Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1670

Appeal PA-980183-1

Ministry of Community and Social Servic**es**

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BACKGROUND:

The Ministry of Community and Social Services (the Ministry) regulates the Ontario system of private and international adoption under the authority of the Child and Family Services Act. In cases where an international adoption is planned, a social worker approved by the Ministry conducts a homestudy assessment of the applicant. The social worker then makes a recommendation to the Ministry as to the suitability of the applicant for adoption. The Ministry then reviews the homestudy and, taking into account the recommendation, decides whether or not to approve the application. Upon approval, the Ministry issues a letter of recommendation for the adoption.

Adoptive applicants searching for a child in need of an adoptive home have several options. They may make a request to the National Adoption Desk, a federal government agency, work on their own to find a child in another country or request assistance from individuals or agencies approved by the Ministry. In addition, applicants may engage the services of an independent facilitator, where the adoption is not completed in Ontario. Independent facilitators in international adoption are not regulated by the Ministry.

The appellant sought to adopt a child in a foreign country. A private social worker approved by the Ministry conducted a homestudy assessment of the appellant and submitted a report to the Ministry recommending that the application be approved. The Ministry accepted the social worker's recommendation, and issued a letter of recommendation. Subsequently, the social worker conducted a second homestudy and submitted a second report to the Ministry. Although the report indicated that the appellant had recently suffered health problems, the social worker again recommended that the Ministry approve the application. The Ministry did so, and issued a second letter of recommendation.

Shortly after the Ministry issued its second letter of recommendation, the appellant engaged the services of an independent facilitator agency operated by two individuals (the primary affected persons) to find a suitable child and to represent the appellant in dealing with Canadian or foreign authorities in the adoption process.

Some months after they were retained by the appellant, the primary affected persons sent an e-mail communication to two different individuals representing two organizations (the third and fourth affected persons). In this communication the primary affected persons express their complaints about, and concerns with, the appellant. In the e-mail the primary affected persons discuss details of the appellant's personal circumstances and adoption application, and refer to discussions between the appellant and the primary affected persons. On the same day, the primary affected persons sent a hard copy of the e-mail to the Ministry, with a covering letter. The covering letter similarly discussed communications between the appellant and the primary affected persons, but was more summary in nature.

NATURE OF THE APPEAL:

The appellant made a request to the Ministry under the Freedom of Information and Protection of Privacy Act (the Act) for access to the two records submitted to the Ministry, the e-mail and the covering letter.

The Ministry denied access to both records, on the basis of the exemptions at sections 20 (danger to safety or health) and 21/49(b) (personal privacy) of the Act. In particular, the Ministry cited the factors against disclosure at sections 21(2)(f) (highly sensitive), (h) (supplied in confidence), and the presumption against disclosure at section 21(3)(g) (personal recommendations or evaluations). The Ministry also cited section 21(1)(b) (compelling circumstances affecting health or safety) but later retracted its reliance on that provision.

The appellant appealed the Ministry's decision. In her letter of appeal, the appellant made detailed submissions on the application of the exemptions cited above. I will refer to these as necessary in my discussion of the issues below.

I sent a Notice of Inquiry setting out the issues in this appeal to the Ministry, the appellant, the primary affected persons, the third and fourth affected persons, and the social worker (the fifth affected person). I received representations from all parties.

Both the third and fourth affected persons indicated that they did not believe that disclosure of the records would affect their interests. The fifth affected person indicated that she had concerns with the disclosure of information pertaining to her only to the extent that it constitutes a personal evaluation by the primary affected persons regarding the manner in which she carried out her responsibilities as a private adoption practitioner.

DISCUSSION:

PERSONAL INFORMATION

The first issue which must be decided is whether or not the records contain personal information and, if so, to whom the personal information relates. Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including:

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

Both records contain personal information of the appellant and the primary affected persons. These records contain the primary affected persons' views or opinions of the appellant [paragraph (g)], the primary affected persons' opinions or views about matters other than the appellant [paragraph (e)] and detailed information about interactions between the primary affected persons and the appellant [paragraph (h)].

These records also contain the names of the third, fourth and fifth affected persons. I find that disclosure of these names in the records would reveal other personal information about them, within the meaning of paragraph (h) of the definition of "personal information", including information about their interactions with the primary affected persons. Therefore, the records also contain the personal information of the third, fourth and fifth affected persons.

The appellant submits that information associated with the primary affected persons is, in fact, not their personal information since it relates to a corporate entity. In my view, although the primary affected persons operate under a business name, the information in these records, while associated with their organization, relates to them primarily as natural persons [Order 113]. In addition, this reasoning would apply to information relating to the third, fourth and fifth affected persons and their business undertakings or associations.

DISCRETION TO REFUSE ACCESS TO ONE'S OWN PERSONAL INFORMATION

Introduction

Section 47(1) of the Act provides individuals with a general right of access to their own personal information in the custody or under the control of an institution. Section 49 provides a number of exceptions to this general right of access. In particular, under section 49(b), a head may refuse to disclose to the individual to whom the information relates personal information where the disclosure "would constitute an unjustified invasion of another individual's personal privacy". Also, under section 49(a), a head may refuse to disclose to the individual to whom the information relates personal information where (among others) the exemption at section 20 (danger to safety or health) would apply to the disclosure of that personal information.

The Ministry has withheld the records on the basis of section 49(b), in conjunction with section 21, as well as section 49(a), in conjunction with section 20. I will address each of these two issues below.

Danger to safety or health

Section 20 reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

The Ministry submits that this case involves allegations of physical threats and that, in the circumstances, the records should not be disclosed.

The primary affected persons state that the records were created and submitted to the Ministry as a result of harassment by the appellant, in the nature of repeated, threatening telephone calls. The primary affected persons claim that the appellant threatened them with economic harm, through legal proceedings as well as through "slander". In addition, the primary affected persons submit that the appellant threatened them with

physical harm, which threat they claim was recorded by their telephone answering machine. The primary affected persons concede that they did not contact the police as a result of these threats.

The primary affected persons supplied this office with a tape which they indicate contains the alleged threats against them. This tape contains two messages. Having carefully reviewed them, I conclude that the appellant did threaten to commence legal proceedings against the primary affected persons, but did not make any threats in the nature of physical harm.

The appellant submits that there is no "nexus or connection" between the records and the "alleged threat to safety". She further submits that "had I threatened or otherwise given [the primary affected persons] cause to fear for their personal safety, common sense would dictate that they take steps to resolve the situation. Criminal charges or at the least, a restraining order would be appropriate. Such steps have not been taken."

In my view, disclosure of the records could not reasonably be expected to seriously threaten the safety or health of the primary affected persons. I agree with the appellant that had the primary affected persons taken any physical threats seriously, they likely would have taken legal steps to reduce the risk of harm, such as contacting the police or seeking a restraining order. Further, since the telephone answering machine tape revealed no physical threats, I am not persuaded that they were ever made.

Personal privacy

Introduction

Section 21 provides guidance in determining whether or not disclosure would constitute an unjustified invasion of another individual's personal privacy within the meaning of section 49(b).

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. The Divisional Court has stated that if one of the presumptions applies, personal information can be disclosed only if it falls under section 21(4) or if the section 23 "public interest override" applies to it [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 21(3) applies, section 21(2) requires me to consider all relevant circumstances, including the factors specifically listed therein and any unlisted factors, in order to determine whether disclosure would constitute an unjustified invasion of personal privacy.

The Ministry's submissions in support of the exemption at sections 49(b) and 21 are confined to the personal privacy of the primary affected persons. Although the records contain the personal information of the third, fourth and fifth affected persons, I find that sections 49(b) and 21 could not apply to this information, based on the submissions of these individuals and my review of the records. Therefore, my discussion of the personal privacy issues will be limited to the interests of the primary affected persons.

Section 21(3)

The Ministry relies on various provisions under sections 21(2) and (3) in support of its decision. With regard to section 21(3), the Ministry submits that the presumption at paragraph (g) is applicable to portions of the record. Section 21(3)(g) reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > consists of personal recommendations or evaluations, character references or personnel evaluations;

The Ministry submits that the information in the records is "evaluative in nature, in terms of opinions expressed about the appellant".

Any information contained in the records which might be characterized as "personal recommendations or evaluations, character references or personnel evaluations" is the personal information of the appellant, by virtue of paragraph (g) of the definition of "personal information" in section 2(1) of the Act. Therefore, disclosure of the record cannot be presumed to constitute an unjustified invasion of the personal privacy of individuals other than the appellant, within the meaning of section 49(b) and section 21(3)(g). Therefore, the presumption at section 21(3)(g) does not apply. No other presumptions are applicable in the circumstances, and therefore section 21(3) does not apply to the records.

Section 21(2)

The Ministry also relies on the factors at sections 21(2)(f) and (h), and submits that these factors indicate that disclosure would constitute an unjustified invasion of the primary affected persons' privacy. Those sections read:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (f) the personal information is highly sensitive;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The Ministry submits:

> . . . the records were provided "in confidence" to the Ministry by [the primary affected persons], and thus would be an invasion of their privacy . . . The personal information is also "highly sensitive" in terms of the serious nature of the allegations and the negative opinions expressed about the appellant by [the primary affected persons].

Section 21(2)(f)

For personal information to be considered "highly sensitive" under section 21(2)(f), it must be established that the disclosure of the information would cause excessive personal distress to the individuals mentioned in the records (Order P-434). Much of the personal information in the records is information of which the appellant would already be aware through her interactions with the primary affected persons and others. For example, in some cases the primary affected persons refer to statements they indicate were made by the appellant. Other personal information in the records, such as the primary affected persons' opinions or views of the appellant, could be characterized as sensitive. However, in the circumstances, I am satisfied that the appellant is already aware of the nature of the opinions or views, given the history of their relationship. I am not satisfied that disclosing the specific opinions or views is likely to cause the primary affected persons excessive personal distress. Therefore, I conclude that section 21(2)(f) is not a relevant factor.

There some exceptions to this finding. Some small portions of the information contained in the records are highly sensitive in the circumstances. These portions relate to personal matters which only remotely pertain to the matters between the primary affected persons and the appellant. As a result, I find that section 21(2)(f) is a relevant consideration with respect to this information; I also find that this is a factor weighing significantly against disclosure.

Section 21(2)(h)

Section 21(2)(h) applies if "the personal information has been supplied by the individual to whom the information relates in confidence". I note that the e-mail contains a statement that "this information is strictly private and confidential", while the cover letter contains no such statement. However, the presence or absence of a confidentiality notation is not determinative of this issue. In my view, section 21(2)(h) 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. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.

In my view, any expectation the primary affected persons may have had in submitting the records to the Ministry was not reasonable in the circumstances. Firstly, most of the substantive information is contained in the e-mail, as opposed to the letter. This e-mail was sent to the third and fourth affected persons, as well as the Ministry. There is no indication of a confidential relationship between the primary affected persons and the third and fourth affected persons. The fact that no such relationship exists is reflected in the third and

fourth affected persons' statements to the effect that their interests would not be affected by disclosure of the records. Moreover, the Ministry provided no evidence of any understanding of confidentiality with respect to these records at the time they were received. This is not surprising, given the fact that it was provided to the Ministry on an unsolicited basis. Thus, by disclosing the e-mail to such persons beyond the Ministry, the primary affected persons have conducted themselves in a manner which is not consistent with a claim of confidentiality as between themselves and the Ministry. The letter contains very little substantive information by comparison to the e-mail, and this information is of a very similar character to that in the e-mail. As a result, I find that section 21(2)(h) is not a relevant consideration in the circumstances.

In her Order P-1436, Adjudicator Laurel Cropley stated with respect to information provided by referees in an adoption homestudy process:

> I find that, in order to protect the interests of children to be placed in prospective adoptive families, the process of assessing the home environment must provide for a degree of confidentiality for individuals providing references pertaining to the prospective adoptive parents.

In my view, Order P-1436 is distinguishable from the present case. In the earlier case, the referees were given clear assurances of confidentiality and indicated that they would not have provided the information had those assurances not been given. Inquiry Officer Cropley found that confidentiality must be upheld in order to ensure that future potential referees provide information without fear of being identified and having their views made known to the adoption applicants. In this case, the appellant clearly is aware of the identity of the individuals who submitted the information (the primary affected persons). Further, the information was not being supplied to the Ministry on the Ministry's request, and was not supplied as part of the adoption process (the Ministry submitted that it is not its practice to involve facilitators in the adoption assessment process, nor to solicit their evaluations). Therefore, in my view, the "chilling" effect on the adoption evaluation process which Adjudicator Cropley alluded to in her Order P-1436 would not apply in the circumstances of this case.

Section 21(2)(e)

I found above that disclosure could not reasonably be expected to seriously threaten the safety or health of the primary affected persons under section 20. The factor at section 21(2)(e) refers to unfair exposure to "pecuniary or other harm" by disclosure. This factor could apply in the event of a physical, mental or economic harm. For the reasons outlined above under section 20, I am not persuaded that physical harm would result from disclosure. While the primary affected persons could come to economic harm through potential legal proceedings, this cannot be characterized as "unfair". Further, any connection between potential economic harm and disclosure of these particular records is remote, at best. Finally, I am not satisfied based on the material before me that disclosure of these records would cause the primary affected persons mental harm. I find that the section 21(2)(e) factor also is not relevant in the circumstances of this case.

Factors weighing in favour of disclosure of "highly sensitive" personal information

I found above that some small portions of the information contained in the records are highly sensitive, and that this section 21(2)(f) factor weighs significantly against disclosure. The appellant has not cited any particular factors weighing in favour of disclosure which might outweigh this factor. In the circumstances, I find that no factors apply to outweigh the significant section 21(2)(f) factor.

Conclusion

Since I found that section 21(3) does not apply here, and that no factors under section 21(2) weigh against disclosure of the records, the information is not exempt under section 21 and 49(b). The exceptions to this conclusion are the small portions of information I found were highly sensitive within the meaning of section 21(2)(f).

ORDER:

1. I order the Ministry to disclose the records to the appellant, with the exception of the information highlighted in the copy of the records provided to the Ministry with this order, no later than **June 1, 1999**, but not earlier than **May 27, 1999**.

2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant pursuant to Provision 1.

Original signed by: April 28, 1999
David Goodis
Senior Adjudicator