

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3920

Appeal PA17-516

Ministry of Labour

January 24, 2019

**Summary:** The Ministry of Labour (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all records relating to the ministry's investigation into complaints about a specified workplace during a certain time frame. The ministry granted partial access to the responsive records. The ministry withheld portions of the records on the basis of the mandatory and discretionary personal privacy exemptions at sections 21(1) and 49(b) of the *Act*. The ministry also relied on the law enforcement exemption at section 14(1)(d) (confidential source), and determined that other information was non-responsive to the request. The requester appealed. In this order, the adjudicator finds that the information withheld is exempt under section 49(a) (discretion to refuse requester's own information) in conjunction with the law enforcement exemption at section 14(1)(d) (confidential source), and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 14(1)(d), and 49(a) ; *Occupational Health and Safety Act*, R.S.O. 1990, Chapter O.1, Parts III and IX, and sections 63(1)(a) and 63(1)(e).

**Orders Considered:** Orders P-316, P-1125, MO-1416, and Privacy Complaint MC09-56.

### OVERVIEW:

[1] This appeal concerns access to records under the *Freedom of Information and Protection of Privacy Act* (the *Act*), which were generated because of an investigation by the Ministry of Labour (the ministry) into a specified workplace during a certain time frame. The investigation occurred because two complaints were made to the ministry about workplace violence and/or harassment at the hands of a non-employee. The non-

employee is the parent of a person with special needs who had been served by the workplace during a specified period of time. The first complaint was made by a named individual. The second one was made anonymously, but there was enough detail within it for the ministry to discern that the allegations within it concerned the same parent and workplace involved in the first complaint. Because the ministry received complaints against this workplace, it investigated the workplace under the authority of the *Occupational Health and Safety Act (OHSa)* to determine compliance with the *OHSa*.

[2] The parent in question made a request under the *Freedom of Information and Protection of Privacy Act* to the ministry for all records relating to the ministry's *OHSa* investigation into the workplace during a specified period. When asked, she confirmed to the ministry that she wanted to wait for the *OHSa* investigation to be completed before the ministry processed her freedom of information request under the *Act*.

[3] After the ministry's investigations were confirmed as completed, the ministry located records related to the two complaints made to the ministry within the specified time frame of the request.

[4] The ministry issued an access decision to the requester, granting her partial access to the responsive records. The ministry fully disclosed to the requester all responsive records for which the ministry was not claiming any exemption under the *Act*. Some information in the responsive records was identified by the ministry as being non-responsive to the request, and was withheld. The ministry also withheld responsive portions of the records on the basis of the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*, and the discretionary law enforcement exemption at section 14(1)(d) (confidential source) of the *Act*.

[5] The requester, now the appellant, appealed the ministry's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[6] During mediation, issues were narrowed, but the parties could not resolve the issue of access to responsive information that was withheld on the basis of exemptions.

[7] The appeal proceeded to the adjudication stage. The inquiry process began with another adjudicator, before the file was transferred to me. Written representations were sought and received by the ministry and the appellant. The ministry received a complete copy of the appellant's representations, and the appellant was provided with the non-confidential representations of the ministry, in keeping with *Practice Direction 7* of the IPC *Code of Procedure*. Upon my review of this case, I determined that it was not necessary to seek representations from any other individual whose interests may be affected by this appeal.

[8] In addition to addressing the application of the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*, the ministry's representations also address the application of section 49(a) (discretion to refuse requester's information) in conjunction with the law enforcement exemption at section 14(1)(d) (confidential source), as well

as the application of section 14(1)(d) on its own.

[9] The appellant's representations indicate concerns related to the *OHSA* investigation (such as accuracy of information provided) and alleged disruption of service to her daughter, but such issues fall outside the scope of what can be decided under the *Freedom of Information and Protection of Privacy Act*. This appeal can only determine if the appellant has a right of access to the withheld information in the records generated by the ministry's *OHSA* investigation.

[10] For the reasons that follow, I find that the exemption at section 49(a) (discretion to refuse requester's own personal information) in conjunction with the law enforcement exemption at section 14(1)(d) (confidential source) applies to the information at issue. In light of this finding, I uphold the ministry's access decision and dismiss the appeal without needing to determine whether any other exemptions apply.

## **RECORDS:**

[11] The information at issue is on pages numbered 1, 12, 13, 15, 16, 27, 29, 30, 31, and 37 by the ministry. These pages are contained within four records, described below, which I will refer to using the following record numbers:

<b>Record Number</b>	<b>Ministry's page numbers</b>	<b>Description</b>
1	1	Ministry Event Information Form.
2	12, 13, 15, and 16	An attachment to the ministry's Notice of Compliance (the workplace's "Summary of Workplace Violence & Harassment Investigation").
3	27, 29, 30, and 31	Ministry Event Information Form with attachments, including an e-mail chain between ministry employees and an anonymously e-mailed complaint to the ministry.
4	37	The ministry investigator's handwritten notes.

## 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(a) in conjunction with the law enforcement exemption at section 14(1)(d) apply to the information at issue?
- C. Did the ministry exercise its discretion under section 49(a)? If so, should this office uphold the exercise of discretion?

## DISCUSSION:

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

[12] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates.

[13] In section 2(1) of the *Act*, "personal information" is defined as "recorded information about an identifiable individual."<sup>1</sup> Examples of personal information that are listed in the *Act* include information about an identifiable individual's

- employment history;<sup>2</sup>
- identifying number;<sup>3</sup>
- telephone number;<sup>4</sup>
- views and opinions, unless they relate to another individual;<sup>5</sup>
- correspondence sent to the institution of a private and confidential nature;<sup>6</sup>
- views and opinions of another individual about the individuals.<sup>7</sup>

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<sup>1</sup> This is part of the introductory wording of the definition of "personal information," found at section 2(1) of the *Act*.

<sup>2</sup> Definition of "personal information," at section 2(1) of the *Act*, paragraph (b).

<sup>3</sup> Ibid, paragraph (c).

<sup>4</sup> Ibid, paragraph (d).

<sup>5</sup> Ibid, paragraph (e).

<sup>6</sup> Ibid, paragraph (f).

<sup>7</sup> Ibid, paragraph (g).

[14] Section 2(1) also lists an individual's name as an example of personal information, if the name appears with other personal information relating to an individual, or if the disclosure of the name would reveal other personal information about the individual.<sup>8</sup>

[15] The list of examples of personal information under section 2(1) is not exhaustive. Information that does not fall under the listed examples may still qualify as personal information. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>9</sup>

[16] Because of the way I have decided this appeal [on the grounds of section 49(a) (discretion to refuse requester's own information) in conjunction with section 14(1)(d) (confidential source)], it is not necessary for me to discuss whether the information withheld contains the personal information of identifiable individuals other than the appellant.

[17] Based on my review of the records at issue, I find that each record in this appeal contains the appellant's "personal information," as that term is defined under section 2(1) of the *Act*.

### ***Records 2 and 3***

[18] The ministry submits, and I find, that Records 2 and 3 contain the appellant's personal information.<sup>10</sup> This includes information that falls within the introductory wording of the definition of "personal information," and/or some of the listed examples of personal information (identifying number, views or opinions about her, and the initials of her name, because the appearance of her initials reveals other personal information about her, and makes her identifiable when considered with other available information, including information provided by the appellant).<sup>11</sup>

### ***Records 1 and 4***

[19] While the ministry does not identify Records 1 and 4 as containing the

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<sup>8</sup> A record without a name could still contain the personal information of an identifiable individual if there is enough information in that record and/or through other sources of information that could reasonably lead to the identification of an individual. If my decision in this case was based on the personal privacy exemption at section 49(b), I would have discussed this at greater length because one of the records relates to a complaint that was anonymously made to the ministry.

<sup>9</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>10</sup> The appellant questions how it can be known that Record 3 relates to her if the complaint in this record was anonymously made. Based on my review of Record 3, I find that it contains the appellant's personal information.

<sup>11</sup> Order P-316 and Privacy Complaint MC09-56.

appellant's personal information, based on my review of these records, I find that they do.

[20] To explain why Record 1 contains the appellant's personal information, I will discuss how it relates to Record 2. Records 1 and 2 both relate to the first complaint that the ministry received involving the appellant and the specified workplace. Each of these records contains the same Occupational Health and Safety Case ID numbers associated with the complaint alleging harassment by the appellant. Therefore, I find that these Occupational Health and Safety Case ID numbers are the personal information of the appellant because they identify investigations into a workplace whose employees the appellant allegedly harassed. In my view, these Occupational Health and Safety Case ID numbers fall within the meaning of "any identifying number...or other particular assigned to an individual" found at paragraph (c) of the definition of "personal information" in the *Act*, as well as the introductory wording of that definition.

[21] Record 4 consists of the ministry's investigating officer's notes. Based on my review of this record, I find that it also contains the appellant's personal information, such as her name, address, and the views or opinions of others about her. This information is also her "personal information" as described in the introductory wording of the definition of that term in the *Act*.

[22] Since Records 1-4 each contain the appellant's personal information, I will now discuss whether the appellant has a right of access to the information in these records that the ministry withheld, under section 49(a).

**Issue B: Does the discretionary exemption at section 49(a) in conjunction with the law enforcement exemption at section 14(1)(d) apply to the information at issue?**

[23] For the reasons set out below, I find that the withheld information is exempt from disclosure by reason of section 49(a) (discretion to refuse requester's own information) in conjunction with the law enforcement exemption at section 14(1)(d) (confidential source).

[24] Section 47(1) 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.

[25] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give the ministry the power to grant requesters access to their personal information.<sup>12</sup>

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<sup>12</sup> Order M-352.

[26] Section 49(a) allows the ministry to withhold a record containing the requester's own personal information if the law enforcement exemption at section 14 would apply to that record. The term "law enforcement" is defined in the *Act* as including "investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings."<sup>13</sup>

[27] The ministry relies on the law enforcement exemption at section 14(1)(d), which says:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

[28] Although the ministry presented arguments relating to both aspects of this exemption, in this appeal, the relevant portion of section 14(1)(d) is the second part ("disclose information furnished only by the confidential source"). This office has held that if the identity of a source is already known to a requester, section 14(1)(d) does not apply.<sup>14</sup> I find that because the pool of possible complainants is so small and is known to the appellant, the first aspect of the exemption at section 14(1)(d) likely does not apply to the records. Rather, as I will explain, section 14(1)(d) applies because disclosure of the information at issue could reasonably be expected to disclose information furnished only by the confidential source. I note, too, that the language of the exemption does not require that the disclosure would be of "personal information" (which is a defined term, as discussed). To apply, all that is needed is that there be disclosure of "information" furnished by only a confidential source.

[29] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.<sup>15</sup> However, it is not enough for a ministry to take the position that the harms under section 14 are self-evident from the record.<sup>16</sup>

[30] Here, the ministry has provided persuasive representations and evidence about the application of the law enforcement exemption at section 14(1)(d), as discussed below.

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<sup>13</sup> Definition of "law enforcement" at section 2(1) of the *Act*.

<sup>14</sup> Order P-1125.

<sup>15</sup> *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

<sup>16</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

***OHSA investigation into the workplace was a law enforcement investigation***

[31] The appellant does not appear to dispute that the *OHSA* investigation was a law enforcement investigation, and based on my review of the evidence provided by the ministry, I find that it was.

[32] The ministry submits, and I find, that based on having received two complaints about the same workplace and parent, the ministry investigated the workplace in question to determine whether the workplace was in compliance with the provisions of the *OHSA*.

[33] I accept the ministry's evidence that ministry investigators do not investigate specific allegations or the behaviour of any individuals to determine if workplace harassment has occurred, and that they cannot order compensation or other remedies.

[34] Despite these investigation parameters, the *OHSA* investigation that the ministry conducted on the basis of two complaints is a "law enforcement investigation" for the purposes of *Freedom of Information and Protection of Privacy Act*. That is because, as mentioned, the definition of the term "law enforcement" in the *Act* includes "investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings."<sup>17</sup> The ministry submits, and I find, that investigations and inspections under *OHSA* qualify as law enforcement because the *OHSA* clearly includes enforcement powers, and contains offences and penalties.<sup>18</sup>

***Information was confidentially disclosed to the OHSA investigator***

[35] The ministry submits, and I find, that the information at issue was supplied to the ministry with an expectation that it would be treated confidentially, and that this information was provided for the purposes of making a complaint against the workplace that was investigated.

[36] I have reviewed the appellant's representations and they were not of assistance in deciding this issue.

[37] The ministry submits, and I find, that there are several reasons for concluding that those providing the *OHSA* investigator with information, did so with an expectation of confidentiality:

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<sup>17</sup> Definition of "law enforcement" at section 2(1) of the *Act*.

<sup>18</sup> *Occupational Health and Safety Act*, R.S.O. 1990, Chapter O.1, Part III and Part IX.



- the informants were providing information in the course of a workplace investigation into allegations of wrongdoing, specifically workplace harassment and/or violence, which is sensitive subject matter;
- investigations require informants (including employers) to be able to provide ministry inspectors with relevant, fulsome information during an investigation;
- the *OHSA*, which is the law governing the investigation, itself contains a duty of confidentiality on ministry inspectors (regarding any information, including personal information and statements, collected or otherwise received while exercising powers under the *OHSA*, such as investigations of workplaces);<sup>19</sup>
- this duty of confidentiality in the *OHSA* provides informants with an expectation of confidentiality that their names will not be divulged;<sup>20</sup> and
- the seriousness of the potential consequences arising from the investigation.<sup>21</sup>

[38] Regarding the latter, the seriousness of potential consequences relates to consequences of revealing information disclosed by confidential sources to a ministry investigator (which relates back to the wording of the exemption at section 14(1)(d) – “disclose information furnished only by a confidential source”). This does not relate to any potential serious consequences to the appellant resulting from the investigation (an issue which she raised).

[39] Since the informants who provided information to the ministry investigator did so with an expectation of confidentiality, I find that, as the ministry submits, disclosure of the information at issue could reasonably be expected to disclose information provided only by the confidential sources who provided the ministry and/or its investigator with information regarding the allegations of workplace harassment and/or violence.

[40] In addition, based on my review of the records, I find that they cannot be further severed in order to disclose information that would not be exempt under section 14(1)(d).

[41] For these reasons, I find that the ministry can withhold all the information at issue on the basis of the section 49(a) in conjunction with section 14(1)(d).

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<sup>19</sup> Section 63(1)(a) of the *OHSA*.

<sup>20</sup> Section 63(1)(e) of the *OHSA*.

<sup>21</sup> Order MO-1416.

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

[42] On the basis of the following, I find that the ministry properly exercised its discretion.

[43] The section 49(a) 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.

[44] 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.

[45] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>22</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>23</sup>

[46] Where access is denied under section 49(a), the ministry must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[47] Here, the ministry submits that it considered many relevant factors in exercising its discretion to withhold the information at issue. These include:

- the purposes of the *Act*, including the principles that exemptions from the right of access should be limited and specific and that individuals should have a right of access to their own personal information;
- only withholding the portions of the responsive records that contained the sensitive personal information of other identifiable individuals and disclosing the rest to the appellant;

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<sup>22</sup> Order MO-1573.

<sup>23</sup> Section 43(2).

- the privacy of individuals should be protected - the appellant is seeking the names and contact number and personal details where disclosure of this personal information could reasonably cause distress;
- the context in which the records were created (as a result of a law enforcement investigation into complaints of workplace harassment and/or violence);
- the sensitivity of the relationship between the appellant and the complaints, given the serious nature of the complaints and the vulnerability of the complainants as potential victims of alleged harassment and/or violence;
- whether the requester has a sympathetic or compelling need to receive the information, and whether there is a sympathetic or compelling need not to disclose the information;
- the fact that the appellant has already received partial disclosure in relation to her request, and that the workplace in question provided her with details about wrongful behaviour alleged;
- the ministry's belief that its reliance on individuals, including employees, to contact the ministry with information about workplaces who may be violating *OHSA*, would be negatively affected by disclosure.

[48] These were proper and relevant considerations, and I am satisfied that the ministry exercised its discretion in good faith and not in bad faith. The ministry submits, and I accept, that it balanced the right of an individual to have access to her own personal information with the need to protect information collected and recorded from confidential sources in the context of a law enforcement investigation. The ministry made some information available to the appellant that would otherwise not reveal information that the ministry only gathered from confidential sources.

[49] The appellant particularly objects to the ministry's position about her lack of compelling or sympathetic reason for access to the information withheld. However, in reviewing the ministry's exercise of discretion, my role is not to re-weigh the factors that the ministry considered. As noted above, there is no evidence before me that the ministry took into consideration any irrelevant factors, or exercised its discretion in bad faith. Therefore, I uphold the exercise of discretion by the ministry.

**ORDER:**

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

Original Signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

\_\_\_\_\_ January 24, 2019

