

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3457

Appeal PA12-550

Ministry of Community and Social Services

January 30, 2015

Summary: The appellant sought access to his complete file with the Family Responsibility Office (FRO). The ministry granted the appellant partial access to the records responsive to his request. The appellant appealed the ministry's decision and narrowed the scope of the request to include only information relating to his former spouse and her communications and correspondence with FRO during a specified period of time. The ministry relied on the discretionary exemption in section 49(b) (invasion of privacy) to withhold the personal information of the appellant's former spouse. The ministry's decision is upheld and the information is found exempt under section 49(b), with reference to the presumption against disclosure in section 21(3)(f) (finances), and the factors in sections 21(2)(f) (highly sensitive) and 21(2)(h) (supplied in confidence).

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

Orders and Investigation Reports Considered: M-1146, P-1014, PO-1750, PO-1833 and PO-3258.

OVERVIEW:

[1] The appellant submitted a request to the Ministry of Community and Social Services (the ministry) under the *Freedom of Information and Protection of Privacy Act*

(the *Act*) for access to his entire case file with the Family Responsibility Office (FRO) from January 1, 2002, to the date of his request.

[2] The ministry located records responsive to the request and issued a decision granting the appellant partial access to them. The ministry relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with sections 14(1)(e) (endanger life or safety) and 20 (danger to safety or health), and the discretionary exemption in section 49(b) (invasion of privacy) to deny access to the undisclosed records. The ministry also claimed that the *Act* did not apply to some responsive records due to the exclusion in section 65(6)3.

[3] The appellant appealed the decision of the ministry to this office.

[4] During mediation, the appellant confirmed that he was only pursuing access to information in the records that contained the dates and content of any communications with FRO initiated by his former spouse (the affected party). As a result, the ministry clarified which records were responsive to the newly narrowed appeal and relied on the discretionary exemption in section 49(b) to withhold the information claimed to be exempt in them.

[5] A mediated resolution of the appeal was not possible and the appeal was moved to the adjudication stage of the appeals process for a written inquiry under the *Act*.

[6] I sought and received representations from the ministry, the affected party and the appellant. Both the affected party and the appellant asked that I keep their representations confidential, and I accepted that these representations satisfied the confidentiality criteria set out in *Practice Direction Number 7* of this office's *Code of Procedure*. Accordingly, I only shared the ministry's representations with the appellant. At the conclusion of my inquiry, the appellant confirmed that for the purposes of this order, he did not object to me directly referring to his confidential representations. Thus, in this order, I will refer to the appellant's confidential representations as necessary for the purposes of my reasons and findings. However, I remain bound by confidentiality concerns and I am accordingly limited in what I am able to state with respect to the affected party's representations. I will therefore provide a summary of the affected party's position and representations to the extent necessary in this order, while preserving their confidentiality.

[7] In this order, I uphold the ministry's decision to withhold the information at issue and dismiss the appeal.

RECORDS:

[8] The records remaining at issue are:

- the withheld portions of the Case Log Report that document the affected party's communications with FRO
- records withheld in part or in full, consisting of correspondence and information submitted by the affected party to FRO during the relevant time period, and miscellaneous internal records that contain the affected party's personal information.

ISSUES:

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

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

C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION

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

[9] 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;

[10] 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.¹ To qualify as personal information, the information must be about the individual in a personal capacity and it must be reasonable to expect that an individual may be identified if the information is disclosed.²

Representations

[11] In its representations, the ministry provides an overview of the work FRO does. It describes FRO as a program that collects spousal and child support payments from support payors and provides the payments to support recipients pursuant to a positive duty under section 5(1) of the *Family Responsibility and Support Arrears Enforcement Act, 1996*, which states:

It is the duty of the Director to enforce support orders where the support order and the related support deduction order, if any, are filed in the Director's office and to pay the amounts collected to the person to whom they are owed.

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[12] The ministry explains that FRO is also a law enforcement program that enforces support provisions contained in court orders and in private written agreements that are filed with the court, and thus, FRO has the legal authority to take a number of different enforcement actions against support payors who do not meet their support obligations.

[13] The ministry adds that FRO is a social justice program that provides the valuable services described above while simultaneously acting as a buffer between support payors and support recipients who often have acrimonious and adversarial relationships. It adds that it is often unaware of the potentially volatile relationships that may exist between support payors and support recipients; therefore, it takes the privacy of support payors and support recipients very seriously and will not disclose any communications between FRO and the support recipient to the support payor, or vice versa.

[14] The ministry submits that the withheld records contain personal information of the affected party, who is the support recipient. The ministry adds that the affected party provided her personal information to FRO for the purposes of enforcing a support order filed with the Director of FRO against the support payor, the appellant. The ministry specifies that the personal information of the affected party includes her address and contact information, her financial information, her date of birth, and her confidential correspondence and communications. The ministry asserts that the information provided by the affected party is highly personal, confidential and sensitive in nature and falls within the ambit of personal information as defined in paragraphs (a), (b), (c), (d) and (f) of the definition of "personal information" in section 2(1) of the *Act*.

[15] In her representations, the affected party states that the withheld records contain her personal information.

[16] In his representations, the appellant submits that the records contain both his and the affected party's personal information. He states that any communications the affected party would have had with FRO would relate entirely to child support payments and corresponding arrangements for them between the affected party and himself. Therefore, he submits that any personal information relating to the affected party would relate to him as well, as he is the support payor, and the affected party's communications to FRO for the purpose of getting it to take action against him would also constitute his personal information.

Analysis and findings

[17] As the records at issue consist of withheld pages and information taken from the appellant's and the affected party's shared FRO file which relates to both of them, it is reasonable to expect that the records, as a whole, contain information that is personal

to both parties. Based on my review of the records at issue, I find that they contain the personal information of the appellant, the affected party and their children.

[18] Specifically, the records contain the appellant's name, address, date of birth, telephone number, marital status, information about his education and employment history and other information about him that along with his name, reveals other personal information about him. This qualifies as personal information as defined in paragraphs (a), (b), (d), (g) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[19] The personal information of the affected party contained in the records includes her name, address, date of birth, telephone number, social insurance number, her confidential correspondence to FRO, her personal views and opinions, and other information about her that along with her name, reveals other personal information about her. This qualifies as personal information as defined in paragraphs (a), (b), (c), (d), (e), (f) and (h) of the definition of "personal information" in section 2(1) of the *Act*.

[20] Finally, some of the records contain the names, dates of birth and other personal information about the affected party's and the appellant's children. This information qualifies as personal information as defined in paragraphs (a) and (h) of the definition in section 2(1).

[21] I find that it is reasonable to expect that the appellant, the affected party and their children would be identified if the withheld information in the records were disclosed.

[22] As all of the records contain the personal information of the appellant in addition to that of the affected party, I will consider the appellant's right to access the records under section 49(b) of the *Act*.

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

[23] Section 49 provides a number of exemptions from individuals' general right of access under section 47(1) of the *Act* to their own personal information held by an institution. 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. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.

[24] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. 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).

[25] In determining whether disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.³ 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 49(b). In this appeal, the ministry claims that the presumptions in sections 21(3)(c), (d) and (f) apply. These sections state:

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

- (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
- (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;

[26] 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.⁴ 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).⁵ The parties have raised the factors in sections 21(2)(d), (e), (f), (h) and (i) as applicable in this appeal. These factors state:

(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;

³ Order MO-2954.

⁴ Order P-239.

⁵ Order P-99.

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

Representations

The ministry's representations

[27] The ministry submits that the discretionary exemption in section 49(b) applies to the information at issue because disclosure of the affected party's personal information to the appellant is presumed to constitute an unjustified invasion of her personal privacy under the presumptions in sections 21(3)(c), (d) and (f). It adds that the factors in sections 21(2)(e), (f), (h) and (i) also apply in this appeal and weigh against disclosure.

[28] The ministry states that in reaching the decision to sever the affected party's personal information, FRO weighed the appellant's right of access against the right of the affected party to the protection of her privacy by considering the unknown nature of the personal relationship between the parties, the exceptions in sections 21(1)(a) through (e), the considerations under section 21(4), the presumptions under sections 21(3)(a) through (h) and the factors under section 21(2) set out below. It submits that none of the exceptions in paragraphs 21(1)(a) through (e), which permit disclosure of personal information, applies in this appeal. It also asserts that none of the exceptions in section 21(4) applies such that disclosure of the information does not constitute an unjustified invasion of personal privacy.

[29] The ministry argues that the presumptions in paragraphs (c), (d) and (f) of section 21(3) apply in this appeal. Specifically, the ministry states that the financial information provided by the affected party may reveal her eligibility for social services or welfare benefits, which shows whether she is in receipt of social assistance. The ministry directs me to page 86 of the records which it claims demonstrates its claim of the presumption in section 21(3)(c). The ministry also asserts that pages 86 and 229 of the records contain information that relates to the affected party's employment or educational history and for this reason, the presumption in section 21(3)(d) applies. Finally, the ministry states that correspondence provided by the affected party to FRO may reveal information about her finances, income, assets, liabilities, net worth, bank balances and financial history or activities, thus engaging the presumption in section 21(3)(f). The ministry adds that pages 76, 197 and 198 contain this type of financial information, as do other records, including the affected party's correspondence.

[30] The ministry takes the position that four factors under section 21(2) that favour privacy protection apply to its decision not to disclose the personal information of the affected party. Regarding the factor in section 21(2)(f), it submits that given the overall sensitivity of the issues FRO handles and because it is not aware of the nature of the parties' relationship, the affected party's personal information should be treated as highly sensitive as its disclosure could reasonably be expected to cause significant personal distress to her and/or the parties' children. For these same reasons, the ministry argues that disclosure of the affected party's personal information may expose her to pecuniary or other harm, thus engaging the factor in section 21(2)(e).

[31] The ministry states that the affected party supplied the withheld information to FRO in confidence for the purposes of enforcing the support order, and therefore, the factor in section 21(2)(h) applies. In addition, it claims the factor in section 21(2)(i) is engaged because disclosure of the withheld information may unfairly damage the reputation of persons referred to in the records. In particular, the disclosure of the content of telephone conversations between the affected party and the enforcement services officers could damage the affected party's reputation. The ministry argues that this damage would be unfair as the information in those conversations is meant to be kept confidential and is conveyed with that understanding in mind.

[32] The ministry also addresses the factor in section 21(2)(d), which if applicable, would favour disclosure. The ministry asserts that section 21(2)(d) does not apply because the affected party's personal information is not relevant to a fair determination of the appellant's rights. The ministry argues that any issues of entitlement to support that may exist between the parties may be resolved without FRO's disclosure of the personal information contained in the file. It states that the appellant has the ability to seek information directly from the affected party in the context of a family law proceeding to which FRO would not be a party. It adds that information relating to the entitlement to support in FRO's possession has already been provided to the appellant, albeit with some irrelevant personal information, such as the affected party's address, severed.

[33] Finally, in respect of the absurd result principle, the ministry states that FRO has made every effort to disclose information in a manner that does not lead to an absurd result or that is inconsistent with the spirit of the *Act*.

The affected party's representations

[34] The affected party takes the position that none of her personal information contained in the records should be disclosed to the appellant. Due to the confidentiality concerns noted above, I am not able to elaborate on her position or to reveal the details of her representations on this issue.

The appellant's representations

[35] In his representations, the appellant sets out various personal and family details, including personal information about the affected party and his relationship with her. Since it is not necessary for me to include all of these details in this order, I will include only what is relevant to his position and arguments. The appellant's position is that the disclosure of the information at issue to him does not constitute an unjustified invasion of the affected party's personal privacy. He submits that the information in the records relates entirely to child support and corresponding arrangements between him and the affected party and the coordination, oversight and enforcement of those arrangements by FRO. He argues that as a result of his marital history with the affected party, and because he is the support payor and the affected party is the support recipient, there would be little or no personal information of the affected party in the records that he would not already be aware of, including her date of birth and contact information.

[36] The appellant submits that he needs the information at issue in this appeal to dispute FRO's enforcement of the affected party's claim that he owes her a significant amount of money in support arrears and interest. In this regard, the appellant relies on the factor in section 21(2)(d) of the *Act*. The appellant states that he and the affected party settled the issue of his support obligations over a decade ago; however, their file with FRO was not officially withdrawn, even though FRO's enforcement of his support obligations was discontinued after the settlement. The appellant continues that despite the fact that he satisfied his obligations to the affected party in accordance with their settlement, the affected party refused to execute the Notice of Withdrawal FRO sent to both of them. Instead, the affected party filed a claim with FRO for support arrears including interest, and FRO in turn accepted, processed and took steps to enforce this claim. The appellant states he has repeatedly written to FRO asking it to discontinue its enforcement of the affected party's claim, however, FRO has refused to exercise its discretion to do so. The appellant submits that he requires a complete unsevered copy of the records at issue so he can know the case that the affected party has made against him which FRO has decided to enforce. He adds that he needs the materials to bring an application in court for a fair determination of his rights with respect to the settlement contract and/or to seek an order removing the enforcement of this matter from FRO's jurisdiction.

[37] The appellant asserts that the factor in section 21(2)(d), which favours disclosure on the basis that the personal information at issue is relevant to a fair determination of the rights of the person who seeks disclosure, is relevant. For the factor in 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.⁶

[38] The appellant's submissions on the four part test that must be established for section 21(2)(d) to apply, are the following:

- (1) The legal right in question is based on statute with respect to his request that FRO exercise its discretion to cease enforcement, or based on the common law of contracts and the common law doctrines of estoppel and acquiescence with respect to the application to court seeking an order for the discontinuance of enforcement by FRO.
- (2) His right is related to a contemplated proceeding that is necessitated by FRO's refusal to exercise its discretion to not pursue enforcement in this matter.
- (3) The personal information he seeks has significant bearing on and is significant to the determination of his legal rights because it will provide evidence to the court of the affected party's conduct and actions following their settlement, and of the existence of a contract between them pursuant to which he took certain steps relating to the support of the children and the payment of university and other costs. Only a complete and unredacted copy of the materials will demonstrate the actions or inactions of the affected party during the relevant period and her subjective intentions as they relate to acquiescence and in turn, to the fair determination of his rights.
- (4) He requires the personal information in order to prepare a further letter to FRO or to prepare court materials for related proceedings with the materials introduced to the court by way of affidavit evidence. The materials are required in order to ensure a fair and complete hearing in court.

⁶ 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.).

[39] The appellant argues that the factors in sections 21(2)(e), (f), (h) and (i) relied on by the ministry do not apply in this appeal. He asserts that the affected party will not be exposed unfairly to pecuniary or other harm or damaged by the release of the materials, and adds that even if she is harmed because FRO or the court determines that enforcement proceedings should be discontinued, such harm would not be “unfair” in the circumstances. He argues that any personal information contained in the records, or any evidence that the affected party did not complain to FRO during the relevant time period, are not “highly sensitive” as they relate to her. Moreover, he submits that the affected party could not have reasonably expected that the records would be treated confidentially with respect to him because any communications between her and FRO would have related only to the payment or enforcement of child support. Because the affected party would expect FRO to act on her communications with it and pursue him for any arrears, the appellant submits that it would have been objectively unreasonable for the affected party to expect that her communications with FRO in respect of enforcement action would be confidential as between FRO and him. Finally, he submits that it is his reputation that has been and will continue to be damaged by the non-disclosure of the records at issue, and for all of these reasons, he submits disclosure would not be an unjustified invasion of the affected party’s personal privacy.

Analysis and findings

[40] Like many support payors and support recipients before him, the appellant has come before this office seeking access to information related to his former spouse held by FRO. The ministry submits that FRO appropriately withheld the personal information of the affected party, including the personal information of the appellant which the affected party provided to FRO in her correspondence, because disclosure of the information would be an unjustified invasion of the affected party’s personal privacy under the *Act*. For the reasons set out below, I uphold the ministry’s decision to withhold the personal information of the affected party at issue, including that which contains the personal information of the appellant, and find that the information is exempt under section 49(b).

[41] Of the three presumptions that the ministry relies on, I find that only one applies to some of the records. The presumption in section 21(3)(f) applies to information that describes an individual’s finances, including income, assets and financial history or activities. I find that section 21(3)(f) applies to some of the personal information found in correspondence and forms submitted by the affected party that detail the amount of support received and the amount and accrual of support arrears owing to her from the appellant. These records include the financial information from the affected party’s general ledger account that appears in pages 43 through 45, and the calculations of support arrears accrued and statement of arrears packages submitted to FRO by the affected party that appear in a number of duplicated pages throughout the withheld records.

[42] Conversely, I find that the presumptions in section 21(3)(c) and (d) do not apply to the records. Page 86 of the records contains a question about social assistance, but I do not agree that this question or the affected party's answer to it relate to her eligibility for social benefits or the determination of benefit levels in a manner that attracts the application of the presumption in section 21(3)(c). Similarly, I disagree with the ministry that pages 86 and 229, which reveal the affected party's name and work contact information, contain information about her employment history such that section 21(3)(d) applies. The application of both of these presumptions requires more than the information found in the pages identified by the ministry.

[43] As I have found that most of the records are not covered by a presumption under section 21(3), the key to my determination is the application of the factors in section 21(2) to the circumstances of this appeal. I will therefore consider the factors that apply in this appeal that favour protection of the affected party's privacy and those that favour disclosure to the appellant.

[44] Beginning with the factors that favour privacy protection, I agree with the ministry that in determining whether disclosure of the affected party's personal information constitutes an unjustified invasion of privacy, the fact that the information is highly sensitive as contemplated by section 21(2)(f) and that it was supplied by the affected party to FRO in confidence as per section 21(2)(h) are relevant. To be considered highly sensitive for the purposes of section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.⁷ For the factor in section 21(2)(h) to apply, both the individual supplying the information and the recipient must have a reasonable expectation that the information would be treated confidentially. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.⁸

[45] The context of this appeal is a dispute between two former spouses over a significant amount of support arrears being enforced by FRO pursuant to information provided by the affected party. I accept that in these circumstances, disclosure of the affected party's personal information to the appellant could reasonably be expected to cause her significant personal distress. The affected party's confidential representations support this contention. Thus, I find that the factor in section 21(2)(f) is relevant in this appeal. I also accept that the affected party, who objects to the disclosure of any of her withheld personal information to the appellant, provided her information to FRO in confidence. Considering FRO's mandate and its role to act as a buffer between parties who are often adversaries, it is objectively reasonable for the affected party to expect confidentiality in her communications with FRO. I find that the factor in section 21(2)(h) is also relevant. However, I also agree with the appellant's contention that the affected party could not reasonably have expected that all of the information she provided to FRO for the pursuit of support arrears from him, would be kept confidential in its

⁷ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

⁸ Order PO-1670.

entirety. Obviously, FRO would have to disclose an adequate amount of information to the appellant in order to advise him of the arrears claim being made against him and the basis for it. Balancing these considerations, while I find that sections 21(2)(f) and (h) apply and weigh in favour of privacy protection in this appeal, I accord them moderate weight.

[46] I disagree with the ministry's assertion that the factors in section 21(2)(e) and (i) are relevant in this appeal. The ministry's general assertions about the sensitivity of the issues between the appellant and the affected party and the unknown state of their relations, do not convince me that the affected party would be subject to pecuniary or other harm such that section 21(2)(e) should apply. 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. As the ministry and the affected party have not provided me with the necessary evidence to establish the relevance of section 21(2)(e), I find it has no application in this appeal. Similarly, I find that the factor in section 21(2)(i) is not relevant in this appeal. The applicability of section 21(2)(i) depends on whether the damage or harm envisioned by it would be "unfair" to the individual involved.⁹ I find the ministry's tentative representations on the application of section 21(2)(i) and its assertion that disclosure of the content of the affected party's telephone conversation with FRO could damage her reputation unfairly, are not sufficient to establish that section 21(2)(i) applies.

[47] Turning to the factors that favour disclosure, the appellant argues that section 21(2)(d) applies, while the ministry refutes this. Section 21(2)(d) requires a consideration of whether disclosure of the affected party's personal information is relevant to a fair determination of the appellant's rights.

[48] I accept the appellant's arguments that he has a legal right to challenge FRO's pursuit of arrears from him in court on the basis that he and the affected party entered into a settlement resolving support issues and obviating the need for support enforcement by FRO. I also accept that the appellant's legal right is related to a proceeding that he has already commenced, as he confirmed during the course of my inquiry that he has in fact brought an application in court. The appellant has therefore established parts 1 and 2 of the test under section 21(2)(d). However, having reviewed his confidential representations describing the legal arguments he proposes to advance in court which form the basis for why he says he requires disclosure, I find the appellant has not established parts 3 and 4 of the test.

[49] Although the appellant asserts that the withheld affected party's personal information in the records is significant to the determination of his FRO enforcement challenge, I am not convinced that it is. The appellant bases his assertion on his

⁹ Order P-256.

assumption that disclosure of the withheld Case Log Report entries and of other details of the affected party's communications with FRO will support his contention that the parties settled their support issues years ago. This assumption is not sufficient to establish part 3 of the test. Even if I were to accept that the affected party's personal information at issue has some bearing on the determination of the appellant's rights in his related legal proceeding, this would not be sufficient to establish the application of section 21(2)(d); the appellant would still have to establish that he requires the affected party's personal information to prepare for his proceeding or ensure an impartial hearing, and I find he has not done so in his representations. I am not persuaded that the appellant requires the affected party's personal information in the records in order to prepare for or to ensure an impartial hearing in his FRO enforcement challenge in court, which presumably turns on whether or not there was a settlement in place between him and the affected party that was adhered to and that obviated the need for support from him and enforcement of any support. I agree with the ministry that the issue of entitlement to support may be resolved without disclosure of the affected party's personal information at issue. I conclude that the appellant is able to seek any necessary information regarding entitlement to support through his existing legal proceeding. My approach in this regard is similar to that set out in previous orders of this office which have established that among the circumstances to be considered in determining the application of section 21(2)(d) is the existence of alternative methods of obtaining the personal information sought.¹⁰ For example, discovery mechanisms available to an appellant who is already engaged in litigation will be sufficient to ensure a fair hearing with the result that section 21(2)(d) does not apply.¹¹ I make the same finding in this appeal.

[50] I also note that FRO has already provided the appellant with information relating to the entitlement to support in its possession. The evidence before me, including the records disclosed to the appellant by FRO and the materials in the appeal file, confirms that the appellant knows the case being made against him by FRO. He is aware that a claim is being made for support payments that he is alleged to not have made and that he is alleged to still owe the affected party. He is also aware of the amount of the support arrears claimed against him and how they were calculated. As such, to the extent that the appellant's representations raise the unlisted factor of inherent fairness, which previous orders of this office have discussed,¹² I find that this unlisted factor is not relevant. In sum, I find that the factor in section 21(2)(d) does not apply in this appeal, and that there are no factors favouring disclosure of the affected party's personal information that are relevant.

[51] The final argument made by the appellant that I must address is his insistence that he is already aware of most of the personal information of the affected party that has been withheld as a result of his marriage to her and the support issues between

¹⁰ Orders M-1146 and PO-3258.

¹¹ Orders PO-1833 and PO-3258.

¹² Orders P-1014 and PO-1750.

them. This argument raises the possible application of the absurd result principle which applies in situations where the individual seeking disclosure of another individual's personal information is already aware of the information such that it would be absurd and inconsistent with the purpose of the exemption to withhold it. If the absurd result principle applies, the personal information at issue may be found not exempt under section 49(b). I accept that some of the information contained in the withheld records is within the appellant's knowledge. For example, he likely knows his former wife's date of birth and address. However, the appellant does not know what the affected party communicated to FRO and what information she sent FRO in her correspondence, or precisely when she did so. Despite his knowledge of some of the withheld personal information, I am satisfied that in this appeal where the affected party objects to any disclosure and the parties have an active dispute to be determined in court, withholding the information would not be absurd or inconsistent with the purpose of the exemption. For this reason, I find that the absurd result principle does not apply.

[52] Having found that the presumption in section 21(3)(f) applies to some of the information in the records, and that the factors favouring privacy protection in section 21(2)(f) and (h) to which I have accorded moderate weight are the only relevant ones in this appeal, I find that disclosure would constitute an unjustified invasion of the affected party's privacy. Balancing the appellant's right to access his own personal information contained in the withheld records against the affected party's right to privacy, I further find that the information at issue is exempt under section 49(b) and I uphold the ministry's decision to withhold it, subject to my consideration of the ministry's exercise of discretion below.

C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[53] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[54] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹³ This office may not, however,

¹³ Order MO-1573.

substitute its own discretion for that of the institution.¹⁴ Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁵

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the historic practice of the institution with respect to similar information.

Representations

[55] The ministry asserts that FRO considered all of the relevant factors, did not act in bad faith or for an improper purpose, and accordingly, appropriately exercised its discretion under section 49(b). The ministry continues that FRO is committed to fulfilling its statutory mandate to enforce support orders and safeguarding the information of support payors and recipients, while being open and transparent. The ministry states that in general, FRO takes the following factors into account in exercising its discretion in access to information requests:

¹⁴ Section 54(2) of the *Act*.

¹⁵ Orders P-344 and MO-1573.

- the purposes of the *Act*, namely the principles that information should be available to the public and the privacy of individuals with respect to personal information should be protected. As such, FRO disclosed information to the appellant that would not interfere with FRO's ability to meet its statutory obligation to enforce support orders or which was the personal information of another individual;
- the principle that the appellant, as a support payor, should have access to his own personal information;
- the exemptions from the right of access should be limited and specific to those records which would interfere with FRO's ability to meet its statutory obligation to enforce support orders or which is the personal information of another individual;
- the unknown nature of the parties' personal relationship;
- the implications of disclosure of enforcement methods on FRO's ability to enforce support orders including the decrease in the public's confidence in FRO's operation; and
- the highly sensitive nature of the personal information in FRO files.

[56] The ministry adds that FRO has reviewed the records and determined that it has disclosed as much as it possibly can under the *Act*. The ministry concludes by stating that given the factors it outlines above, its exercise of discretion in denying access to the records under section 49(b) should be upheld.

[57] The appellant does not address this issue directly, but his representations criticize the ministry's exercise of discretion. The appellant argues that the ministry's representations demonstrate that it did not consider the specific facts in this appeal including his need for the information and his knowledge of much of the affected party's personal information. He argues that instead, the ministry acted in a "standard" manner as it must do for all appeals and provided "boilerplate" representations. He adds that the ministry did not consider his right to access the information in his file, which although it may contain the affected party's personal information, relates to him in its entirety as it is he who is being pursued for arrears. Finally, the appellant asserts that in the circumstances, the ministry should not have considered the affected party's personal information to be highly sensitive.

Analysis and findings

[58] I am satisfied that the ministry exercised its discretion under section 49(b) in denying the appellant access to the withheld personal information of the affected party

in the records, including that which contains his own personal information. I accept that the ministry considered relevant factors including the appellant's right to access his own personal information, the affected party's right to have the privacy of her personal information protected, the relationship between the parties, the sensitivity of the information at issue and the wording of the exemptions applicable in this appeal. I have upheld the ministry's decision to withhold the information at issue and I am satisfied that the ministry disclosed as much of the appellant's personal information as it could under the *Act*, without comprising the privacy of the affected party, after balancing the competing rights of the parties in this appeal. Accordingly, I find that the ministry exercised its discretionary appropriately and I uphold its exercise of discretion.

ORDER:

I uphold the ministry's decision to withhold the personal information of the affected party and dismiss this appeal.

Original Signed By: _____
Stella Ball
Adjudicator

_____ January 30, 2015