document with, at most, two or three lines showing. Without the context of the rest of the statement, such information would be worthless. The effort such severance would require on the part of the department is not proportionate to the quality of access it would provide.

[81] Similarly, in *Canada (Information Commissioner) v. Canada (Solicitor General)*,<sup>19</sup> the Federal Court of Appeal stated:

One of the considerations which influences me is that these statutes do not, in my view, mandate a surgical process whereby disconnected phrases which do not, by themselves, contain exempt information are picked out of otherwise exempt material and released. There are two problems with this kind of procedure. First, the resulting document may be meaningless or misleading as the information it contains is taken totally out of context. Second, even if not technically exempt, the remaining information may provide clues to the content of the deleted portions. Especially when dealing with personal information, in my opinion, it is preferable to delete an entire passage in order to protect the privacy of the individual rather than disclosing certain non-exempt portions or words.

Indeed, Parliament seems to have intended that severance of exempt and non-exempt portions be attempted only when the result is a reasonable fulfilment of the purposes of these statutes...

Disconnected snippets of releasable information taken from otherwise exempt passages are not, in my view, reasonably severable.

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<sup>16</sup> *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

<sup>17</sup> (1988), 51 D.L.R. (4th) 306 at 320.

<sup>18</sup> S.C. 1980-81-82-83, c. 111, sch. I, s. 25.

<sup>19</sup> [1988] 3 F.C. 551 at 558.

[82] In this case, I find that any information that would remain in the records after severing out the personal information would consist of the type of information described in the above decisions. It would consist of:

- information that would be meaningless to the appellant and would not fulfill the purposes of the *Act* (such as standard tribunal forms with all personal information redacted);
- information that might provide clues to the content of the deleted portions (for example, the very name of a form provides information regarding the nature and course of the tribunal application); and/or
- disconnected snippets of information, such as in the case of the records containing the details of the allegations.

[83] I conclude that there is no information in the exempt records that can *reasonably* be severed under section 10(2) of the *Act*.

**ORDER:**

1. I order the tribunal to disclose to the appellant the records located at tabs 13 and 14 of records 13 and 17. This disclosure is to take place no later than **March 2, 2015**, but not before **February 25, 2015**.
2. I uphold the tribunal's decision to withhold the remainder of the records at issue.
3. In order to verify compliance with provision 1 of this order, I reserve the right to require the tribunal to provide me with a copy of the information disclosed to the appellant.

Original Signed By:  
Gillian Shaw  
Adjudicator

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January 26, 2015