Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4452

Appeal PA23-00332

Ministry of Children, Community and Social Services

October 20, 2023

Summary: The appellant made a request for records relating to their ex-partner to the ministry and the ministry denied access to those records under the mandatory and discretionary personal privacy exemptions. The appellant appealed the ministry's decision to the IPC. The ministry refused to provide records to the IPC so that it may conduct an inquiry. In this decision, the adjudicator orders the ministry to produce the records at issue in the appeal to the IPC.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 42(1)(d), 52(4), 61(1)(d).

Orders: Orders PO-2910 and PO-3051.

OVERVIEW:

[1] This order addresses the Ministry of Children, Community and Social Services (the ministry's) refusal to provide the Information and Privacy Commissioner of Ontario (the IPC) with the records at issue in appeal PA23-00332. In this decision, I order the ministry to provide the IPC with a copy of the records.

[2] The ministry received an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records from the Family Responsibility Office (FRO):

> Calls, call logs, emails and general records of the opposing party.

The request form indicates that the requester was seeking access to: general records, access to his/her own personal information and access to other's personal information by authorized party.

[3] The ministry denied access to the responsive records on the basis of the mandatory and discretionary personal privacy exemptions in sections 21(1) and 49(b) of the *Act*. In its decision letter,[1] the ministry provided the following explanation for its denial of access:

> …the information you are requesting cannot be released under sections 21(1) and 49(b) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) as it constitutes the personal information of another person. The Information and Privacy Commissioner has stated on several occasions that information about support payors and recipients held by the Family Responsibility Office is highly sensitive personal information and in order for the Director to effectively enforce support orders, the parties must be able to communicate without fear that anyone but themselves will have access to this highly sensitive information.

[4] The requester, now the appellant, appealed the ministry's decision to the IPC.

[5] In order to address the appeal and as contemplated by the IPC's *Code of Procedure*, the Registrar of the IPC sought from the ministry a copy of all documentation including the records at issue. The ministry refused to provide a copy of the records, noting that the ministry had not conducted a search for the responsive records because, it was of the view, to do so would be a privacy breach.

[6] The file was then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry under the *Act*. I decided to conduct an inquiry into the issue of the ministry's refusal to provide the records at issue to the IPC. Initially, I sought the ministry's views on its decision to not provide records to the IPC. The ministry provided representations in response.

[7] In this decision, I order the ministry to conduct a search for the responsive records and provide a copy of those records to the IPC in order that the IPC may conduct an inquiry into the appeal.

DISCUSSION:

[8] I have decided to order the ministry to produce the records at issue in the appeal to the IPC for the purposes of conducting an inquiry under the *Act*.

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[1] Ministry's decision letter dated May 8, 2023 provided to the IPC.

[9] Under section 52(4) of the *Act*, the Commissioner may require the production of any record. Specifically, section 52(4) states:

> In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

[10] Under section 61(1)(d) of the *Act*, no person shall wilfully obstruct the Commissioner in the performance of her functions under the Act. This includes a demand for the production of any records for the purposes of conducting an inquiry. Section 61(1)(d) states:

> No person shall,
>
> > Wilfully obstruct the Commissioner in the performance of his or her functions under this Act;

[11] Furthermore, section 10.01 of the IPC's *Code of Procedure* sets out the procedure for providing records to the IPC. It states:

> Where the IPC determines that copies of records are required to process an appeal, it may send a written request for the records to the institution, including the date by which the records are to be received. Where an institution fails to provide the records, or any of them, within the specified time, the IPC may issue an order requiring the institution to produce the records to the IPC, without inviting representations from any party on this issue.

[12] As contemplated by section 10.01, the IPC requested the records from the ministry. As set out above, the ministry refused to provide these.

[13] I sought the ministry's representations regarding its position to not provide records to the IPC. In my letter dated August 28, 2023, I asked the ministry to provide an explanation of its position regarding providing the records to the IPC for the purposes of addressing the appeal. I asked the ministry for any background details that may be relevant to its decision not to search for the responsive records or provide those records to the IPC. In particular, I noted the following:

> The ministry's decision is both the mandatory and discretionary personal privacy exemptions apply to the records at issue. Accordingly, I assume that is the ministry's understanding that some of the responsive records would contain information that qualifies as the personal information of the appellant. Is it the ministry's position that it will not search for personal information relating to the appellant? Would disclosing the appellant's

> personal information to the IPC also be a privacy breach? Please provide an explanation of the ministry's decision not to search for the personal information records of the appellant.

[14] The ministry was also asked to cite the sections of the *Act* or any decisions that it relies on to support its position.

Ministry's representations

[15] The ministry submits that a staff member spoke with the requester and the requester confirmed during that conversation that he was seeking another individual's personal information (namely their ex-partner's), and that they did not have that other individual's permission to access this information. As a result, the ministry denied access in a decision letter dated May 8, 2023.

[16] As background, the ministry explains that FRO is a program mandated under the *Family Responsibility and Support Arrears Enforcement Act, 1996* ("*FRASEA*") in response to the significant social problem of non-payment of spousal and child support and arrears. Under *FRASEA*, every court order for child and spousal support made in Ontario is automatically filed with FRO for enforcement. The Director of FRO has the exclusive jurisdiction to enforce support orders filed with the program.

[17] The ministry's arguments for not searching for or providing the records to the IPC are summarized as follows:

- The records contain highly sensitive personal information.
- The appellant does not have the consent of his ex-partner and he only seeks the personal information of his ex-partner.
- It is self-evident that disclosure of the non-consenting ex-partner's personal information would constitute an unjustified invasion of that individual's personal privacy and the ministry did not have to conduct a search to determine that this information would be exempt under section 21(1).
- Searching for the responsive records would neither be necessary or proper in the discharge of the institution's functions and would be an improper use of the personal information contained in the records.

[18] I will address each of these points below.

The records contain highly sensitive personal information

[19] I do not find the fact that the records contain highly sensitive personal information establishes that the ministry should not have to search for or provide the records to the IPC.

[20] The ministry explains that every FRO case involves a support payor and recipient and the Director acts as a conduit between the payor and the recipient. The ministry submits that the relationship between the payor and recipient is usually very acrimonious and adversarial. To this end, each FRO file is composed of two "compartments" with one being for the payor and one for the recipient. The ministry cites Orders P-1056, P-1269, P-1340, PO-2910 and PO-3051 in support of its position that the personal information in the FRO files is highly sensitive.

[21] I do not dispute the ministry's position that past decisions of the IPC have found that the factor favouring non-disclosure of personal information in section 21(2)(f) (highly sensitive) has applied to the adjudicator's consideration of whether disclosure of the personal information at issue would be an unjustified invasion of an individual's personal privacy. I note that in all of the orders cited by the ministry, the adjudicators would have made this decision after reviewing the records at issue and considering the specific circumstances of the appeal.

[22] Section 21(2) lists several factors that may be relevant to determining whether disclosure of personal information would be an unjustified invasion of personal privacy.[2]

[23] Section 21(2)(f) weighs against disclosure when the evidence shows that the personal information is highly sensitive. To be considered "highly sensitive," there must be a reasonable expectation of significant personal distress if the information is disclosed.[3] For example, personal information about witnesses, complainants or suspects in a police investigation may be considered highly sensitive.[4]

[24] Section 21(2)(f) is not an exemption from the right of access. It is a factor that should be considered when determining whether disclosure of the personal information at issue would be an unjustified invasion of personal privacy. I do not accept the ministry's position that because disclosure of the personal information in the records could be expected to cause significant personal distress the responsive records should not be searched or provided to the IPC to determine the appeal.

The appellant does not have the consent of his ex-partner and he only seeks the personal information of his ex-partner.

[25] I do not accept the ministry's argument that because the appellant does not have the consent of their ex-partner it is not required to search for responsive records and not required to provide the records to the IPC.

[26] The ministry states that given the highly sensitive information the records, only the individual to whom it relates should be given access. The ministry submits that the appellant seeks access to the personal information of their ex-partner only. The ministry

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[2] Order P-239.
[3] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[4] Order MO-2980.

further submits that the appellant knew that their ex-partner had not consented to the disclosure of their personal information. The ministry submits that the appellant does not have authority to access their ex-partner's personal information.

[27] Where an individual seeks the personal information of another individual, an institution can claim either the mandatory or discretionary personal privacy exemption under section 21(1) or 49(b). I do not dispute that where an individual seeks the personal information of another individual the institution can deny access to the responsive information after considering the presumptions and factors in section 21(2) and (3) of the *Act*. However, this does not mean that the institution should not provide the records at issue to the IPC where the requester has appealed the institution's decision to the IPC. Nor does this mean the ministry should not search for the responsive records.

[28] Furthermore, in Orders PO-3051 and PO-2910, orders referenced by the ministry, the records at issue were found to contain the personal information of both the appellant and the affected party, or the support recipient and payor. While the appellant in the present appeal only seeks the personal information of their ex-partner, it is likely that any responsive records would contain the personal information of the appellant and their ex-partner. To be clear, I expect that the ex-partner's records could contain personal information of the appellant. And where the records contain the personal information of the appellant and their ex-partner, the appellant has a right of access to that information, subject to the personal privacy exemption at section 49(b).

[29] The ministry determined without searching for the records or viewing the records at issue that the appellant had no right of access to any of the records at issue. The appellant does not know the ministry's records holdings or the types of records in the FRO file. Without being able to examine the records at issue, the IPC also cannot properly adjudicate whether the appellant has a right of access to the records, and whether the ministry has properly applied the claimed exemptions to disclosure.

[30] Accordingly, I find that the fact that the appellant seeks the personal information of his ex-partner and does not have that individual's consent is not a sufficient reason for the ministry to not search for the responsive records or provide those records to the IPC.

It is self-evident that disclosure of the non-consenting ex-partner's personal information would constitute an unjustified invasion of that individual's personal privacy and the ministry did not have to conduct a search to determine that this information would be exempt under section 21(1).

[31] The ministry submits that given the nature of FRO files, it is possible that, if any records exist which are responsive to the appellant's request, such records could also contain limited information that relates to the appellant and that is why the ministry cited section 49(b) in their decision. The ministry states:

> Had the requester asked for access to their own FRO records, it is the ministry's position that it would have been appropriate to conduct a search, redact those records if appropriate, and possibly disclose them (in part or in full) to the requester. However, this was not the nature of their request; rather, the requester, explicitly and exclusively asked for their ex-partner's personal information.
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> Hypothetically, if the appellant were to request access to their next-door neighbour's driving records without their consent, or if a stranger were to request access to the Commissioner's health records, the ministry submits that it would be similarly self-evident that the requester would not have the authority to access. It would not be necessary for the institution to view the records which, by their very nature, are highly sensitive, to determine that disclosing them to an unauthorized requester would constitute an unjustified invasion of privacy under section 21 of FIPPA.

[32] The ministry's arguments are not helpful and do not address the factual circumstances in the FRO files. The ministry explained, and as I set out above, that FRO is a program to deal with the non-payment of spousal and child support arrears. The individuals whose information is collected and used by FRO are former partners or spouses. The ministry concedes that, in the present appeal, it expects that responsive records may contain the appellant's personal information and that is why it claimed section 49(b).

[33] The hypothetical examples given by the ministry are not helpful because those are situations where a requester had no former or current relationship with the individual whose personal information is sought.

[34] Section 47(1) of the *Act* provides that every individual has a right of access to their personal information in the custody or control of an institution. Under section 49(b), the ministry is permitted to refuse to disclose the personal information to that individual where disclosure would constitute an unjustified invasion of another individual's personal privacy. However, the ministry did not conduct a search for the responsive records in the present appeal. The ministry did not locate and review the records before rendering its decision to deny access to records where it concedes could possibly contain the personal information of the appellant. I find the ministry chose to interpret the appellant's request in an unreasonably narrow manner by determining that he was only seeking records that would contain the personal information of another identifiable individual.

[35] I find that this argument does not establish that the ministry should not conduct a search for responsive records or provide those records to the IPC.

Searching for the responsive records would neither be necessary or proper in the discharge of the institution's functions and would be an improper use of the personal information contained in the records.

[36] The ministry cites section 42(1)(d) of the *Act* which addresses where disclosure of personal information is permitted by an institution. Section 42(1)(d) states:

> An institution shall not disclose personal information in its custody or under its control except,
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> > where disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and where disclosure is necessary and proper in the discharge of the institution's functions;

[37] The ministry submits that given the nature of the request and what it expects the responsive records to be, the ministry did not have to search for or view any responsive records in order to determine that providing access would constitute an unjustified invasion of privacy. The ministry further submits that accessing the responsive information would be neither necessary or proper in the discharge of the institution's functions, and that no ministry employee would need to view this highly sensitive personal information in the performance of the duties in question. The ministry states:

> Since there would be no business purpose for the ministry to view any responsive records, it follows that doing so anyway would constitute improper and unauthorized use of the personal information contained within.

The ministry goes on to say that it followed best practices set out in the IPC's privacy fact sheet by limiting the amount of personal information that would be used (viewed) by ministry staff in determining that it was not necessary to use this personal information to get the work done.

[38] Finally, the ministry states, according to the IPC a privacy breach occurs when personal information is collected, retained, used, disclosed or disposed of in ways that do not comply with Ontario's privacy laws. The ministry submits that if ministry staff were to search for responsive records related to the appellant's request then this would be an improper use of another individual's personal information and would constitute a privacy breach.

[39] The ministry is obliged under the *Act* to provide access to records within its custody or control including providing access to personal information (sections 10 and 47). Sections 41 and 42 of the *Act* imposes limits on the use and disclosure of personal information within the institution's custody or control. This includes section 42(1)(d) cited by the ministry above. Section 42(1)(m) is also relevant. It states:

> An Institution shall not disclose personal information in its custody or under its control except,
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> to the Information and Privacy Commissioner;

[40] The ministry is an institution under the *Act* and as an institution has obligations to respond to access to information (both general and personal information) requests. It is a function of the ministry, as an institution under the *Act*, to respond to information to access requests. To give effect to the access and appeal provisions of the *Act*, an institution, in responding to an access request, must search, review and potentially copy and retain records containing personal information. Where the ministry staff member is properly responding to an access request, the resulting "use" or "disclosure" of personal information records from searching for responsive records is not an improper use or disclosure of the personal information. These uses and disclosures are permitted under the *Act* and its regulations to allow the institution to meet its obligation of responding to access to information requests under the *Act*.

[41] In this particular case, the search of records for the appellant or the appellant's ex-partner's personal information would not be an improper use or disclosure for the purposes of the *Act*. Furthermore, the *Act* and its privacy provisions is not an impediment to the ministry searching for and providing records to the IPC.

Conclusion

[42] Accordingly, I find the ministry has not established that it is unable to search for responsive records or provide those records to the IPC.

ORDER:

1. I order the ministry to search and identify records responsive to the appellant's request. This means any records that reasonably relate to the request which would include records containing the appellant's personal information.

2. I order the ministry to issue an access decision for the records it locates as a result of its search without recourse to the time extension provision in section 27 of the *Act* treating the date of this order as the date of the request for administrative purposes.

3. In accordance with section 52(4) of the *Act*, I order the ministry to provide the IPC with a copy of the records it locates as a result of its search by **November 24, 2023.**

Original Signed by: October 20, 2023

Stephanie Haly
Senior Adjudicator