

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3822

Appeal PA16-296

Ministry of Government and Consumer Services

February 28, 2018

Summary: The appellant, a divorced father of a ten year old child, made an access request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information on recent applications that had been made to the ministry for a birth certificate for his child. The ministry confirmed that two applications for the child's birth certificate had been made and that the ministry had denied both applications. The ministry, however, refused to disclose the identity of the individual(s) who had made the applications or the dates of the applications, citing the discretionary personal privacy exemption at section 49(b) of the *Act*. On appeal, the adjudicator finds that disclosure of the name(s) of the individual(s) and the dates of the applications would not be an unjustified invasion of their personal privacy and that as a result, section 49(b) does not apply. She orders the ministry to disclose this information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 49(b) and 66(c).

BACKGROUND:

[1] The appellant submitted a request to the Ministry of Government and Consumer Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

I would like to request information on applications that have been submitted for a birth certificate for my daughter, [named individual], born

in Toronto on [date] 2007. I am interested in the period of time between 1 August 2015 and 22 April 2016. It would be extremely useful to provide the name(s) of the applicant(s) and date(s) of their applications.

According to the active court orders of the UK and Switzerland, [named child] lives with me in Switzerland, and I have sole custody over her... I am also the only parent who should hold [named individual]'s birth certificate and her passport. I have already provided copies of the active court orders to Service Ontario.

[2] The ministry identified records responsive to the request and issued a decision denying access to them pursuant to the mandatory personal privacy exemption at section 21(1) of the *Act*. The ministry did confirm that two applications for a birth certificate were made for the appellant's daughter during the time period in question, and that no birth certificates were issued in respect of either application.¹

[3] The appellant appealed the ministry's access decision to this office. During mediation, the ministry clarified that it was relying on the discretionary personal privacy exemption at section 49(b) of the *Act* to deny access to the withheld parts of the records at issue.² The ministry also stated its position that without consent, disclosure of the withheld information would constitute an unjustified invasion of the personal privacy of another individual or individuals.

[4] The appellant maintained that he has a right to the withheld information and confirmed that he is only interested in obtaining the name(s) of the person(s) who made an application for his daughter's birth certificate and the dates of the applications. As the appellant stated that he is not interested in obtaining any additional information in the records, that information is no longer at issue.

[5] No further mediation was possible and, accordingly, the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. The appellant consented to his identity being made known to an affected party, and I began my inquiry by seeking representations from the ministry and the affected party. The ministry provided representations, while the affected party did not. I then invited and received representations from the appellant, followed by reply representations from the ministry. The parties' representations were shared with one another in accordance with *Practice Direction 7* and section 7 of the *Code of Procedure*.

¹ The ministry refers to "requests" for a birth certificate, while the appellant refers to "applications" for a birth certificate. To avoid confusion between a "request" for a birth certificate and the appellant's access "request" under the *Act*, I will use the terms "application" and "apply" with reference to applications for a birth certificate.

² Where a record contains the requester's personal information along with the personal information of others, the appropriate exemption to consider is the discretionary personal privacy exemption at section 49(b), and not the mandatory exemption at section 21(1).

[6] In this order, I find that section 49(b) does not apply to the name(s) of the individual(s) who applied for the birth certificate or the dates of the applications. I order the ministry to disclose this information to the appellant.

RECORDS:

[7] The records at issue are two applications for a birth certificate for the appellant's daughter, and related documentation. Only the name(s) of the applicant(s) and the dates when the applications were made are at issue.

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

DISCUSSION:

Additional background:

[8] Some additional background is helpful to place the issues in context.

[9] The appellant, the father of a child of about ten years of age, is divorced from the child's mother. The child was born in Ontario and now lives with her father in Switzerland. The mother also lives in another country. According to a court order, the father holds the child's passport and birth certificate.

[10] The father suspects that the person who applied to the ministry for his child's birth certificate is his ex-wife and that the intent was to use the birth certificate to obtain a passport for the child in order to remove the child from Switzerland, against court orders. He submits that he requires the information to provide to the Swiss court and child protection authorities.

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

[11] 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;

[12] 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.³

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

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

³ 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.

[14] The ministry submits that the name(s) of the individual(s) who applied for the birth certificate, and the timing of the applications, is personal information of the individual(s). It also submits that the fact that an application was made for the child's birth certificate is the child's personal information. The appellant's representations do not specifically address the issue of whether the records contain personal information.

[15] Having reviewed the records, I find that they contain the personal information of the appellant, his child and the individuals(s) who applied for the child's birth certificate. The records contain the appellant's name, address, and his family status as father of the child, all of which is his personal information pursuant to paragraphs (a) and (d) of the definition. The records contain the child's name combined with the fact that an application has been made for her birth certificate. This is the child's personal information according to paragraph (h) in conjunction with the introductory wording of the definition; that is, the fact that an application has been made for a birth certificate is information "about" the child in her personal capacity. Finally, the records contain the personal information of the individual(s) making the applications for the birth certificate. Their names, combined with the fact that the individual(s) made the applications, and when, is their personal information according to paragraph (h) of the definition in conjunction with the introductory wording of the definition.

[16] In summary, I find that the records contain the personal information of the appellant, his child, and the individual(s) who made the birth certificate applications.

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

[17] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[18] I have found above that the records contain the personal information of the appellant. Since the records also contain the personal information of his child, section 66(c) of the *Act* is relevant. That section provides as follows:

Any right or power conferred on an individual by this Act may be exercised,

if the individual is less than sixteen years of age, by a person who has lawful custody of the individual;

[19] If a requester meets the requirements of this section, then he or she is entitled

to have the same access to the personal information of the individual under sixteen years of age as the individual would have. The request for access to the personal information of the individual will be treated as though the request came from the individual him or herself.⁴ In this instance, the requester has lawful custody of the child who is less than sixteen years of age. Therefore, he has the same right to the child's personal information as she herself would have. The ministry acknowledges this in its representations.

[20] 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. I must determine, therefore, whether disclosure of the name(s) of the individual(s) who applied for the child's birth certificate, and the dates of those applications, would be an unjustified invasion of their personal privacy.

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

Section 21(1)(d) – disclosure expressly authorized by another Act

[22] 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). Of particular relevance here is section 21(1)(d) which provides as follows:

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

(d) under an Act of Ontario or Canada that expressly authorizes the disclosure;

[23] In order for section 21(1)(d) to apply, there must either be specific authorization in the statute for the disclosure of the type of personal information at issue, or there must be a general reference to the possibility of such disclosure in the statute together with a specific reference to the type of personal information to be disclosed in a regulation.⁵

[24] Section 20(5) of Ontario's *Children's Law Reform Act* states as follows:

⁴ Order MO-1535.

⁵ Orders M-292, MO-2030, PO-2641 and MO-2344.

The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

[25] Section 16(5) of Canada's *Divorce Act* contains similar wording about access to a child's information:

Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.

Representations

[26] The ministry acknowledges that according to two court orders, the appellant has lawful custody of the child and therefore is entitled to access information as to the health, education and welfare of the child. The ministry submits, however, that the information at issue in this appeal – the name(s) of the individual(s) applying for the child's birth certificate, and the dates of the applications – does not relate to the health, education or welfare of a child. The ministry relies on Orders PO-2407 and MO-3026 and submits that based on the analysis in those orders, the name(s) of the individuals applying for the birth certificates, and the dates of the applications, relate to those individual(s) and not to the health, education or welfare of the child. The ministry also submits that the interests addressed in section 20(5) of the *Children's Law Reform Act* and section 16(5) of the *Divorce Act* were addressed when it disclosed the number of applications made and the fact that no birth certificates were issued in response to those applications.

[27] The appellant submits that preventing an abduction of his daughter relates directly to her safety, health and well-being.

Analysis and findings

[28] As noted above, the appellant's child was born in Ontario. The ministry responsible for Ontario birth certificates is a ministry of the Government of Ontario and the appellant's access request was appropriately made under Ontario's *Freedom of Information and Protection of Privacy Act*. However, the appellant, his ex-wife and their child now all live outside of Canada, and the court orders referred to above are from courts outside of Canada. Neither party made representations specifically on the applicability of the above provisions of the *Children's Law Reform Act* and the *Divorce Act* in these circumstances. Because of my other findings, below, it is not necessary for me to determine whether these provisions apply. It is therefore not necessary for me to directly address the ministry's argument that the information at issue does not relate to the child's health, education or welfare within the meaning of section 20(5) of the *Children's Law Reform Act* or section 16(5) of the *Divorce Act*.

Sections 21(2) and (3)

[29] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office considers, and weighs, the factors and presumptions in sections 21(2) and (3) and balances the interests of the parties.⁶

[30] 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). I agree with the ministry's submission that none of these paragraphs apply.

[31] Section 21(2) lists various other factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.⁷ Section 21(2) reads as follows:

(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,

- (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

⁶ Order MO-2954.

⁷ Order P-239.

- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[32] The factors listed at paragraphs (a) through (d), if present, weigh in favour of disclosure, while those listed at paragraphs (e) through (i), if present, weigh in favour of non-disclosure.

[33] 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).⁸ In previous orders, inherent fairness issues have been found to be relevant in determining whether disclosure of information would be an unjustified invasion of personal privacy.⁹

Ministry's representations

[34] The ministry submits that none of the factors favouring disclosure apply. It submits that the information is highly sensitive within the meaning of paragraph (f), which weighs in favour of non-disclosure. The ministry elaborates in confidential representations that were not shared with the appellant because they would reveal the information at issue.

[35] The ministry also submits that it has a long-standing practice of not disclosing the names of applicants, and that the factor at paragraph (h) (supplied in confidence) applies. The ministry refers to section 53(1) of the *Vital Statistics Act*, which states as follows:

No division registrar, sub-registrar, funeral director, person employed in the service of Her Majesty, person providing services on behalf of the Registrar General or the Deputy Registrar General, or prescribed person, shall,

(a) communicate or allow to be communicated to any person not entitled thereto, any information obtained under this Act, the *Change of Name Act* or the *Marriage Act*; or

(b) allow any person not entitled to do so to inspect or have access to any records containing information obtained under this Act, the *Change of Name Act* or the *Marriage Act*.

[36] The ministry submits that the presence of the above-noted factors supports a conclusion that disclosure of the information at issue to the appellant would be an unjustified invasion of personal privacy.

⁸ Order P-99.

⁹ Orders M-82, PO-1731, PO-1750, PO-1767 and P-1014.

Appellant's representations

[37] The appellant submits that he requires the information at issue to provide to the Swiss court and police, as he believes his ex-wife is planning to abduct their child. The appellant provided copies of court orders stipulating that he is the only parent who should hold the child's passport and birth certificate.

Ministry's reply representations

[38] The ministry submits that the appellant has not provided any documentation to substantiate that the court or the police have requested the information at issue. The ministry submits that it has addressed any safety considerations by informing the appellant that the ministry did not issue any birth certificates in response to either of the applications received during the specified time period.

[39] The ministry also addressed the potential application of the factor at paragraph 21(2)(d) (fair determination of rights). The ministry submits that the appellant has not established that his custodial rights or the right to travel with the child will be at issue in an existing or contemplated proceeding. The ministry also submits that it is not clear how the information at issue relates to any such proceedings, given that the ministry did not issue any documents in respect of the applications, and that if the information is indeed required for a court proceeding, the court could compel its production. Finally, the ministry submits that if the appellant is concerned about a potential kidnapping, paragraph 42(1)(g) of the *Act* permits the ministry to disclose personal information to a law enforcement agency, but that this section is not relevant when determining whether personal information can be disclosed directly to the appellant.

Analysis and findings

Factors weighing in favour of non-disclosure

[40] As noted above, the ministry argues that the information at issue is highly sensitive. Previous orders of this office have found that to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁰ The affected party did not file representations, and I have no other direct evidence from the individual(s) in question. I am prepared to accept, however, that the individual(s) who applied for the child's birth certificate will experience significant personal distress if their information is disclosed. In the circumstances, however, I do not place significant weight on this factor. According to the court orders provided to me, the appellant is the only person entitled to hold the child's birth certificate. The other individual(s) who applied for the child's birth certificate were not entitled to receive it, as evidenced by the ministry's refusal of both applications. In the circumstances, I do not place significant weight on any distress the

¹⁰ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

individual(s) may experience should their identities and the dates of their applications be disclosed to the appellant.

[41] The ministry also submits that the applications for the birth certificate were made in confidence. This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and if that expectation is reasonable in the circumstances. Section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹¹

[42] I have reviewed the records at issue and note that there is no statement on the applications that they will be kept confidential. I also find that section 53(1) of the *Vital Statistics Act* does not create a reasonable expectation that an application would be kept confidential vis-à-vis the child's custodial father. The language of section 53(1) is qualified in that it precludes communication of information to individuals who are "not entitled" to it. In my view, this language is not sufficient to create a reasonable expectation on the part of the individual(s) applying for a birth certificate that their identities would be kept from the child's father. I conclude that the factor at section 21(2)(h) does not apply.¹²

Factors weighing in favour of disclosure

Unlisted factor: fairness considerations

[43] The appellant has custody of his child and has been involved in contentious litigation with his ex-wife over child custody and access issues. By court order, the appellant alone is to hold the child's birth certificate. The fact that the holder of the birth certificate is specifically stipulated in a court order underlines the birth certificate's significance as a fundamental legal document. As a matter of fairness, in my view, the appellant is entitled to know who attempted to obtain a birth certificate for his child and when. This is the case whether the applications were submitted by the appellant's ex-wife, as he suspects, or by others. Regardless of who made the applications, their identity is a piece of information that could be highly relevant in any ongoing custody and access issues between the husband and his ex-wife, or outside of those proceedings, to protect his daughter from individual(s) attempting to obtain her identification documents for identify theft or other illegal purposes.

[44] However, the precise use to which the appellant may put this information is not, in my view, critical. In my view, as a matter of basic fairness to both him as custodial parent, and to his child, he is entitled to be made aware of who has attempted to obtain a birth certificate for his child, and when. As noted above, I do not need to decide whether this information relates to the child's "welfare" within the meaning of the *Children's Law Reform Act* or the *Divorce Act*. In my view, however, given the

¹¹ Order PO-1670.

¹² Pursuant to section 67(1) of the *Freedom of Information and Protection of Privacy Act*, the *Act* prevails over section 53(1) of the *Vital Statistics Act*.

nature of a birth certificate as a fundamental piece of legal identification, it is a matter relating broadly to the child's welfare.

[45] I have also reviewed the parties' representations on whether the factor at section 21(2)(d) (fair determination of rights) applies. 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.¹³

[46] Since the appellant's arguments on this factor revolve around his assumption that it was his ex-wife who applied for the birth certificate, it is difficult to discuss this factor in this order without confirming or denying the appellant's assumption. However, because of the way I balance the above-mentioned factors for and against disclosure, below, it is not necessary for me to make a determination about whether the factor at section 21(2)(d) applies.

Balancing of factors for and against disclosure

[47] I have found above that the information at issue is highly sensitive, which weighs against disclosure of the information, but that this factor does not attract significant weight. On the other hand, in my view the factor favouring disclosure, fairness to the appellant and his daughter, is deserving of significant weight. Balancing these two factors and taking into account the interests of the parties, I find that the equities in this case strongly favour disclosure of the information at issue to the appellant. As a result, I find that disclosure of the information at issue would not be an unjustified invasion of the personal privacy of the individual(s) who made the applications for the birth certificates. Therefore, the exemption at section 49(b) does not apply to the information.

¹³ 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.).

ORDER:

1. I find that section 49(b) does not apply to the information at issue, and I order the ministry to disclose it to the appellant by **April 5, 2018** but not before **March 28, 2018**. With the ministry's copy of this order is a copy of the records at issue with the information to be disclosed highlighted in yellow.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant.

Original Signed by: _____
Gillian Shaw
Adjudicator

February 28, 2018 _____