

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4208

Appeal PA19-00309

Ministry of Agriculture, Food and Rural Affairs

November 10, 2021

Summary: The Ministry of Agriculture, Food and Rural Affairs (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a specified email received by the Minister. The ministry issued a decision denying access to the responsive email under the personal privacy exemption at section 21(1) of the *Act*. The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario. During the inquiry, the ministry issued a revised decision granting partial access to the withheld email. In this order, the adjudicator finds that the appropriate personal privacy exemption to consider is the discretionary one in section 49(b) and that some of the withheld portions of the email are exempt on that basis. However, she orders the ministry to disclose to the appellant additional portions of the email, which she finds consist of his personal information and are not exempt under section 49(b).

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)(e), 21(2)(f), 21(2)(h), and 49(b).

Orders Considered: Order MO-2318.

OVERVIEW:

[1] This order determines the issue of access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to an email received by the Ministry of Agriculture, Food and Rural Affairs (the ministry), which was described in an access request

submitted to the ministry as "...a copy of an email that was sent to [the Minister] regarding [me] and [an individual's] feelings towards [me]. The email was received on [specified date]."

[2] Upon receiving the request, and following notification of two affected parties to seek their views on disclosure, the ministry issued a decision to the requester and the affected parties, denying access to the responsive record in its entirety under the mandatory personal privacy exemption in section 21(1) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry by inviting representations from the ministry and the two affected parties, initially. I received representations from the ministry and the affected parties. I withheld portions of the ministry's representations, and the affected parties' representations in their entirety, because I accepted they were confidential according to the confidentiality criteria in section 7 of the IPC's *Code of Procedure*.

[5] During the inquiry, the ministry issued a revised decision granting partial access to portions of the email with consent from one of the two affected parties.¹ However, the appellant advised that he continues to seek access to the withheld portions of the email. Therefore, I continued my inquiry by sharing the non-confidential representations of the ministry with the appellant, and invited his representations, which I received.

[6] In this order, I partially uphold the ministry's decision. I find that the discretionary personal privacy exemption in section 49(b) applies to exempt some of the withheld portions of the email. However, I order the ministry to disclose additional information to the appellant that is not exempt under section 49(b). I have highlighted this information on a copy of the record provided to the ministry along with this order.

RECORDS:

[7] Remaining at issue in this appeal are the withheld portions of a two-page email.

¹ It appears that the ministry disclosed this additional personal information in accordance with the exception in section 21(1)(a), which states: A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

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 personal privacy exemption at section 49(b) 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?

[8] 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. It is important to know whose personal information is in the record. If the record contains the requester's own personal information, their access rights are greater than if it does not.² Also, if the record contains the personal information of other individuals, one of the personal privacy exemptions might apply.³

[9] The 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,

² Under sections 47(1) and 49 of the *Act*, a requester has a right of access to their own personal information, and any exemptions from that right are discretionary, meaning that the institution can still choose to disclose the information even if the exemption applies.

³ Sections 21(1) and 49(b), as discussed below.

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[10] 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.⁴

[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.⁵

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁶

Representations of the parties

[13] The ministry submits that the withheld portions of the email contain personal information of the affected parties that fits within paragraphs (a)-(d), (f), and (h) of the definition of "personal information" in section 2(1) of the *Act*. The ministry submits that if the withheld information were disclosed, it is reasonable to expect that the affected parties would be identifiable to the appellant. The ministry submits that the withheld portions of the email do not contain the appellant's personal information.

⁴ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁵ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁶ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[14] The appellant submits that the email contains personal information about him that fits within paragraphs (b), (e), and (g) of the definition of “personal information” under section 2(1) of the *Act*. The appellant also submits that it is possible that the email contains some personal information of the affected parties.

[15] As noted above, I withheld the representations of the affected parties as confidential. However, generally, the affected parties submit that the record contains personal information about them.

Analysis and findings

[16] The IPC applies the “record-by-record” method of analysis to records subject to an access-to-information request. Applied to requests for access to one’s own personal information, the “record-by-record” approach gives requesters a right of access to an entire record (or the withheld portions of records) that contain their own personal information, subject to any applicable exemptions. Under this method, the unit of analysis is the whole record, rather than individual pages, paragraphs, sentences or words contained in a record. In addition, where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including released portions) is analyzed in determining a requester’s right to access the withheld information.⁷

[17] Based on my review of the email at issue and the representations of the parties, I find that the email contains the mixed personal information of the appellant and the affected parties. Specifically, I find that the email contains personal information about the appellant, such as his sex, views or opinions about him, and his name along with other information, which fits within paragraphs (a), (b), (g), and (h) of the definition of “personal information” in section 2(1) of the *Act*.

[18] I also find that the email contains personal information about the affected parties, such as their sex, email address, employment and education, phone number, and their name along with other information, which fits within paragraphs (a)-(d), and (f)-(h) of the definition of “personal information” in section 2(1) of the *Act*.

[19] The ministry argued that the applicable personal privacy exemption is the mandatory one in section 21(1), not the discretionary one in section 49(b), because the portions of the email remaining at issue do not contain the appellant’s personal information. However, as I stated above, it is the entire record that matters for the personal information finding, and since I find that the email at issue contains the personal information of both the appellant and the affected parties, I must review the

⁷ See Orders M-352 and PO-3642.

application of the discretionary personal privacy exemption in section 49(b) of the *Act*.⁸

[20] With respect to the appellant's personal information, the ministry argues that the withheld portions of the email no longer contain his personal information. While I agree that most of the appellant's personal information has been disclosed to him through the ministry's revised decision, I find that the withheld portions of the email still contain his personal information. Specifically, I find that the withheld portions of the email contain the appellant's personal information in the form of statements about him that fit within paragraph (g) of the definition of "personal information" in section 2(1) of the *Act*. I am satisfied that disclosure of the withheld personal information of the appellant would not reveal the identity of the affected parties and that it can reasonably be severed from that of the affected parties'. Since disclosure of the appellant's own personal information to him would not be an unjustified invasion of another individual's personal privacy under the exemption in section 49(b), I will order the ministry to disclose it to him. I will now review the application of section 49(b) to the affected parties' personal information.

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

[21] 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.

[22] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of exceptions in sections 21(1)(a) to (e), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[23] Sections 21(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

[24] In determining whether the disclosure of the personal information in the records

⁸ When a record does not contain a requester's personal information, the applicable personal privacy exemption is the mandatory one in section 21(1).

would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.⁹

[25] If any of sections 21(3)(a) to (h) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). 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.¹⁰ 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).¹¹

Representations of the ministry and the affected parties

[26] The ministry submits that disclosure of the withheld portions of the email would constitute an unjustified invasion of personal privacy of the affected parties. The ministry submits that none of the exceptions in sections 21(1)(a) to (e) apply to the withheld portions of the email.

[27] The ministry submits that the presumption against disclosure in section 21(3)(d) (employment or educational history) applies to the withheld portions of the email, because these withheld portions set out the educational history of an affected party. The ministry submits that the exceptions in section 21(4) do not apply.

[28] The ministry submits that the factors in sections 21(2)(e) (pecuniary or other harm), (f) (highly sensitive), and (h) (supplied in confidence), and three unlisted factors apply to the withheld portions of the email. The ministry submits that these factors weigh considerably in favour of privacy protection of the affected parties.

[29] The ministry submits that the section 21(2)(e) (pecuniary or other harm) factor applies, because of the seriousness of the issues outlined in the withheld portions of the email and more fully elaborated upon in the confidential submissions of the affected parties. The ministry submits that the IPC should consider the impact on the affected parties, if the personal information were disclosed. The ministry submits that given the specific events referred to in the email, the expected harm is reasonable and not speculative in nature. The ministry outlines the specific harms in portions of its representations that were withheld as confidential.¹²

[30] The ministry submits that what the affected parties have described is sufficient

⁹ Order MO-2954.

¹⁰ Order P-239.

¹¹ Order P-99.

¹² My reasons for finding them to be confidential included that these representations would disclose the actual contents of the withheld portions of the record and/or reveal the identity of the affected parties.

evidence for the IPC to reasonably conclude that the appellant's motives for seeking access to this information may not be benevolent and therefore, disclosure of the withheld personal information could unfairly expose the affected parties and others to reprisals. The ministry submits that it seeks to protect the affected parties from harm and to ensure that their emotional and physical health and safety are not unfairly put at risk through the disclosure of the withheld personal information in the email. The ministry submits that the factor for pecuniary or other harm in section 21(2)(e) should be accorded significant weight in favor of non-disclosure of the withheld portions of the email.

[31] The ministry submits that the section 21(2)(f) (highly sensitive) factor applies to the withheld personal information, because the email was written by one of the affected parties and the withheld portions of the email contain highly sensitive information. The ministry submits that there is a reasonable expectation of significant personal distress to the affected parties, if the withheld personal information is disclosed given the affected parties' strenuous objections to its release. The ministry submits that given that disclosure under the *Act* is disclosure to the world and there are no constraints upon a requester's use of the information, the sensitive personal information of the affected parties could be publicized to their detriment and without their knowledge. The ministry submits, therefore, that section 21(2)(f) should be accorded significant weight in favor of non-disclosure of the withheld portions of the email.

[32] The ministry submits that the withheld personal information in the email was supplied to the ministry in confidence within the meaning of section 21(2)(h) for the following reasons:

- The affected party that authored the email indicated to the ministry that they discussed the correspondence with the other affected party and asked them to keep it confidential.
- Both affected parties indicated that they expected that the email would be kept confidential given the nature of the contents.
- One affected party further indicated that they expected that the discussion referred to in the email, including the fact that they participated in the discussion, would be kept confidential.
- Further, given the contents of the email, it is reasonable to expect that the personal information would be treated confidentially.

[33] The ministry submits that the factor for personal information that has been supplied in confidence in section 21(2)(h) should be accorded significant weight in favour of non-disclosure of the withheld portions of the email.

[34] The ministry submits that there are three unlisted factors that should be taken into consideration. First, the ministry submits that the affected parties did not consent

to the disclosure of the remaining withheld personal information in the email. Second, the ministry submits that the affected parties provided submissions to the ministry and spoke with the ministry about their concerns to reinforce their strenuous objection to the disclosure of the withheld personal information. Third, the ministry submits that if the IPC were to disclose the withheld personal information in the email, it would deter people like the affected parties from reaching out in the future to government officials out of fear that their personal information would be disclosed. The ministry also submits that the ability of individuals to control the dissemination and use of their own personal information is a principle reflected in the purpose of the *Act*.

[35] As noted above, the representations of the affected parties were withheld, because they met the confidentiality criteria in section 7 of the IPC's *Code of Procedure*. However, it is clear from their representations that they support the ministry's claim that the factors favouring privacy protection in sections 21(2)(e), (f) and (h) apply to their personal information.

Representations of the appellant

[36] The appellant submits that the discretionary exemption at section 49(b) does not apply to the withheld portions of the email, because its disclosure would not constitute an "unjustified invasion" of the affected parties' personal privacy. The appellant submits that he agrees with the ministry that the exceptions in sections 21(1) and 21(4) do not apply in the circumstances of this appeal.

[37] The appellant submits that the section 21(3)(d) presumption does not apply to the withheld portions of the email. The appellant submits that his interest in receiving disclosure of his own personal information and the information that affects his reputation and legal rights outweighs the affected parties' interests in protecting "small amounts of personal information related to their employment and educational background". The appellant submits that any information relating to the affected parties' employment and educational background can be severed.

[38] The appellant submits that the section 21(2)(e) (pecuniary or other harm) factor should be given no weight in favour of withholding portions of the email at issue. The appellant submits that he seeks disclosure of the withheld portions of the email, because it contains information about him and his dismissal from an advisory board. The appellant submits that the affected parties would only be subject to legal proceedings determining his rights if the statements were found to be untrue. The appellant submits, therefore, any harm suffered by the affected parties would not be "unfair", because they voluntarily made statements about him to the ministry.

[39] With respect to the section 21(2)(f) (highly sensitive) factor, the appellant submits that it is reasonable to expect that individuals who make complaints or allegations about other individuals to the ministry could suffer some personal distress if this information is later disclosed. The appellant submits that the level of distress that is

reasonably anticipated to be experienced by the affected parties upon disclosure of the withheld portions of the email is minor, relative to the distress he has experienced because of being unable to respond to the allegations.

[40] The appellant submits that the section 21(2)(h) (supplied in confidence) factor may apply to the name of the affected parties and other personal information about them, but it cannot apply to the allegations that were made about him, because this is his personal information alone. The appellant submits, therefore, that this factor should not be given any weight.

[41] The appellant submits that he rejects the ministry's submissions regarding the unlisted factors under section 21(2) of the *Act*. The appellant submits that these unlisted factors are in substance a reiteration of the arguments made under section 21(2)(h), suggesting that the affected party provided the information in confidence. The appellant submits that he is not seeking personal information about the affected parties, but seeking his own personal information, which was provided in the form of an opinion, allegation, or complaint by the affected parties to the ministry.

[42] The appellant submits that previous IPC decisions, such as Order PO-1731, and as the *Act* confirms at section 2(1), an individual's opinions and views of others should not attract the same protection as the affected individuals' own personal information which may or may not have been provided in confidence. The appellant submits that in Order P-656, the adjudicator found that to ensure the proper operation of these confidential reporting mechanisms, the respondents to these types of complaints "must be advised of what they are accused of and by whom to enable them to address the validity of the allegations."

[43] The appellant submits that it is not the purpose of the *Act* to ensure that the ministry's policies make individuals feel safe and secure coming forward with allegations or complaints about other individuals. The appellant submits that by withholding this information from him, and reinforcing a practice of inappropriate procedures related to complaint management, the ministry may cause the very issue that it intends to avoid. The appellant submits that the purposes of the *Act*, which favour access to one's own personal information, should take precedence over any concerns relating to complaint management, and weigh in favour of disclosure to him in these circumstances.

[44] The appellant submits that the factor at section 21(2)(d) (fair determination of rights), applies to the withheld portions of the email. The appellant submits that "his legal rights were violated, in the disparaging comments made about him, and through his unexpected and unwarranted removal from his position with the ministry". The appellant asserts his intention, "if necessary", to pursue legal action against the affected parties or the ministry in order to "clear his name". The appellant submits, therefore, that the personal information in the withheld portions of the email is "very likely to have some bearing on the determination of legal rights he may have".

[45] The appellant acknowledges that there may be other means of receiving the information externally from the *Act*, namely the civil litigation system, but the availability of other means of receiving the information does not take away from rights of access under the *Act*. The appellant submits that the section 21(2)(d) factor should be given significant weight in favour of disclosure.

[46] The appellant argues that the unlisted factor of "inherent fairness" applies in favour of disclosure of the withheld portions of the email. The appellant argues that basic fairness requires that he be given an opportunity to respond to the comments of the affected parties, when those comments clearly caused him to lose his position with the ministry's advisory group. The appellant submits that significant weight should be given to this consideration as he does not know what allegations were raised against him, and as a result, has had no ability to rebut or defend against them.

[47] The appellant submits that in Order PO-1731, the adjudicator found that in circumstances where comments made about the appellant by the affected parties may be questionable and/or incapable of being verified, the fact that the information may be inaccurate or unreliable weighs in favour of disclosure. The appellant argues that the adjudicator further held that if that inaccurate information were used against his interests, fairness would require that he be apprised of the nature of the information.

[48] The appellant submits that the unlisted factor for "adequate degree of disclosure" applies in favour of disclosure of the withheld portions of the email. The appellant submits that the affected parties' comments in the withheld portions of the email provide added context to him with respect to the actions taken against him and any recourse or remediation that may be available to him. The appellant submits, therefore, that this should warrant the application of the unlisted factor for "adequate degree of disclosure".

[49] The appellant submits that in Order P-1014, the adjudicator found that in investigative situations "both the complainant and the respondent in such a proceeding are entitled to a degree of disclosure which permits them to understand the finding that was made and the reasons for the decision". The appellant submits that the ministry exercising its discretion to withhold substantial portions of the email impedes his right to know the allegations against him that ultimately led to his dismissal.

[50] The appellant submits that in Order MO-2954, the adjudicator found that the *Act* should not be used in a way that prevents individuals from exercising their rights, and afforded the unlisted factor favouring an "adequate degree of disclosure" significant weight. The appellant submits that it should also be afforded significant weight in this case.

[51] The appellant submits that the withheld personal information should be disclosed based on the absurd result principle because the information, if true, is clearly within his knowledge, because he would be aware of the allegations raised against him and

who is raising them.

Analysis and findings

[52] Since I will be ordering the ministry to disclose to the appellant his remaining personal information in the email, the only personal information remaining at issue in my analysis of section 49(b) is the personal information of the affected parties. Based on my review of the withheld personal information in the email and the representations of the parties, I find that none of the exceptions at sections 21(1)(a) to (e) and 21(4) apply.

[53] As none of the exceptions in section 21(1)(a) to (e) or 21(4) apply, I must consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.¹³

Section 21(3)(d) – employment or educational history

[54] The ministry submits that the section 21(3)(d) (employment and educational history) presumption applies to some of the withheld personal information.

[55] Section 21(3)(d) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information, relates to employment or educational history;

[56] Based on my review of the withheld personal information and the representations of the parties, I find that the section 21(3)(d) presumption does not apply. Past orders have addressed the application of the presumption against disclosure in section 21(3)(d) and have determined that, to qualify as “employment or educational history,” the information must contain some significant part of the history of the person’s employment or education. What is or is not significant must be determined based on the facts of each case.¹⁴ While some of the withheld portions of the email do mention details about an affected party’s former employment and educational qualifications, I find that these details do not comprise a significant part of their educational or employment history. The withheld personal information does not contain specifics of the affected party’s employment or educational history, such as the dates and duration of employment, or year of graduation or school attended. Therefore, I find that the section 21(3)(d) presumption does not apply to the withheld personal information of the affected party in the email.

¹³ Order MO-2954.

¹⁴ Orders M-609 and MO-1343.

[57] Neither the ministry nor the affected parties argued that any other presumption in section 21(3) applies, and I find that none of them do.

[58] In light of my findings above, it is the factors in section 21(2) that are the focus of my determination of whether disclosure would constitute an unjustified invasion of the personal privacy of the affected parties under section 49(b).

[59] The ministry and the affected parties submit that the factors at sections 21(2)(e) (pecuniary or other harm), 21(2)(f) (highly sensitive), and section 21(2)(h) (supplied in confidence) apply to the withheld personal information. These factors weigh against disclosure, if they are found to apply.

[60] The appellant submits that the factor at section 21(2)(d) (fair determination of rights) applies to the withheld personal information. This factor weighs in favour of disclosure, if it is found to apply.

[61] The parties also argue that various unlisted factors apply in the circumstances, and I will consider those unlisted factors, below.

[62] Sections 21(2)(d), (e), (f), and (h) state:

21(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

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

Factors weighing in favour of disclosure

[63] The appellant argues that the section 21(2)(d) factor applies in favour of disclosure. In order for this factor to apply in favour of disclosure, the appellant must establish all four parts of the following test:

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

[64] I am not persuaded by the appellant's argument that section 21(2)(d) applies to the personal information at issue in this appeal. The appellant has argued that "his legal rights were violated, in the disparaging comments made about him, and through his unexpected and unwarranted removal from his position with the ministry". The appellant has argued that he intends, "if necessary", to pursue legal action against the affected parties or the ministry in order to "clear his name". Based on the evidence before me, however I am not satisfied that the second requirement of section 21(2)(d) is met. Specifically, I find that the appellant has not established that there is a proceeding, either existing or reasonably contemplated, for the purpose of part two of the test.

[65] Furthermore, although the appellant submits that the personal information in the withheld portions of the email is "very likely to have some bearing on the determination of legal rights he may have," he has not explained how or why the withheld personal information of the affected parties is required for him to prepare for any proceeding, even if he had established that one existed or was reasonably contemplated. Given this, the appellant has not established that the withheld personal information is required for the fair determination of his rights for the purpose of the fourth part of the test. As the appellant noted, the ministry's withholding of the personal information at issue does not prevent him from pursuing other legal remedies that might be available to him.¹⁶

[66] In order for section 21(2)(d) to apply, all four parts of the test must be established. Since the appellant has not persuaded me that all four parts of the section 21(2)(d) test have been met, I find that section 21(2)(d) does not apply to weigh in favour of the disclosure of the withheld personal information of the affected parties in this appeal.

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.).

¹⁶ Section 51(1) of the *Act* provides that "This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation."

Factors weighing against disclosure

[67] In order for section 21(2)(e) (pecuniary or other harm) to apply, the evidence must demonstrate that the damage or harm envisioned by disclosure of the personal information is present or foreseeable, and that this damage or harm would be “unfair” to the individual involved.¹⁷

[68] The ministry submits that the factor at section 21(2)(e) applies to the withheld personal information, because its disclosure would unfairly expose the affected parties to reprisal. I have considered the ministry’s explanation of the specific harms in its confidential representations. The appellant submits that this factor does not apply, because any harm suffered by the affected parties would not be “unfair” because they voluntarily made statements about him to the ministry. In their confidential representations, the affected parties explain how they believe disclosure of the withheld personal information would unfairly expose them to harm.

[69] In Order MO-2318, former Commissioner Brian Beamish provided guidance on “unfair harm” as contemplated by section 14(2)(e), the municipal equivalent of section 21(2)(e). He stated:

Turning to the factor at section 14(2)(e), this office has held that although the disclosure of personal information may be uncomfortable for those involved in an already acrimonious matter, this does not mean that harm would result within the meaning of this section, or that any resulting harm would be unfair [Order PO-2230]. However, it has also been held that the unfair harm contemplated by section 14(2)(e) is foreseeable where disclosure of personal information is likely to expose individuals to unwanted contact with the requester [Order M-1147]

[70] I agree with and adopt the analysis set out by former Commissioner Beamish in this appeal. In this case, I find the harm that the ministry and the affected parties have identified is foreseeable, because I am satisfied that disclosure of the withheld personal information is likely to expose the affected parties to unwanted contact with the appellant. I also find that the harm would be unfair to the affected parties in the circumstances of this appeal. Therefore, I find that the factor at section 21(2)(e) applies to the withheld personal information of the affected parties and weighs against disclosure.

[71] In order for section 21(2)(f) (highly sensitive) to apply, the withheld personal information must be considered to be highly sensitive, which means there must be a

¹⁷ Order P-256.

reasonable expectation of significant personal distress if the information is disclosed.¹⁸ The ministry submits that this requisite reasonable expectation of significant personal distress has been established in this situation. The appellant submits that the level of distress the affected parties could expect to experience is minor relative to his distress from being unable to respond to the allegations made against him.

[72] The email at issue contains statements of a sensitive nature written by one of the affected parties about the appellant and his actions. I will order the ministry to disclose these statements about the appellant to him because they are his personal information. However, I am satisfied that it is reasonable to expect that disclosure of the affected parties' personal information would cause the affected parties significant personal distress, because they would be identified and associated with those statements. Therefore, I find that the factor at section 21(2)(f) applies to the withheld personal information and weighs in favour of non-disclosure of the affected parties' personal information in this appeal.

[73] Section 21(2)(h) (supplied in confidence) 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. Section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹⁹ Based on the content of the withheld personal information in the email and the representations of the parties, including the confidential portions, I find that the section 21(2)(h) factor applies in favour of non-disclosure. As noted above, the email contains statements of a sensitive nature written by one of the affected parties about the appellant and his actions. Given the nature of these statements, the fact that the affected parties voluntarily came forward to provide these statements to the ministry, and the specific context, I find that the affected parties and the ministry both had a reasonable expectation that the personal information supplied by the affected parties would be held in confidence. I also find that this expectation is reasonable in the circumstances of this appeal. Therefore, I find that the factor at section 21(2)(h) applies to the withheld personal information of the affected parties in the email and weighs against its disclosure.

Unlisted factors

[74] As noted above, 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).²⁰ Both the ministry and the appellant have argued that various unlisted factors apply to the withheld personal information in the email.

¹⁸ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹⁹ Order PO-1670.

²⁰ Order P-99.

[75] The ministry submits that there are three unlisted factors that weigh against disclosure. The ministry submits that the affected parties did not provide consent and strenuously objected to disclosure. The ministry further submits that disclosure of the withheld personal information would deter people from reaching out in the future to government officials out of fear of reprisal or disclosure of their personal information. The appellant submits that these unlisted factors are in substance a reiteration of the arguments made under section 21(2)(h) (supplied in confidence).

[76] Having considered the representations of the parties, I find that the ministry's submissions about the three unlisted factors are not sufficient to establish new unlisted factors. However, the concerns reflect considerations that are relevant to the other factors in section 21(2) already argued by the ministry or are ones appropriately considered by the ministry in its exercise of discretion. Accordingly, for the purposes of my analysis under section 49(b), I have considered these arguments to the extent they touch on issues related to the other factors argued by the ministry that I found, above, to be applicable.

[77] The appellant submits that the two unlisted factors of "inherent fairness" and "adequate degree of disclosure", which have been recognized by the IPC in previous orders, apply in favour of disclosure of the withheld personal information of the affected parties. The appellant argues that basic fairness requires that he be given an opportunity to respond to the comments of the affected parties, because those comments caused him to lose his position with an advisory group of the ministry.

[78] The unlisted factor of "adequate degree of disclosure" stems from the purposes section of the *Act*, which provides that individuals should have a right of access to their own personal information. This factor addresses the requirement of fairness of administrative processes, and the need for a degree of disclosure to the parties, which is consistent with the principles of natural justice.²¹

[79] I have considered the appellant's position that he requires the withheld personal information to understand the comments and allegations made about him in the email, which he believes led to his dismissal from his advisory position with the ministry. After reviewing the withheld personal information of the affected parties and considering the circumstances of this appeal, I am not persuaded that the appellant's arguments establish the unlisted factors of "inherent fairness" or "adequate degree of disclosure". Previous orders have held that individuals who face accusations, which result in administrative or judicial proceedings, are entitled to know the case that has been made against them.²² In this appeal, while the appellant alleges that the email at issue is what ultimately led to him losing his advisory position with the ministry, he has not

²¹ Order P-1014.

²² Order P-1014.

provided sufficient evidence of any specific or identifiable administrative proceeding in which the withheld personal information of the affected parties ought to be disclosed for reasons of fairness or natural justice.

[80] Furthermore, I will be ordering the ministry to disclose the statements about the appellant contained in the withheld portions of the email because of my finding that they constitute his personal information, and this should assist the appellant in understanding the allegations made about him. Given this, I find that the appellant has not established that the withheld personal information of the affected parties should be disclosed for reasons of "inherent fairness" or to allow for an "adequate degree of disclosure".

[81] I have also considered Orders MO-2954, P-1014, and PO-1731, which were cited by the appellant, and I find that they are not persuasive in the circumstances of this appeal. I find that the facts of these orders are distinguishable from those in this appeal. In the orders cited by the appellant, the personal information at issue was part of a specific and identifiable investigation. In this appeal, the withheld personal information of the affected parties is not part of an investigation into the appellant. As I noted above, there is insufficient evidence before me to establish that the withheld personal information of the affected parties ought to be disclosed for reasons of fairness or natural justice. Nor am I satisfied that the denial of access to the affected parties' personal information prevents the appellant from exercising any rights he may have.

[82] For the reasons above, I find that the unlisted factors of "inherent fairness" and "adequate degree of disclosure" do not apply in the circumstances of this appeal to weigh in favour of disclosure of the affected parties' personal information.

Absurd result

[83] The appellant submits that the withheld personal information should be disclosed based on the absurd result principle because, as I understand the argument, the information, if true, is clearly within his knowledge, and he would be aware of the allegations made against him and who made them.

[84] Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.²³

[85] The absurd result principle has been applied where, for example:

²³ Orders M-444 and MO-1323.

- the requester sought access to his or her own witness statement²⁴
- the requester was present when the information was provided to the institution²⁵
- the information is clearly within the requester's knowledge²⁶

[86] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.²⁷

[87] In the circumstances of this appeal, I find that the absurd result principle does not apply to the withheld portions of the email because this information is clearly not within the appellant's knowledge. The appellant did not supply the personal information about the affected parties that is contained in the email and he was not present when this information was provided. From the appellant's submissions, it is clear that he does not know what the withheld portions of the email contain. Therefore, I conclude that the withheld portions of the email are not within his knowledge.

Summary

[88] Overall, I have found that the factors at sections 21(2)(e), (f), and (h) weigh against disclosure of the withheld personal information of the affected parties in the email and that no section 21(2) factors, listed or unlisted, weigh in favour of disclosure. Balancing the interests of the parties, the totality of the facts of this appeal weigh against disclosure of the withheld personal information in the email. Therefore, I find that the withheld personal information of the affected parties in the email is exempt from disclosure under the discretionary exemption at section 49(b) of the *Act*.

[89] Since the section 49(b) exemption is discretionary, and would permit the ministry to disclose the personal information at issue, despite the fact that it could withhold it, I considered the ministry's exercise of discretion. The appellant submits that the ministry improperly weighed relevant factors in favour of the affected parties in exercising its discretion, which led the ministry to improperly withhold portions of the email. Since I have found only the affected parties' personal information exempt under section 49(b), my review of the ministry's exercise of discretion is limited to its decision to withhold their personal information. Based on the circumstances of this appeal, I am satisfied that the ministry considered relevant factors and properly exercised its discretion to withhold the affected parties' personal information under section 49(b) of the *Act*.

²⁴ Orders M-444 and M-451.

²⁵ Orders M-444 and P-1414.

²⁶ Orders MO-1196, PO-1679 and MO-1755.

²⁷ Orders M-757, MO-1323 and MO-1378.

ORDER:

1. I partially uphold the ministry's position.
2. I order the ministry to disclose the highlighted portions of the copy of the email provided with this order to the appellant by **December 16, 2021** but not before **December 10, 2021**.
3. In order to verify compliance with order provision 2, I reserve the right to require the ministry to provide me with a copy of the email disclosed to the appellant.

Original Signed by: _____
Anna Truong
Adjudicator

November 10, 2021