

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3813

Appeal PA15-585

Trillium Health Partners

February 9, 2018

Summary: The Trillium Health Partners (THP) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to the identity of an individual that made a request for commercial information in another file. THP denied access, citing the mandatory personal privacy exemption in section 21(1).

This order finds that the name, address, and telephone number of the original requester is personal information and is exempt under section 21(1).

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(1), 21(2)(d), and 21(2)(h).

Orders Considered: Orders PO-2764, PO-3241, PO-3573 and PO-3696.

BACKGROUND:

[1] The Trillium Health Partners (THP) received a request under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to the identity of a third party that made a request in another file, as well as a copy of the request itself.

[2] After notifying the third party who made the original request (the original requester) pursuant to section 28 of the *Act* and seeking representations on disclosure, THP issued a decision granting access in part to the request form and citing the

mandatory personal privacy exemption in section 21(1) of the *Act* to withhold the first and last name, address, telephone number, signature and credit card information.

[3] The requester (now the appellant) appealed THP's decision.

[4] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. I sought the representations of all of the parties. I received representations from THP and the appellant. The original requester was provided with a copy of THP and the appellant's representations, but did not provide representations in response. The original requester, however, still maintained their objection to disclosure of their first and last name, address, and telephone number.

[5] In this order, I find that the name, address, and telephone number of the original requester is personal information and is exempt by reason of section 21(1).

RECORD:

[6] At issue is the first and last name, address, and telephone number of the original requester withheld from a completed two-page request form.

ISSUES:

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

DISCUSSION:

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

[7] 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;

[8] 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

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

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

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

¹ Order 11.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[10] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²

[11] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.³

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁴

[13] The appellant submits that both the original requester and THP have not discharged their onus to demonstrate that section 21(1) applies to the requested information because they have not provided any convincing evidence to explain why sections 2(3) and 2(4) of the *Act* do not apply to the requested information.

[14] THP states that the record at issue contains personal information regarding the original requester who submitted a Freedom of Information ("FOI") request to it. It states:

Since the original requester informed THP that the original request was made in a personal capacity and not in a professional or business capacity, the name of the original requester comprises personal information as defined under *FIPPA*. It is reasonable to expect that the original requester will be identified if the record requested by the present requester, the appellant, is disclosed.

[15] THP states that the information in front of THP does not signal that the request was made in a business or professional capacity. It states that for contact information on the request form, the original requester provided a mailing address which was limited to a street address, and a direct telephone number without any phone extension. As well, it states that the request was paid from what appears to be a personal credit card. Furthermore, as previously submitted, THP reiterates that it later asked the original requester for clarity, at which point the original requester stated that

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

³ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁴ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

the request was made in a personal capacity.

[16] In reply, the appellant states that the facts are inadequate support for THP's conclusion that the requested information is personal information. It states that individuals acting in a "business, professional, or official capacity" could easily list their professional street addresses on their access requests without providing a company name and may have a direct professional line without an extension. It also states it is common practice for professionals to pay for business expenses with a personal credit card and seek reimbursement thereafter.

[17] The appellant states that THP's claim that it was told by the original requester that the access request was made in a personal capacity should be given minimal weight as it is a bald, unsupported assertion.

[18] The appellant relies on Orders PO-2764, PO-3241, PO-3573 and PO-3696, where the IPC rejected a requester's claim in those orders that their access request was made in a personal capacity, largely because such claims were unsubstantiated.

[19] The appellant submits that THP appears to have ignored highly compelling substantive evidence: the nature of the access request and the context in which it occurred. It states that the request was for materials evaluating an entirely private commercial entity operating in a fiercely competitive industry where foreknowledge of performance quality translates into a significant competitive edge.

[20] The appellant submits that THP has erred in law by assuming that the requested information is presumptively personal information unless there is evidence to indicate otherwise and that this presumption effectively abdicates THP from its burden of proof.

Analysis/Findings

[21] The appellant relies on Orders PO-2764, PO-3241, PO-3573 and PO-3696.

[22] In Order PO-2764, Commissioner Brian Beamish considered a request for a copy of a specific access request submitted by an individual other than the appellant. He applied the test enunciated by former Assistant Commissioner Mitchinson in Order PO-2225 and found that the original requester's name and contact information should be disclosed.

[23] In coming to his decision in Order PO-2764, Commissioner Beamish assigned significant weight to the fact that the individual who submitted the initial access request used his business contact details on the request form and concluded that there was nothing about that individual's name, in the context of the appeal, that would reveal something of a personal nature about the individual if it were disclosed.

[24] In Order PO-3241, the original requester's requests were for information from the Ministry of Government Services' Ontario Business Information System database.

The original requester in that appeal acknowledged in his representations that he is “a professional searcher of public records who accesses information from public databases, often for litigation purposes” and that he “accesses the public record to obtain the information for others to begin their investigations”. The adjudicator concluded from the original requester’s own evidence that the requests were made to the institution for a professional and business purpose, as opposed to a personal one.

[25] In Order PO-3573, the ministry provided information that the individual who filed the access request for the appellant’s winning proposal was one of the other bidders in a Request for Proposals (RFP) competition. In that order, the adjudicator found that there was ample evidence that the original requester filed his access request in a business capacity and not in a personal capacity, even though the original requester may have put his residential address on the “Access/Correction Request” form.

[26] In Order PO-3696, Adjudicator Stella Ball stated that the first step in determining whether a requester’s name in an access request constitutes personal information is to consider the context in which the name appears. This order, as was the case in Order PO-2764, involved a request for disclosure of a requester’s name to an affected party that knew of both the existence and nature of the filed access request. Adjudicator Ball determined that:

The evidence before me is that the appellant [the original requester] has worked for many years in the energy industry and has submitted similar previous requests on behalf of a former employer. Although no longer employed by this former employer at the time of the access request, the appellant acted as an advocate for another company’s FIT⁵ application on the day it filed the access request. The appellant has also had their own company in the energy industry, which they have operated for a number of years, and they continue to operate their company’s website. When the appellant submitted their access request, they did so by personal email listing their home address, and they advised the FOI Coordinator that they were filing their access request “as an individual”. After being notified of the affected party’s request to access their name, the appellant sent the FOI⁶ Coordinator a letter objecting to disclosure of their name and insisting that they made the access request as an “individual and not for any company or other group”.

In the face of this evidence, the appellant asserts that they submitted their access request as an individual for personal social justice reasons, as a concerned ratepayer and watchdog. They point to their use of their personal email address, their statement in the access request that they

⁵ Feed-in tariff.

⁶ Freedom of Information.

submit the request as an individual, and their objection letter to the FOI Coordinator as facts that establish the personal context of the access request. They provide no further information or evidence to support their assertions.

I accept the appellant's assertion that they filed their access request as an individual, clearly not connected to their former employer. However, for the reasons set out below, I do not accept that the appellant did so in a personal capacity for personal reasons.

The evidence before me leads me to conclude that the appellant filed their access request as an individual acting for their own business interests as a professional who, at the time of the request, carried on business at their residence. While I agree with the appellant that their operation of their company does not amount to proof that they submitted their access request on behalf of the company, this fact, in combination with the other circumstances, supports that conclusion. The information that is the subject of the access request is detailed and extensive contractual information on a particular segment of the provincial energy industry that is closely connected to the appellant professionally and to the appellant's company.

[27] In the orders cited by the appellant, the evidence demonstrated that the request was being made in a professional capacity, as follows:

- In Order PO-2764, the original requester had used their business contact details on the request form;
- In Order PO-3573, the original requester was identified by the ministry as an unsuccessful bidder in an RFP process;
- In Order PO-3241, the original requester in their representations acknowledged their professional status and that they were obtaining access to the records for business reasons; and,
- In Order PO-3696, the request was part of a pattern of the original requester obtaining access to detailed and extensive business information for business reasons.

[28] I have considered the wording of the request in this appeal, which reads:

1. In electronic format, dashboard metrics used by Trillium Health Partners in order to monitor the quality of [the corporate appellant] from May 2014 to September 10, 2015.

2. A list of Trillium staff member names and job titles who correspond with [the named company] on a regular basis in relation to [the corporate appellant's] operational performance.

[29] Despite the request seeking commercial information, in the circumstances of this appeal, I find on balance that the request was not made in a business, professional or official capacity.

[30] I find that the facts in this appeal are not sufficiently similar to those in the four orders relied upon by the appellant, as noted above. In particular, in this appeal:

- the original requester did not use their business contact details on the request form;
- nor has the original requester acknowledged their professional status and that they were obtaining access to the records for business reasons;
- nor has the original requester been identified by the ministry as a bidder seeking to do business with the institution;
- nor is the request part of a pattern of the original requester obtaining access to detailed and extensive business information for business reasons.

[31] Instead, the request form reveals an individual requesting the information using their name only, with what appears to be a residential address and phone number and the institution advising that the original requester informed THP that the original request was made in a personal capacity and not in a professional or business capacity.

[32] I have also considered whether sections 2(3) or 2(4) apply to the information at issue in this appeal. However, I find that these sections do not apply as I do not have sufficient evidence to determine that the name, and contact information of the original requester identifies them in a business, professional or official capacity.

[33] Therefore, I find that the original requester's name, address and phone number is personal information within the meaning of that term in section 2(1) of *FIPPA*.

[34] I will now consider whether the mandatory personal privacy exemption in section 21(1) applies to the original requester's name, address and phone number.

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

[35] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[36] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[37] If the information fits within any of paragraphs (a) to (e) of section 21(1) or if it fits within paragraphs (a) to (d) of section 21(4), it is not exempt from disclosure under section 21. The information at issue does not fit within these paragraphs.

[38] Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[39] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[40] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.⁷ THP has not raised the application of any of the presumptions in section 21(3) and I find that none apply.

[41] If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁸ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.⁹

[42] 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).¹⁰

[43] In previous orders, relevant considerations that have found to apply include:

- inherent fairness issues;¹¹
- ensuring public confidence in an institution;¹²

⁷ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁸ Order P-239.

⁹ Orders PO-2267 and PO-2733.

¹⁰ Order P-99.

¹¹ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

- personal information about a deceased person;¹³ and
- benefit to unknown heirs.¹⁴

[44] THP relies on the factors in sections 21(2)(d) and (h), which read:

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;

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

[45] THP states that the factor in section 21(2)(d) applies as the personal information is relevant to a fair determination of rights of the original requester as they are empowered to consent to the release by THP of the record requested under the original request and may challenge the original request based on the identity of the original requester.

[46] THP states that section 21(2)(h) also applies because the personal information was supplied in confidence by the individual to whom the information relates. It refers to refers to IPC *Practices No. 16*, which reads in part:

Anyone, including employees of an institution, is entitled to exercise his or her right to access information under the Acts or make a privacy complaint, without being unnecessarily identified and without fear of negative repercussions.

[47] As a result, THP submits that a requester has a reasonable expectation that his/her identity will be protected when making an FOI request. It states that the rationale may be grounded in a concern to ensure that individuals are not inhibited from making a request, and to recognize that particular requests may reveal something of a personal nature about the requester.

[48] Further, THP states that, as set out in Order P-370, under section 21(2), a head shall consider all relevant circumstances, not only those enumerated, when considering whether to disclose personal information. It submits that although the type of information requested did not conform to any of the types of information listed in section 21(3), the Inquiry Officer in that case weighed the original requester's interest

¹² Orders M-129, P-237, P-1014 and PO-2657.

¹³ Orders M-50, PO-1717, PO-1923, PO-1936 and PO-2012-R.

¹⁴ Orders P-1493, PO-1717 and PO-2012-R.

in remaining anonymous against the requester's interest in knowing the original requester's identity and upheld the institution's decision to withhold the information.

[49] The appellant submits that THP has not met the burden of proof under section 53 of the *Act* that the section 21(1) exemption applies.

[50] In particular, the appellant submits that section 21(2)(d) of the *Act* favours disclosure of the requested information, as disclosure is relevant to the fair determination of the appellant's rights in appeal file PA16-58 and any following reply submissions or appeals brought by it in respect of that appeal.

Analysis/Findings

[51] 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 ¹⁵

[52] THP argues that 21(2)(d) applies in favour of the original requester in order for this individual to submit an access request. However, the original requester is not seeking personal information in this appeal, only the appellant is seeking personal information, namely the name and contact information of the original requester. Therefore, part 3 of the test set out above is not met and the factor in section 21(2)(d) does not apply.

[53] The appellant relies on the factor in section 21(2)(d), arguing that disclosure is relevant to the appellant's rights in appeal file PA16-58. However, the appeal in PA16-58 has been concluded in the appellant's favour, therefore, part 4 of the test set out above has not been met as the information is not required by the appellant for a proceeding or hearing.

¹⁵ 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.).

[54] Accordingly, I find that the factor in section 21(2)(d) does not apply in this appeal.

[55] THP relies on the factor in section 21(2)(h). 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.¹⁶

[56] I agree with the appellant's characterization of the request as being a request for materials evaluating an entirely private commercial entity operating in a competitive industry.

[57] I acknowledge that IPC *Practices No. 16* raised by THP provides that requesters can make requests without being unnecessarily identified. I also acknowledge that THP, as the recipient of the information at issue in this appeal, had an expectation that the information would be treated confidentially.

[58] I have considered the detailed commercial information requested by the original requester, as set out above, and also that the original requester did not provide representations. Nevertheless, I find that the original requester, as supplier of the information at issue in this appeal, in the circumstances of this appeal, objectively had a reasonable expectation that their information would be treated confidentially. Therefore, I find that the factor in section 21(2)(h) applies and weighs in favour of privacy protection.

[59] As noted above, as no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹⁷ In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring disclosure in section 21(2) must be present. In the absence of such a finding, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.¹⁸

[60] In this appeal, I have not found that any factors and/or circumstances favouring disclosure in section 21(2) are present, therefore, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.

[61] Accordingly, I uphold THP's decision that the information at issue in this appeal, being the name and contact information of the original requester, is exempt under section 21(1).

¹⁶ Order PO-1670.

¹⁷ Order P-239.

¹⁸ Orders PO-2267 and PO-2733.

ORDER:

I uphold THP's decision and dismiss the appeal.

Original Signed by: _____

Diane Smith
Adjudicator

February 9, 2018 _____