

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3827

Appeal PA17-181

Ministry of Labour

March 15, 2018

Summary: The ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the transcript of an anonymous call, including all allegations made against the requester relating to the appellant and his business. The ministry granted partial access to responsive record, with severances pursuant to the discretionary personal privacy exemption at section 49(b). The adjudicator finds that the record contains the personal information of the appellant and other identifiable individuals. The adjudicator upholds the ministry's decision to withhold personal information of identifiable individuals pursuant to section 49(b) applied with reference to the factors and considerations in sections 21(2)(f) and (i).

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)(f), 21(2)(g), 21(2)(i), and 49(b).

Orders and Investigation Reports Considered: Order P-496, PO-1984, and PO-2518.

OVERVIEW:

[1] The Ministry of Labour (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the transcript of an anonymous call and any information about allegations made against the requester and his business.

[2] The ministry located records responsive to the request and issued a decision

granting partial access. The ministry denied access to a two-page fax pursuant to section 14(1)(d) of the *Act* on the basis that the information was received from a confidential source.

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

[4] During mediation, on further review of the record, the ministry noted that it contained the appellant's personal information. As a result, the ministry issued a revised decision in which it claimed the application of section 49(a) (discretion to refuse a requester's own information), read in conjunction with section 14(1)(d) (law enforcement), as well as the discretionary personal privacy exemption at section 49(b).

[5] The appeal could not be resolved at mediation. The file was transferred to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. The adjudicator began the inquiry by inviting the ministry's representations in response to the Notice of Inquiry.

[6] Before providing representations, the ministry issued another revised decision indicating that it was no longer withholding the fax pursuant to section 49(a) in conjunction with section 14(1)(d). The ministry partially disclosed the record to the appellant with three paragraphs redacted pursuant to section 49(b). Given that sections 14(1)(d) and 49(a) were no longer at issue, the ministry provided written representations addressing the application of section 49(b) alone.

[7] The adjudicator then invited the appellant to provide representations in response to the Notice of Inquiry and the non-confidential portions of the ministry's representations, which were shared in accordance with *Practice Direction Number 7* of the IPC's *Code of Procedure*. The appellant did not provide representations.

[8] The appeal file was then transferred to me to complete the inquiry. I find that the personal information of other individuals contained in the two-page record at issue is exempt from disclosure pursuant to section 49(b). For the reasons that follow, I uphold the ministry's decision and dismiss the appeal.

RECORD:

[9] The record at issue is a two-page fax that the ministry received in a general intake mailbox. The name of the sender of the fax is not contained in the record; however, the appellant and two other individuals are named in the body of the record.

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

DISCUSSION:

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

[10] 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;

[11] 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

[12] 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

Representations

[13] The ministry submits that the information that remains at issue in this appeal is the personal information of two identifiable individuals other than the appellant (Individuals A and B) as the information reveals something of a personal nature about those individuals. Specifically, the ministry maintains that the redacted paragraphs contain the names of those individuals and allegations of quasi-criminal/regulatory wrongdoing. Neither individual is the complainant.

[14] The ministry submits that the information about Individual A relates to that person in a personal capacity and the information about Individual B relates to that person in a professional capacity. While information associated with an individual in a professional capacity will not typically be considered "about" an individual, the ministry notes that this office has previously determined that where allegations of wrongdoing are brought against an individual, records relating to those allegations are no longer within the realm of the "professional" capacity of the individual. In such cases, the information constitutes the personal information of the individual against whom the allegations are made.³

[15] The ministry submits that the information about Individual B relates to alleged involvement in various types of regulatory wrongdoing and how that involvement may be indicative of a professional conflict of interest. On this basis, the ministry submits that the information about Individual B constitutes "personal information" as defined in section 2(1) of the *Act*.

Analysis and findings

[16] Having reviewed the record, I am satisfied that it contains the personal

¹ Order 11.

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

³ The ministry cites order P-721, P-117, M-1053, MO-2309, PO-2633, and PO-2440.

information of two identifiable individuals other than the appellant, as identified by the ministry.

[17] I find that the information about Individual A includes that person's sex and name, which appears with other personal information relating to the individual, as well as the views or opinions of another individual about the individual. This information constitutes "personal information" as defined in paragraphs (a), (g), and (h) of the definition in section 2(1).

[18] I find that the information about Individual B includes that person's name and title identifying the individual in a professional capacity. However, the information also includes the anonymous complainant's allegations that Individual B has acted in a conflict of interest in relation to professional responsibilities.

[19] In my view, the record contains information describing Individual B in a professional capacity; however, the information is included in the record because the anonymous complainant believes that Individual B has acted in a conflict of interest, and has assisted the appellant in committing acts of fraud. The complainant has identified Individual B's profession in support of his allegations of misconduct. The information contained in the record does not relate to Individual B carrying out professional duties or employment-related activities.

[20] Accordingly, I am satisfied that disclosure of Individual B's name, together with the other information, would reveal something of a personal rather than professional nature about Individual B.⁴ I therefore find that the information constitutes "personal information" as defined by the *Act*.

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

[21] 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.

[22] 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.⁵

⁴ See Orders P-1409, R-980015, PO-2225, and PO-2271.

⁵ See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

[23] Under section 49(b), sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. 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. Section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[24] For records claimed to be exempt under section 49(b) (i.e., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.⁶

[25] The ministry submits that none of the exceptions in sections 21(1)(a) through (e) and section 21(4) apply to the information at issue. Upon my review of the record, I am satisfied that those sections do not apply.

[26] The ministry submits that it has disclosed to the appellant the portion of the record to which the section 21(3)(b) presumption could apply. Accordingly, the ministry does not rely on the presumption in section 21(3) to withhold information under section 49(b) from disclosure, and I will not consider it.

[27] In this appeal, my analysis rests on the factors and considerations in section 21(2).

Section 21(2) – factors

[28] Section 21(2) of the *Act* lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b).

[29] In this case, the ministry submits that the factors listed at sections 21(2)(f), (g), and (i) apply. Those sections 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,

...

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

...

⁶ Order MO-2954.

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

Section 21(2)(f) – highly sensitive

[30] The ministry submits that in order for information to qualify as “highly sensitive” as contemplated by section 21(2)(f), it must be found that disclosure of the information could reasonably be expected to cause excessive personal distress to the subject individual.⁷ The ministry submits that this office has held that information about an individual’s criminal history and allegations of professional wrongdoing are highly sensitive within the meaning of section 21(2)(f).⁸ By analogy, the ministry maintains that the allegations of quasi-criminal wrongdoing against Individuals A and B are comparably “highly sensitive” personal information within the meaning of section 21(2)(f).

[31] I note that in other portions of the ministry’s representations, the ministry submits that in the appellant’s original request, he indicated that he intends to use the information in contentious civil litigation with a former employee, which would involve disclosing this information in court proceedings or another public forum.

[32] In Order PO-2518, former Senior Adjudicator Higgins stated the following:

Throughout the Ministry’s representations, it argues that the information at issue is highly sensitive. Previous orders have stated that, in order for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause “excessive” personal distress to the subject individual [Orders M- 1053, PO-1681, PO-1736]. In my view, this interpretation is difficult to apply and a reasonable expectation of “significant” personal distress is a more appropriate threshold in assessing whether information qualifies as “highly sensitive.”

[33] Accordingly, the threshold for personal information to be considered highly sensitive changed from there needing to be a reasonable expectation of “excessive” personal distress, as submitted by the ministry, to now requiring a reasonable expectation of “significant” personal distress if the information is disclosed.⁹

[34] Past orders of this office have held that disclosure of concerns expressed by one individual about another individual’s personal integrity could reasonably be expected to cause the second individual personal distress where disclosure could result in these

⁷ Orders M-1053, P-343, PO-1681, and PO-1736.

⁸ Orders M-692 and PO-1727.

⁹ See also Orders PO-2617, MO-2262, and MO-2344.

concerns being disseminated publicly.¹⁰ In addition, information relating to allegations of improper professional conduct against individuals is likely to cause personal distress to those individuals, and is highly sensitive.¹¹

[35] Based on my review of the record and the ministry's submissions, I find that the record contains allegations of professional and quasi-criminal wrongdoing. I am satisfied that the disclosure of this information could reasonably be expected to cause significant personal stress to the identifiable individuals other than the appellant, as it would reveal to the appellant concerns about those individuals' integrity as well as allegations of wrongdoing.

[36] As a result, I find that this factor weighing against disclosure of personal information is relevant to the determination of whether disclosure amounts to an unjustified invasion of the identifiable individuals' personal privacy.

Section 21(2)(g) – unlikely to be accurate or reliable

[37] The ministry submits that it is unable to verify whether the anonymous allegations against the identified individuals are accurate and reliable since the subject matter of the allegations is outside the legal mandate of the ministry. The ministry notes that the allegations are not supported by objective evidence, such as affidavits or documentary evidence, which would reinforce their veracity. Moreover, since the allegations were made anonymously, the ministry submits that it cannot contact the complainant to request further information in support of their claims. Even if the ministry could identify the complainant, it submits that it has no legal mandate to substantiate the allegations, because its jurisdiction to do so is confined to allegations made in respect of occupational health and safety and employment standards.

[38] Having considered the ministry's representations, I find that the ministry has provided arguments speaking to the difficulty of verifying the accuracy of the information contained in the record. It has not indicated in what specific ways the information at issue is inaccurate, nor has it submitted any evidence to show how the information is unlikely to be accurate or reliable. Without more information, it is impossible for me to determine whether the information at issue is unlikely to be accurate or reliable. It is likewise impossible to assess what effect such inaccuracy or unreliability may have if it exists.

[39] Accordingly, I find that section 21(2)(g) of the *Act* is not a relevant factor to consider in this appeal.

¹⁰ See, for example, Order PO-1984 (Note: These orders pre-date Order PO-2518, which changed the threshold from "excessive" to "significant".)

¹¹ Orders M-1053 and PO-1727 (Note: These orders pre-date Order PO-2518, which changed the threshold from "excessive" to "significant".)

Section 21(2)(i) – unfair damage to reputation

[40] The ministry submits that disclosure of the unverified and potentially inaccurate information is likely to damage the reputations of identifiable individuals other than the appellant. The ministry notes that the applicability of section 21(2)(i) is dependant on whether the damage or harm would be “unfair” to the individuals involved.

[41] The ministry submits that in the original request, the appellant expressed an intention to use the information in contentious civil litigation with a former employee. The ministry submits that disclosure of this information in court proceedings or another comparable public forum could affect the personal and professional reputations of the identifiable individuals because it relates to their potential involvement in regulatory wrongdoing and professional conflict of interest.

[42] The ministry maintains that the present appeal is analogous to the factual context of Order P-496, where the adjudicator stated:

Much of the information is in the nature of hearsay or second-hand information, and its release could, by its very nature, harm the appellant and the other persons named. I find that because of the unsubstantiated nature of the comments contained in this anonymous communication, the damage or harm to the individuals involved would be unfair within the meaning of section 21(2)(i).

[43] On this basis, the ministry maintains that the information should be subject to section 21(2)(i).

[44] Whether section 21(2)(i) applies turns not on whether disclosure would damage the reputation or a person referred to, but on whether such damage would be unfair.¹² Whether damage to a reputation will be unfair in a particular instance will depend on the circumstances and will be determined through a balancing of competing interests as described in section 21(2).

[45] In Order PO-1984, the adjudicator determined that disclosure of unsubstantiated concerns about an individual’s integrity could unfairly damage the individual’s reputation; however, if the statements were indisputable facts, there would be nothing unfair about their disclosure. This office has held that where there is sufficient reason to question the accuracy or reliability of personal information, there may be sufficient reason to believe that disclosure may unfairly damage the reputation of a person concerned.¹³

[46] In the circumstances, I accept that disclosure of the information at issue could

¹² Order P-256.

¹³ Order 151.

present a misleading picture of the identifiable individuals' conduct. In turn, I accept that disclosure could reasonably be expected to damage or harm their reputations. I adopt the reasoning set out in Orders P-496 and PO-1984, and find that any damage or harm to the individuals' reputations that might result from disclosure of the allegations would be "unfair" to those individuals, given that the allegations are not capable of verification. Accordingly, I find that the factor at section 21(2)(i) is relevant to the determination of whether the disclosure of the information at issue would amount to an unjustified invasion of the identifiable individuals' personal privacy.

Finding

[47] I have found that the factors and considerations set out in sections 21(2)(f) and (i) are relevant to the determination of whether the disclosure of the information at issue would result in an unjustified invasion of personal privacy of the individuals to whom it relates. These factors weigh against disclosure of the information on the basis that disclosure would constitute an unjustified invasion of personal privacy.

[48] The appellant did not provide evidence that any of the factors at sections 21(2)(a) to (d) weighing in favour of disclosure might apply. Based on my review, I am satisfied that none of those factors are relevant in the circumstances.

[49] In the absence of any evidence or argument on factors weighing in favour of the disclosure of the information at issue, I find that the factors and considerations in section 21(2) weigh against disclosure of the personal information of the identifiable individuals other than the appellant. Accordingly, I am satisfied that the disclosure of the information relating to the identifiable individuals other than the appellant would result in an unjustified invasion of the personal privacy of those individuals and it is therefore exempt from disclosure under section 49(b) of the *Act*.

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

[50] After deciding that records or portions thereof fall within the scope of a discretionary exemption, an institution is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. Sections 49(a) and (b) are discretionary exemptions, which means that the ministry could choose to disclose the information, despite the fact that it may be withheld under the *Act*.

[51] In applying sections 49(b), the ministry was required to exercise its discretion. On appeal, the Commissioner may determine whether the ministry failed to do so. In addition, the Commissioner may find that the ministry erred in exercising its discretion where it did so in bad faith or for an improper purpose; where it took into account irrelevant considerations; or where it failed to take into account relevant considerations. In either case, I may send the matter back to the ministry for an exercise of discretion

based on proper considerations. According to section 54(2) of the *Act*, however, I may not substitute my own discretion for that of the ministry.¹⁴

Representations

[52] The ministry submits that it exercised its discretion in a reasonable manner and that its exercise of discretion should be upheld. The ministry submits that it considered all relevant factors and did not consider irrelevant factors in exercising its discretion. Specifically, the ministry submits that it considered the following factors:

- The appellant's right of access to his own personal information, including the complaint about his non-compliance with the *OHSA* and the details of the ministry's ensuing investigation of the non-compliance;
- The fact that the ministry has disclosed every record that is responsive to the appellant's request other than the three redacted paragraphs that are at issue in this appeal;
- The right to privacy of Individuals A and B;
- The nature of the information at issue – i.e. highly sensitive, unsubstantiated and unverifiable allegations about regulatory wrongdoing made by an anonymous source;
- The fact that the appellant does not have a sympathetic or compelling need to receive the information at issue;
- The fact that the disclosure of unsubstantiated and unverifiable personal information about third parties could undermine confidence in and lead to privacy complaints against the ministry; and
- The ministry's historic practice in protecting any personal information relating to third parties contained in complaints made to the ministry.

[53] The ministry maintains that it has not exercised its discretion in bad faith or for an improper purpose.

[54] The ministry submits that its reasonable exercise of discretion under 49(b) has enabled the appellant to achieve complete transparency vis-à-vis the ministry's investigation into his company and the enforcement outcomes of that investigation, while ensuring that the privacy interests of third parties are protected.

¹⁴ See also Order MO-1573.

Analysis and findings

[55] An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law.¹⁵ It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to re-exercise its discretion.¹⁶

[56] The appellant has not provided any representations to undermine the ministry's exercise of discretion. As a result, there is no evidence before me to establish that the ministry exercised its discretion in bad faith, or for an improper purpose, or took into account irrelevant considerations, or was withholding the information for a collateral or improper purpose.

[57] Based on my review of the ministry's submissions and the information at issue, I am satisfied that the ministry considered relevant factors in exercising its discretion and did not take into account irrelevant factors. I am satisfied that the ministry was aware of the reason for the request and why the appellant wished to obtain the information. I am satisfied that in proceeding as it did, the ministry considered whether the appellant had a sympathetic or compelling need to receive the information that it withheld, in addition to that which it exercised its discretion to disclose to him.

[58] I find that the appellant has obtained access to a significant amount of information responsive to his request through the ministry's various access decisions, and that the information that remains withheld contains the personal information of other identifiable individuals. I am satisfied that the ministry considered the appellant's right to his own personal information and balanced that against the other individual's right to personal privacy.

[59] Therefore, in the circumstances and for the reasons set out above, I uphold the ministry's exercise of discretion with respect to the information at issue in this appeal. Accordingly, the personal information of the two identifiable individuals other than the appellant is exempt pursuant to section 49(b).

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: _____
Jaime Cardy
Adjudicator

_____ March 15, 2018

¹⁵ Order MO-1287-I.

¹⁶ Order P-58.

