

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3458

Appeal PA12-548

Ontario Lottery and Gaming Corporation

February 5, 2015

Summary: In October 2010, the appellant obtained an injunction against her sister from the Ontario Superior Court that restrains her sister from doing anything that would damage the appellant's business or personal reputation. In February 2012, the appellant was contacted by an Ontario Provincial Police detective, who advised her that her sister had made allegations about her to the Ontario Lottery and Gaming Corporation. The appellant then submitted an access request to the OLG for any information relating to complaints made by her sister about the appellant or her business. The OLG denied her access to the responsive records under section 21(1) (personal privacy) of the *Act*. The appellant appealed the OLG's decision. In this order, the adjudicator finds that because the records contain the personal information of both the requester (i.e., the appellant) and other individuals, the discretionary exemption at section 49(b) (personal privacy), not the mandatory exemption at section 21(1), is at issue. He finds that disclosing the mixed personal information in the responsive parts of the records (particularly the allegations that the appellant's sister made to the OLG about the appellant on or after the date of the injunction), would not constitute an unjustified invasion of the personal privacy of the appellant's sister under section 49(b). He orders the OLG to disclose those parts of the records to the appellant.

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"), 2(3), 21(1)(b), 21(2)(d), 21(2)(e), 21(2)(f), 21(2)(g), 21(2)(h), 21(2)(i), 21(3)(a), 21(3)(d), and 49(b).

Orders and Investigation Reports Considered: Orders PO-1731 and MO-2954.

OVERVIEW:

[1] The appellant submitted an access request to the Ontario Lottery and Gaming Corporation (the OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for any information relating to complaints made by her sister about the appellant or her business.

[2] The appellant claims that her sister has been engaging in a long-term campaign to ruin her personal and business reputation. In her access request to the OLG, she states that she successfully obtained a permanent injunction against her sister from Justice Byers of the Ontario Superior Court. This injunction, dated October 15, 2010, states:

THIS COURT ORDERS a permanent injunction against [the appellant's sister], restraining her from contacting the suppliers and business partners of the [appellant and her business] and restraining her from doing anything that would otherwise damage the business or personal reputations of the [appellant and her business], pursuant to section 101 of the *Courts of Justice Act*, and Rule 14.05(3)(g) of the *Rules of Civil Procedure*.¹

[3] The appellant's access request further states that she was contacted by a detective with the Ontario Provincial Police on February 3, 2012, who advised her that her sister had written to the OLG and made allegations against her. The appellant believes that her sister has made false allegations to the OLG that contravene the permanent injunction issued by Justice Byers. Consequently, she filed an access request with the OLG for any information relating to complaints made by her sister about the appellant or her business for the purpose of obtaining evidence to enforce this injunction.

[4] The OLG located 69 pages of records and an audio interview. It then notified the appellant's sister under section 28 of the *Act* and asked her whether disclosing the information in the records would constitute an unjustified invasion of her personal privacy under the mandatory exemption in section 21(1) of the *Act*. In response, the appellant's sister advised the OLG that she objected to the disclosure of the information in the records because doing so would be an unjustified invasion of her personal privacy under section 21(1).

[5] The OLG then issued a decision letter to the appellant that denied her access to all of the information in the requested records. It withheld some information in the records under section 21(1) but also withheld other information because it is not

¹ Court File No. CV-10-462-00.

responsive to the appellant's access request. The appellant appealed the OLG's decision to the Information and Privacy Commissioner of Ontario (IPC).

[6] During the mediation stage of the appeal process, the appellant stated that she was not seeking access to those parts of the records that the OLG has deemed to be non-responsive to her request. The mediator also raised the possible application of the discretionary exemption in section 49(b) (personal privacy) of the *Act*, which applies to records containing the personal information of both the requester and other individuals.

[7] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I sought and received representations on the issues to be resolved in this appeal from the OLG, the appellant and the appellant's sister (who is an affected party). In addition, I went to an OLG office to listen to an audio interview, which is one of the records at issue. I also received some unsolicited correspondence from the appellant's sister during the course of this inquiry.

RECORDS:

[8] The records at issue in this appeal are set out in the following chart:

Records	Page number(s)	OLG's decision	Exemptions
Internal OLG email, dated October 25, 2010	1	Withhold	ss. 49(b)/21(1)
Entries from OLG case management system (occurrence details with references to years 2002, 2008, 2010 and 2012)	2-11	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated November 23, 2010	12-14	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated April 2, 2012	15	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated May 23, 2012	16-18	Withhold	ss. 49(b)/21(1)
Fax from appellant's sister to OLG, dated June 30, 2007	22-24	Withhold	ss. 49(b)/21(1)

Fax from appellant's sister to OLG, dated November 20, 2007	25	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated July 11, 2008	26-36	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated June 18, 2008	37-44	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated July 8, 2008	45-47	Withhold	ss. 49(b)/21(1)
Internal OLG emails from 2008	48-61	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated March 26, 2008	62	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated March 26, 2008	63-65	Withhold	ss. 49(b)/21(1)
Entry from OLG case management system (summary investigation report), dated January 22, 2010	66	Withhold	ss. 49(b)/21(1)
Handwritten note by OLG employee, dated June 10, 2011	67	Withhold	ss. 49(b)/21(1)
Excerpt of fax from appellant's sister to OLG, dated December 19, 2011	68-69	Withhold	ss. 49(b)/21(1)
Audio interview with appellant's sister, dated May 29, 2008	On CD	Withhold	ss. 49(b)/21(1)

ISSUES:

- A. Is the appellant's access request barred by statute or a court order, and is it frivolous or vexatious?
- 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 OLG exercise its discretion under section 49(b)? If so, should the IPC uphold its exercise of discretion?

DISCUSSION:

PRELIMINARY ISSUE

A. Is the appellant's access request barred by statute or a court order, and is it frivolous or vexatious?

[9] The appellant's sister submits that the appellant is a "confirmed embezzler and extortionist." She claims that this appeal is "illegal (statute barred) and orders barred" and cites several statutes, rules of court, court file numbers and case citations to support her position. In addition, she submits that the appellant's access request is frivolous and vexatious.

[10] The appellant submits that her sister's arguments are false and a figment of her own imagination. She submits that there is no statutory bar against the appeal; there are no court orders relevant to the appeal (except for the order of Justice Byers); and her appeal is neither frivolous nor vexatious.

[11] In my view, the appellant's sister has not established that this appeal is barred by any statute or court order. None of the statutes or rules of court that she cites prevent the appellant from appealing the OLG's access decision. In addition, although the appellant's sister had raised various court file numbers and case citations, she has not provided me with copies of any specific court orders that might operate to bar the appellant from appealing the OLG's access decision.

[12] On the issue of whether the appeal is frivolous or vexatious, section 10(1)(b) of the *Act* provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This provision reads:

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,

the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[13] Section 5.1 of Regulation 460 reads:

A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

- (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
- (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[14] I note that the discretionary power in section 10(1)(b) rests with the head of an institution, not third parties such as the appellant's sister. In addition, this provision applies to the access request itself, not a requester's appeal of an institution's access decision to the IPC. The OLG did not claim that the appellant's access request is frivolous or vexatious, and the appellant's sister has not provided me with any persuasive evidence to show that the access request fits within the grounds in section 5.1 of Regulation 460. Consequently, I find that the appellant's access request is not frivolous or vexatious.

PERSONAL INFORMATION

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

[15] The personal privacy exemptions in sections 21(1) and 49(b) of the *Act* only apply to "personal information." Consequently, it is necessary to determine whether the records contain "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;

[16] 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.²

² Order 11.

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.³

[18] The OLG submits that the records at issue contain the personal information of the appellant, her sister and other individuals.

[19] The appellant states that she is generally not seeking her sister's personal information, but is seeking access to the allegations that her sister made about her to the OLG. She submits that under paragraph (e) of the definition of "personal information" in section 2(1), the personal views or opinions expressed by an individual about another individual are not considered the "personal information" of the first individual under the *Act*. Accordingly, records containing her sister's personal opinions and views about the appellant cannot be exempt under sections 21(1) or 49(b), because these exemptions only apply to "personal information."

[20] I have reviewed the records at issue, which include internal emails between OLG staff, faxes that the OLG received from the appellant's sister, an audio interview between an OLG investigator and the appellant's sister, and other records. For the reasons that follow, I find that these records contain the personal information of the appellant, her sister and other individuals.

[21] The types of personal information in the records relating to the appellant's sister include her name, address, telephone numbers, medical history, employment history and other information. All of this information falls within paragraphs (a), (b), (c), (d), and (h) of the definition of personal information in section 2(1). In addition, the faxes that she sent to the OLG, which form part of the records at issue, fall within paragraph (f) of this definition, because it constitutes correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature.

[22] The appellant's sister has also made allegations about the appellant that are documented in the records. Consequently, it must be determined whether these allegations are the personal information of the appellant, her sister, or both of these individuals.

[23] Paragraphs (e) and (g) of the definition of personal information in section 2(1) provide guidance in making this determination. Under paragraph (e), personal information means recorded information about an identifiable individual including "the personal opinions or views of the individual *except* if they relate to another individual." As a result, I find that the allegations that the appellant's sister makes about the appellant in the records cannot qualify as her own personal information, because her personal opinions and views relate to another individual (the appellant).

³ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[24] Under paragraph (g) of the definition, personal information means recorded information about an identifiable individual including “the views or opinions of another individual about the individual.” I find that the allegations that the appellant’s sister made to the OLG about the appellant are the appellant’s personal information, because they are the views or opinions of another individual (her sister) about her, as defined in paragraph (g) of the definition of “personal information.”

[25] However, the parts of the records that contain the allegations that the appellant’s sister made about her also include the name of the appellant’s sister and reveal other information about her, such as the fact that she communicated with the OLG on specific dates. In my view, this information qualifies as the “personal information” of the appellant’s sister under paragraph (h) of the definition of that term in section 2(1). In short, I find that those parts of the records that set out the allegations that the appellant’s sister made about the appellant contain the mixed personal information of both the appellant and her sister.

[26] The appellant’s sister also makes allegations to the OLG about other named individuals in the records. I find that her allegations about these other individuals are their personal information, because they are the views or opinions of another individual about them, as defined in paragraph (g) of the definition of “personal information.”

[27] Finally, section 2(3) of the *Act* excludes certain information from the definition of personal information. It states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[28] The records at issue include the names, job titles and contact information of several OLG staff and some police officers. In accordance with section 2(3), I find that this information does not qualify as these individuals’ personal information. Consequently, it cannot qualify for exemption under the personal privacy exemptions in sections 21(1) or 49(b) of the *Act*.

PERSONAL PRIVACY

B. Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?

Introduction

[29] The personal privacy exemptions in sections 21(1) and 49(b) of the *Act* only apply to “personal information.” In the “Personal Information” section above, I found that the records at issue contain the personal information of the appellant, her sister

and other individuals. Before assessing whether this personal information qualifies for exemption under section 21(1) or 49(b) of the *Act*, it may be useful to clarify the scope of the appellant's request and particularly which information she is actually seeking.

[30] The OLG has refused access to some information in the records because it is not responsive to the appellant's access request. During the mediation stage of the appeal process, the appellant stated that she was not seeking access to those parts of the records. Consequently, any personal information in those parts of the records that the OLG has identified as non-responsive is not at issue in this appeal, and I will not be assessing whether it qualifies for exemption under sections 21(1) or 49(b).

[31] In addition, the appellant makes the following statement in her representations about the specific information she is seeking:

Simply, the appellant is seeking access to statements that her sister made regarding the appellant to a public entity, in bald contravention of the Order of Justice Byers. . . .

[32] Justice Byers' order was issued on October 15, 2010. Given that his order is not retroactive, the appellant's access request would only apply to any allegations that her sister made to the OLG about her on or after October 15, 2010. It appears that the appellant's sister contacted the OLG in 2002 and 2008 and most of the information in the records at issue, including some of the more serious allegations that she made against her sister, is from that time period, particularly 2008. Given that this information pre-dates Justice Byers' order of October 15, 2010, I find that it is not responsive to the appellant's access request.

[33] In my view, the parts of the records that are responsive to the appellant's access request and are at issue in this appeal are those that describe the allegations that the appellant's sister made about her to the OLG on or after October 15, 2010. These allegations are found in an internal OLG email from 2010⁴ and excerpts from faxes that the appellant's sister sent to the OLG on various dates in 2010, 2011 and 2012.⁵ In the "Personal Information" section above, I found that those parts of the records contain the mixed personal information of both the appellant and her sister. Consequently, I will now assess whether this mixed personal information qualifies for exemption under either section 21(1) or 49(b) of the *Act*.

[34] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

⁴ See p. 1 of the records.

⁵ See pp. 12-14, 15, 16-18, 19-21 and 68-69 of the records.

[35] In contrast, under section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 21(1)(f).

[36] In the circumstances of this appeal, each record contains the personal information of both the requester (the appellant) and other individuals. Consequently, the discretionary exemption at section 49(b), not the mandatory exemption at section 21(1), is at issue. This provision states:

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

if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[37] I have found that those parts of the records that set out the allegations that the appellant's sister made about the appellant contain the mixed personal information of both the appellant and her sister. In the circumstances of this appeal, it must be determined, therefore, whether disclosing the appellant's own personal information and her sister's personal information to her would constitute an unjustified invasion of her sister's personal privacy under section 49(b).

[38] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold under section 49(b) is met:

- if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b);
- section 21(2) lists "relevant circumstances" or factors that must be considered;
- section 21(3) lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy; and
- section 21(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 21(3).

Sections 21(1)(a) to (e)

[39] The appellant submits that the exception in section 21(1)(b) applies to the personal information in the records. This provision states:

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

in compelling circumstances affecting the health or safety of an individual, if upon disclosure notification thereof is mailed to the last known address of the individual to whom the information relates;

[40] The appellant submits that given the history between herself and her sister, her safety may be at risk. In my view, although the appellant may believe that she has grounds for being concerned about her safety, I am not convinced that there are “compelling circumstances” affecting her safety that would be alleviated by the disclosure of the personal information in the records. Consequently, I find that section 21(1)(b) does not apply.

[41] None of the parties submit that the remaining exceptions in section 21(1)(a) to (e) apply to the personal information in the records. In short, I find that none of these exceptions are applicable in the circumstances of this appeal.

Sections 21(2), (3) and (4)

[42] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), the IPC will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁶

Section 21(3)

[43] I will start by examining the presumptions in section 21(3). This provision lists circumstances in which the disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy. The OLG submits that the presumptions in sections 21(3)(a) and (d) apply to some of the personal information that relates solely to the appellant’s sister. These provisions state:

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

⁶ Order MO-2954.

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- . . .
- (d) relates to employment or educational history;

[44] The appellant submits that the presumptions in sections 21(3) are not applicable in this appeal. The appellant's sister does not address these presumptions but submits that disclosing her personal information to the appellant would "fully violate" her privacy rights.

[45] I agree with the OLG that some parts of the records contain personal information of the appellant's sister that falls within the presumptions in sections 21(3)(a) and (d), because it relates to her medical and employment history. However, the appellant is not seeking access to those parts of the records. She is only seeking access to the allegations that the appellant's sister made about her on or after October 15, 2010 that are documented in the records. In addition, the general allegation by the appellant's sister that the appellant harmed her does not, in my view, transform this information into her "medical history" for the purposes of section 21(3)(a).

[46] In short, I find that those parts of the records that contain the medical or employment history of the appellant's sister are not responsive to the appellant's access request. Consequently, the presumptions in sections 21(3)(a) and (d) are not applicable.

[47] Section 21(4) lists circumstances in which the disclosure of personal information does not constitute an unjustified invasion of personal privacy, despite section 21(3). Given that I have found that the presumptions in sections 21(3)(a) and (d) are not applicable and none of the parties have raised any of the other presumptions in section 21(3), I find that the circumstances in section 21(4) are also not applicable in this appeal.

Section 21(2)

[48] 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.⁷ This provision 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,

⁷ Order P-239.

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (b) access to the personal information may promote public health and safety;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (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.

[49] The factors in paragraphs (a), (b), (c) and (d) of section 21(2) generally weigh in favour of disclosure, while those in paragraphs (e), (f), (g), (h) and (i) weigh in favour of privacy protection.⁸

[50] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).⁹

[51] The only factors that are raised either directly or indirectly in the parties' representations are sections 21(d), (e), (f), (g), (h) and (i).

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

[52] I will start my analysis of the section 21(2) factors by examining section 21(2)(d), which has particular relevance in the circumstances of this appeal.

⁸ Order PO-2265.

⁹ Order P-99.

[53] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(d) requires the OLG to consider whether the personal information is relevant to a fair determination of rights affecting the person who made the request. If this factor is found to apply, it would weigh in favour of disclosing the mixed personal information in those parts of the records sought by the appellant.

[54] The OLG submits that the section 21(2)(d) factor does not apply to the mixed personal information at issue. In contrast, the appellant submits this mixed personal information is relevant to a fair determination of her rights with respect to Justice Byers' order.

[55] The IPC has found that 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; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.¹⁰

[56] The parts of the records that are at issue in this appeal are those that set out the allegations that the appellant's sister made about the appellant. The appellant is seeking access to these allegations for the purpose of enforcing Justice Byers' injunction, which restrains her sister from damaging her personal or business reputation.

[57] In my view, the four-part test for section 21(2)(d) is applicable to the mixed personal information in those parts of the records because:

- (1) the appellant's right to enforce the injunction against her sister is drawn from from the concepts of common law or statute law;

¹⁰ 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.).

- (2) this right is related to a contemplated proceeding against her sister to enforce Justice Byers' injunction;
- (3) the personal information she is seeking has some bearing to her right to enforce the injunction, because she needs to show that the injunction has been violated; and
- (4) she requires the personal information to prepare for the proceeding to enforce the injunction.

[58] I find, therefore, that disclosing the mixed personal information in those parts of the records that set out the allegations that the appellant's sister made about the appellant, is relevant to a fair determination of the appellant's rights under section 21(2)(d). Consequently, this factor weighs in favour of disclosing this mixed personal information and I would assign considerable weight to it.

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

[59] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(e) normally requires the institution to consider whether the individual to whom the information relates will be exposed unfairly to pecuniary or other harm. In the circumstances of this appeal, where the parts of the records sought by the appellant contain the personal information of both the appellant and her sister, it must be determined whether disclosing this mixed personal information will expose the appellant's sister unfairly to pecuniary or other harm.

[60] If this factor is found to apply, it would weigh in favour of withholding the mixed personal information. In order for this section to apply, the evidence must demonstrate that the damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved.

[61] The OLG does not specifically cite section 21(2)(e) but it is evident from its representations that it concluded that the appellant's sister may be exposed to repercussions if the allegations she made to the OLG are disclosed to the appellant.

[62] The appellant's sister also does not cite section 21(2)(e) but she claims that the appellant is "murderous toward me" and "criminally insane," and disclosing the personal information in the records would increase the appellant's "vehemence" against her. Based on these submissions, I will assume that the appellant's sister takes the position that disclosing the allegations she made to the OLG about the appellant will expose her unfairly to pecuniary or other harm, as stipulated in section 21(2)(e).

[63] Given that the appellant is seeking access to her sister's allegations for the purpose of enforcing Justice Byers' injunction, it is possible that if the mixed personal information is disclosed, her sister could be exposed to pecuniary or other harm if she is found to have violated this injunction and faces sanctions from the court. In my view, however, any harm that she is exposed to as a result of such a finding would not be "unfair" because she voluntarily made these allegations about the appellant to the OLG, despite knowing the language contained in Justice Byers' injunction. Consequently, I find that the section 21(2)(e) factor, which weighs in favour of privacy protection, does not apply to the mixed personal information in those parts of the records at issue in this appeal.

Section 21(2)(f): highly sensitive

[64] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(f) requires the OLG to consider whether the personal information is highly sensitive. In the circumstances of this appeal, where the parts of the records sought by the appellant contain the mixed personal information of both the appellant and her sister, it must be determined whether this information is highly sensitive. If this factor is found to apply, it would weigh in favour of withholding the personal information. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹¹

[65] The OLG submits that disclosing any of the personal information in the records could reasonably be expected to cause personal distress to the appellant's sister. Consequently, it appears that the OLG concluded that the personal information at issue is highly sensitive.

[66] Given that the appellant's sister alleges that the appellant is "murderous" towards her, I will assume that she takes the position that disclosing the allegations she made to the OLG about the appellant would cause her significant personal distress.

[67] The appellant acknowledges that the personal information in the records is likely to be highly sensitive, given the past history between her and her sister and the nature of her sister's correspondence.

[68] In general, it is reasonable to expect that individuals who make complaints or allegations about other individuals to an institution would suffer some personal distress if this information is later disclosed. In the circumstances of this appeal, I am satisfied that the appellant's sister would suffer significant personal distress if the allegations she made about the appellant to the OLG are disclosed, and the personal information at issue is, therefore, highly sensitive, as stipulated in section 21(2)(f). Consequently, I

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

find that this factor weighs in favour of withholding this personal information and I would assign moderate weight to it.

Section 21(2)(g): inaccurate or unreliable

[69] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(f) requires the OLG to consider whether the personal information is unlikely to be accurate or reliable. Previous orders have generally found that the likelihood that information is inaccurate or unreliable is a factor that weighs against disclosure. However, where the information at issue includes the requester's personal information (as is the case here), the fact that the information may be inaccurate or unreliable weighs in favour of disclosure.¹²

[70] Neither the OLG nor the appellant's sister raises this factor in their representations, but I will assume that the appellant's sister takes the position that the allegations she made to the OLG about the appellant are both accurate and reliable.

[71] The parts of the records that contain the allegations that the appellant's sister made about the appellant also include the name of the appellant's sister and reveal other information about her, such as the fact that she communicated with the OLG on specific dates. I have found that this information qualifies as the personal information of the appellant's sister. In my view, this personal information is likely to be accurate and reliable.

[72] However, I have also found that the allegations that the appellant's sister made to the OLG about the appellant are the appellant's personal information. Based on my review of the records and the conclusions reached by the OLG about the allegations made by the appellant's sister, I am satisfied that the appellant's personal information in the parts of the record (which are contained in her sister's allegations) are unlikely to be accurate or reliable, as stipulated in section 21(2)(g). Consequently, I find that this factor weighs in favour of disclosing this personal information and I would assign significant weight to it.

21(2)(h): supplied in confidence

[73] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(f) requires the OLG to consider whether the personal information has been supplied by the individual to whom the information relates in confidence. If this factor is found to apply, it would weigh in favour of withholding the personal information.

¹² Order PO-1731.

[74] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹³

[75] At the outset, I note that this factor only applies to personal information that "has been supplied by the individual to whom the information relates. . . ." Consequently, if this factor is applicable, it can only apply to the personal information of the appellant's sister, not the appellant's personal information. In other words, it can potentially apply to the name of the appellant's sister, coupled with other personal information about her, but not to the allegations that she made about the appellant, which is the appellant's personal information alone.

[76] It can be surmised from the representations of both the OLG and the appellant's sister that they believe that the appellant's sister supplied her own personal information in confidence to the OLG. The appellant simply submits that the factor in section 21(2)(h) is not relevant in this matter.

[77] In general, it is likely that both the individuals who supply their personal information to the OLG when making a complaint, and the OLG itself, would expect that at least some of this information will be treated confidentially. In my view, such an expectation would be reasonable. Consequently, for those parts of the records that are at issue in this appeal, I find that the appellant's sister supplied her own personal information to the OLG "in confidence," as stipulated in section 21(2)(h).

[78] However, given the appellant is already aware that her sister made allegations to the OLG about her, I find that the privacy interests of the appellant's sister with respect to her name and other information about her, such as the fact that she communicated with the OLG on specific dates, is somewhat diminished. Consequently, I find that the section 21(2)(f) factor applies to the personal information of the appellant's sister in those parts of the records that are at issue, but I would assign it low weight.

21(2)(i): unfair damage to reputation

[79] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(i) requires the OLG to consider whether the disclosure may unfairly damage the reputation of any person referred to in the record. The applicability of this section is not dependent on whether the damage is present or foreseeable, but whether this damage would be "unfair" to the individual involved.¹⁴

¹³ Order PO-1670.

¹⁴ Order P-256.

[80] Neither the OLG nor the appellant's sister directly address section 21(2)(i), but it is reasonable to assume that the appellant's sister believes that disclosing the mixed personal information in those parts of the records at issue in this appeal may unfairly damage her reputation. The appellant submits that the information that the appellant's sister provided to the OLG is very likely to unfairly damage the appellant's reputation.

[81] I do not agree with the appellant's line of argument, because the test in section 21(2)(i) is whether disclosing the personal information in the records to her in response to her access request may unfairly damage the reputation of any person referred to in the records, not whether the information that her sister supplied to the OLG may cause such damage.

[82] Applying the test in section 21(2)(i), I am not convinced that disclosing the mixed personal information in those parts of the records at issue may unfairly damage the reputation of any person referred to in the record. Although the reputation of the appellant's sister might ultimately be damaged if a court concludes that she made false allegations against the appellant to the OLG, I find that any such damage would not be unfair, because she voluntarily made these allegations. In short, I find that the section 21(2)(i) factor, which weighs in favour of privacy protection, does not apply to the mixed personal information in those parts of the records at issue in this appeal.

Unlisted factor favouring disclosure

[83] As noted above, the list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).¹⁵

[84] In Order MO-2954, Adjudicator Laurel Cropley stated that the *Act* should not be used in a way that prevents individuals from exercising their legal rights. She found that this is an unlisted factor favouring disclosure and gave significant weight to this unlisted factor.

[85] The appellant does not directly raise this unlisted factor but makes the following submissions, which are somewhat related to this factor:

Frankly, if the OLG's decision is upheld (and the release of the records deemed to constitute an unjustified invasion of personal privacy), it would allow the appellant's sister unfettered leeway to continue to make comments, and express opinions and personal views with the sole intent of damaging the reputations (both personal and business) of the appellant). Such would fly in the face of the order of Justice Byers, the end result of decades of litigation.

¹⁵ Order P-99.

[86] The facts in the appeal before me are different than those before Adjudicator Cropley in Order MO-2954, but the same general principle applies. Justice Byers' injunction restrains the appellant's sister from doing anything that would damage the appellant's personal or business reputation. In my view, the OLG's refusal to provide the appellant with access to the mixed personal information at issue (particularly the allegations that her sister made about her) is preventing her from exercising her legal right to enforce the injunction. In the particular circumstances of this appeal, I give considerable weight to this unlisted factor.

Conclusion

[87] The parts of the records that are responsive to the appellant's access request and are at issue in this appeal are those that describe the allegations that the appellant's sister made about her to the OLG on or after October 15, 2010. These allegations are about the appellant and constitute her personal information, not her sister's. However, these parts of the records also contain the personal information of the appellant's sister because they include her name and reveal other information about her, such as the fact that she communicated with the OLG on specific dates.

[88] As noted above, in determining whether disclosing this mixed personal information to the appellant would constitute an unjustified invasion of her sister's personal privacy under section 49(b), I must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.¹⁶

[89] I have found that the presumptions in sections 21(3)(a) and (d), which were raised by the OLG, are not applicable to those parts of the records that are responsive to the appellant's access request. In addition, none of the parties raised any of the other presumptions in section 21(3). Consequently, in the particular circumstances of this appeal, I must only weigh and balance the factors in section 21(2) and balance the interests of the parties in determining whether disclosure of the mixed personal information would constitute an unjustified invasion of the personal privacy of the appellant's sister under section 49(b).

[90] In my analysis of section 21(2), I have found the following:

- disclosing the mixed personal information in those parts of the records that set out the allegations that the appellant's sister made about the appellant, is relevant to a fair determination of the appellant's rights under section 21(2)(d). This factor weighs in favour of disclosure and should be given considerable weight.

¹⁶ Order MO-2954.

- the section 21(2)(e) factor (pecuniary or other harm), which weighs in favour of privacy protection, does not apply to the mixed personal information in those parts of the records at issue in this appeal.
- the personal information is highly sensitive, as stipulated in section 21(2)(f). This factor weighs in favour of privacy protection and should be given moderate weight.
- the appellant's personal information in those parts of the records which contain her sister's allegations about her are unlikely to be accurate or reliable, as stipulated in section 21(2)(g). This factor weighs in favour of disclosure and should be given considerable weight.
- the appellant's sister supplied her own personal information to the OLG "in confidence," as stipulated in section 21(2)(h). This factor weighs in favour of privacy protection and should be given moderate weight.
- the section 21(2)(i) factor (unfair damage to reputation), which weighs in favour of privacy protection, does not apply to the mixed personal information in those parts of the records at issue in this appeal.
- An unlisted factor in section 21(2) is that the *Act* should not be used in a way that prevents individuals from exercising their legal rights. The OLG's refusal to provide the appellant with access to the mixed personal information at issue (particularly the allegations that her sister made about her) is preventing her from exercising her legal right to enforce Justice Byers' injunction. This unlisted factor, which weighs in favour of disclosure, should be given considerable weight.

[91] I have considered and weighed the factors in section 21(2). Although the factors in section 21(2)(f) and (h) are applicable and weigh in favour privacy protection, I find that they are significantly outweighed by the factors in sections 21(2)(d) and (g) and the unlisted factor cited above, which all weigh in favour of disclosure. In addition, in balancing the access rights of the appellant and the privacy rights of her sister, I find that the existence of Justice Byers' injunction tilts the balance in favour of the appellant's access rights over her sister's privacy rights.

[92] Consequently, after considering and weighing the factors in sections 21(2), and balancing the interests of the parties, I have concluded that disclosing the mixed personal information in the responsive parts of the records (particularly the allegations that the appellant's sister made to the OLG about the appellant), would not constitute an unjustified invasion of the personal privacy of the appellant's sister under section 49(b). Although I accept that the appellant's sister has privacy rights, and that disclosing this information will to some extent be an invasion of her personal privacy, I

am satisfied that it does not constitute an unjustified invasion of her personal privacy. I will, therefore, order the OLG to disclose the responsive parts of the records to the appellant.

[93] Given that I have found that the discretionary exemption in section 49(b) does not apply to the mixed personal information in the responsive parts of the records, it is not necessary to address Issue D (exercise of discretion).

ORDER:

1. I order the OLG to disclose to the appellant those parts of the following records that I have found do not qualify for exemption under section 49(b) of the *Act*:
 - (a) Internal OLG email, dated October 25, 2010; (page 1);
 - (b) Excerpt of fax from appellant's sister to OLG, dated November 23, 2010 (pp. 12-14);
 - (c) Excerpt of fax from appellant's sister to OLG, dated April 2, 2012 (page 15);
 - (d) Excerpt of fax from appellant's sister to OLG, dated May 23, 2012 (pp. 16-18);
 - (e) Excerpt of fax from appellant's sister to OLG, dated June 19, 2012 (pp. 19-21)¹⁷; and
 - (f) Excerpt of fax from appellant's sister to OLG, dated December 19, 2011 (pp. 68-69)
2. I am providing the OLG with a copy of these records with this order. I have highlighted in green those parts of the records that must be disclosed to the appellant. To be clear, the parts of the records that are not highlighted in green must not be disclosed to the appellant.

¹⁷ There is a sentence that I am ordering the OLG to disclose at the top of page 20. However this sentence begins on the previous page, which the OLG did not provide to the IPC because it deemed this page to be non-responsive to the appellant's access request. To ensure that the complete sentence is disclosed, I asked the OLG to provide me with a copy of that previous page. I have included this unnumbered page (it appears between pages 19 and 20) in the package of highlighted records that I am providing to the OLG with this order.

3. I order the OLG to disclose these severed records to the appellant by March 12, 2015 but not before March 6, 2015.

Original Signed By: _____ February 5, 2015
Colin Bhattacharjee
Adjudicator