



Information and Privacy  
Commissioner/Ontario

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

# **ORDER PO-1767**

Appeal PA-990232-1

Ministry of Community and Social Services



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## **NATURE OF THE APPEAL:**

The Ministry of Community & Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of all records relating to the appellant, including “writings by [three named individuals]” and:

1. notes of any conversations between [three named individuals];
2. any unsolicited letters, notes or phone calls received in regards to [the appellant];
3. reasons for instructing [one of the named individuals] to withdraw her support of the adoption application.

The Ministry located 38 pages of responsive records and granted access to some of them. Access to pages 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18 and 19, in whole or in part, was denied on the basis of section 21(1) of the Act (invasion of privacy), with reference to the considerations listed in sections 21(2)(e) (unfair exposure to pecuniary or other harm), 21(2)(f) (highly sensitive information), 21(2)(h) (information supplied in confidence) and 21(2)(i) (unfair damage to reputation) of the Act.

The appellant appealed the decision to deny access, and also raised the possible application of the consideration favouring disclosure which is set forth in section 21(2)(d) (fair determination of rights) of the Act.

During mediation, the appellant provided this office with a consent executed by his wife to the disclosure of her personal information to him and confirmed that the sole issue in this appeal is whether he is entitled to access to the withheld information contained in the records.

The Ministry subsequently advised that, in addition to section 21(1), it was relying on the discretionary exemption in section 49(b) of the Act.

A Notice of Inquiry was provided to the Ministry and two of the individuals referred to in the records who are resisting the disclosure of the information which relates to them (the affected persons). Following the receipt of the representations of these parties, I decided not to share their submissions with the appellant, based on concerns which I had about the confidentiality of the information which they contained. A Notice of Inquiry was then provided to the appellant, who also made submissions.

## **RECORDS:**

The records at issue (pages 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18 and 19) consist of an interoffice memoranda, notes and an International File Information Sheet.

## **DISCUSSION:**

## **PERSONAL INFORMATION**

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual, including 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.

The appellant submits that because all of the records relate to certain allegations made by others about him, they contain “the views and opinions of another individual (the affected persons) about the individual (himself),” as defined in section 2(1)(g) of the definition of the term “personal information.” I agree with this assertion. Because all of the records relate directly to the allegations made against the appellant, they contain his personal information within the meaning of section 2(1)(g).

In addition, some of the records also contain the personal information of the appellant's wife, specifically, her name along with other information relating to her marriage to the appellant (section 2(1)(h)). As noted above, during mediation the appellant's wife has consented to the disclosure of her personal information to the appellant.

Many of the records also contain the personal information of the two affected persons and one other identifiable individual. In particular, the information about these individuals relates to their education, medical, psychiatric and employment history (section 2(1)(b)) and includes their addresses, telephone numbers (section 2(1)(d)) and their names along with other personal information relating to them (section 2(1)(h)).

I also find that the undisclosed portion of page 10 contains only personal information which relates to the appellant. As the exemptions in section 21(1) and 49(b) cannot apply to personal information which relates solely to the requester, I find that the appellant must be given access to the undisclosed portion of page 10. Similarly, the undisclosed portion of page 18 contains only the personal information of the appellant and his wife, who has consented to the disclosure of her personal information to him. In accordance with my reasoning above, I will order that the severed portion of page 18 also be disclosed to the appellant (Orders M-1141 and PO-1756).

In addition, the undisclosed information contained in page 11 was supplied by the appellant to the Ministry in the course of an interview with him and his wife. In Order M-444, former Adjudicator John Higgins found that applying the presumption in section 14(3)(b) of the municipal Act to information which the appellant or her representative originally provided to the Police would, applying the rules of statutory interpretation, lead to an “absurd result.” He found that to apply the presumption in that case would be contrary to one of the purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This reasoning has been applied in a number of subsequent orders of this office (Orders M-451, M-613 and P-1457, PO-1723).

In the present appeal, it would be contrary to the purposes of the Act, and would result in an absurdity to apply section 21(1) to information which was provided by the appellant to the Ministry. I will order, accordingly, that the appellant be given access to the undisclosed information contained in page 11.

By way of summary, I find that pages 2, 4, 5, 6, 7 and 8 in their entirety and the undisclosed portions of pages 9, 12, 13, 15, 16 and 19 contain the personal information of the appellant, his wife and several other identifiable individuals, including the affected persons.

## **INVASION OF PRIVACY**

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and another individual and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the appellant access to that information.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767]. It found that a section 21(3) presumption can be overcome if the personal information at issue falls under section 21(4) of the Act or if a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 23 exemption.

In this case, the only exception to the section 21(1) exemption which could apply is section 21(1)(f), which reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

The Ministry submits that pages 5 and 9 contain information relating to the psychiatric history of one of the affected persons and that its disclosure is, therefore, presumed to constitute an unjustified invasion of the personal privacy of that individual under section 21(3)(a). This section states that:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

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relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

In addition, both the Ministry and the affected persons argue that the following considerations listed in section 21(2) apply to the personal information contained in the remaining records:

- the individual to whom the information relates will be exposed unfairly to pecuniary or other harm - section 21(2)(e);
- the personal information is highly sensitive - section 21(2)(f);
- the personal information has been supplied by the individual to whom the information relates in confidence - section 21(2)(h);
- the disclosure may unfairly damage the reputation of any person referred to in the record - section 21(2)(i).

The appellant has made extensive submissions refuting the application of each of the considerations listed above. In addition, he argues that the factors favouring disclosure which were analysed by Adjudicator Laurel Cropley in Order PO-1731 apply to the present appeal. The appellant submits that fairness considerations with regard to the Ministry's own adoption application policies require that the records be disclosed. He submits that he consented to having the Ministry contact the affected persons and was told that their comments would be shared with him and would be provided to a psychologist who would prepare an impartial assessment of the situation.

In addition, he argues that his ability to know and understand the nature of the allegations against him is a significant factor weighing in favour of disclosure. The appellant suggests that without knowing the nature of the comments made about the adoption application, he is unable to respond to them. This places him in the untenable position of being unable to answer the allegations and thereby proceed further with the adoption application, according to the appellant.

### **Application of the Presumption in Section 21(3)(a)**

I find that portions of pages 5 and 9 contain information relating to the psychiatric history of one of the affected persons. Accordingly, this information falls within the ambit of the presumption in section 21(3)(a) and its disclosure is presumed to constitute an unjustified invasion of that individual's personal privacy.

### **Application of the Considerations in Section 21(2)**

#### **Section 21(2)(e) - Unfair Exposure to Pecuniary or Other Harm**

The Ministry submits that it has concerns about the mental health of one of the affected persons should the information in the records be disclosed to the appellant. It suggests that disclosure will unfairly expose this individual to injury to her mental state. The affected persons indicate that they also have concerns for their own personal safety and mental health, as well as that of another individual, should the information contained in the records be disclosed to the appellant.

The appellant argues that there is no credible basis for suggesting that he may be the cause of any unfair pecuniary or other harm to either the affected persons or anyone else.

I find that I have not been provided with sufficient evidence to enable me to conclude that the disclosure of the information at issue will expose any individuals to pecuniary or other harm. Neither the submissions of the parties resisting disclosure nor the records themselves would give rise to any suggestion that the appellant would take steps to unfairly expose the affected persons or anyone else to harm of any sort. Accordingly, I cannot give this consideration any significant weight.

### **Section 21(2)(f) - Highly Sensitive Information**

The affected persons submit that the information contained in the records is highly sensitive. The Ministry concurs and suggests that its release to the appellant would cause severe harm to one of the affected persons' mental health.

The appellant argues that in order for personal information to be regarded as highly sensitive, it must be established that its release would cause excessive personal distress to the individuals affected. The appellant suggests that, as was held in Order P-434, it is not sufficient that release might cause some level of embarrassment. In addition, the appellant argues that since the information relates to his "parenting style," it is already known to him, if it is true. If, on the other hand, it is not true, the appellant submits that its disclosure would not cause excessive personal distress to any individuals. He argues that the Act is not designed to protect individuals from distress caused by their providing inaccurate and potentially damaging information to the Ministry. The appellant also points out that disclosure to him of the information contained in the records would not result in any further, wider distribution of it.

By its very nature, the information contained in the records is "highly sensitive" within the meaning of section 21(2)(f). The allegations made against the appellant are of a serious nature and the records contain a great deal of very intimate personal information about the affected persons and their lives. In my view, its disclosure to the appellant, who is the subject of the allegations, would cause excessive personal distress to the affected persons and another identifiable individual.

In addition, the records also describe the sequence of events which gave rise to the Ministry's "change of heart" regarding its support for the appellant's adoption application. I also find this information, particularly that which outlines the reasons behind the Ministry's actions, to be highly sensitive within the meaning of section 21(2)(f). I find this to be a very compelling consideration when balancing the appellant's right of access against the privacy protection interests of the other parties to the appeal.

### **Section 21(2)(h) - Information Supplied in Confidence**

The Ministry states in no uncertain terms that it provided the affected persons with an assurance of confidentiality. The Ministry also indicates that this assurance was also granted by the social worker who contacted the affected persons. The notes which form part of the records at issue make it clear that assurances of confidentiality were sought by the affected persons and given by both the Ministry and social worker.

The affected persons similarly submit that they would not have provided the information which they did to the Ministry unless they received assurances that their information would not be shared with the appellant. Again, the records themselves clearly articulate the affected persons' expectation and assurance of confidentiality on the part of the Ministry.

The appellant has provided me with a copy of a letter from the social worker involved in his adoption application indicating that one of the affected persons did not speak to her in confidence. I prefer the evidence of the affected person who adamantly maintains that any information which was shared with the Ministry or the social worker was given with an expectation that it would be treated confidentially. This individual's submission on this point is unequivocal and consistent with the circumstances surrounding the provision of the information.

The appellant also cautions against placing an inordinate amount of emphasis on the confidentiality consideration in balancing the factors in section 21(2) favouring disclosure against those favouring privacy protection. He notes that, as described by Adjudicator Cropley in another adoption records case, Order P-1436, the confidentiality issue arises in situations where it is necessary to protect the interests of children being placed with prospective adoptive families. She commented in that case that the information provided by referees in adoptions may be entitled to a "degree of confidentiality," which the appellant argues may vary on a case-by-case basis.

I agree with the position taken by the appellant in this regard; the expectation of confidentiality in these cases does not create a presumption that if the information was provided in confidence it ought not be disclosed under any circumstances. Rather, as argued by the appellant, this consideration is one of several which must be balanced when evaluating whether the disclosure of the requested information would constitute an unjustified invasion.

I find, however, that the fact that the information was provided by the affected persons with a reasonably-held expectation that it would be treated in a confidential manner is a significant factor favouring the non-disclosure of this information. While not elevating the importance of this consideration to that of a presumption, I find it to be a meaningful and important factor in balancing the appellant's right of access against the affected persons' right to privacy.

### **Section 21(2)(i) - Unfair Damage to Reputation**

The Ministry argues that the disclosure of the information contained in the records would unfairly damage  
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the reputation of another identifiable individual. I note that this individual was not involved in making the allegations against the appellant. I find that this consideration may, therefore, weigh more in favour of disclosure rather than privacy protection as its release to the appellant would, in effect, serve to indicate the true source of the allegations against him.

### **Unlisted Factors - Fairness and the Ability to Respond to the Allegations**

The appellant argues that, as accepted by Adjudicator Cropley in PO-1731,

basic fairness requires that he be given an opportunity to respond to the comments of the affected persons when those comments clearly caused an adoption application which had been receiving favourable consideration until such comments were received to quickly and dramatically lose that support.

Without knowing what the affected persons' comments were, the appellant submits that he had no basis for even attempting to respond. The appellant also relies on the fact that he was advised by the Ministry that he would be entitled to have access to the affected persons' comments after he gave his consent to the Ministry contacting these individuals. The appellant indicates that he wishes to proceed with the adoption application but is unable to do so until such time as he can refute the allegations made against him. He suggests that he is now at an impasse, unable to proceed with the application until such time as he is aware of the nature of the allegations.

The appellant also seeks to distinguish the present situation from that which was present in the adoption under discussion in Order P-1436. Here, unlike the circumstances in Order P-1436, the adoption application which was poised to be recommended was then reversed following the receipt of some undisclosed information. According to the appellant, fairness dictates that he be granted the right of access to that information.

Similarly, unlike the situation addressed by Adjudicator Cropley in PO-1731, the appellant in the present case argues that he is not "aware of the nature of the allegations which have been made" and he has not "received a significant amount of information." The appellant indicates that he has not been apprised of the nature of the allegations, except in the most general way.

Again, I agree with the position taken by the appellant in this regard. The question of fairness and his ability to respond to the allegations made against him are significant factors favouring the disclosure of the information contained in the records. The appellant finds himself in the untenable position of being unable to re-initiate his adoption application on his and his wife's behalf until such time as he is able to refute the allegations made against him. Without access to the information in the records, it is difficult, if not impossible, for him to do so.

Adjudicator Cropley commented further in Order PO-1750 on the situation where a requester is seeking access to information provided to an institution by a third party which relates primarily to the requester. She held that:



However, in the circumstances of this appeal, the fact that the information is actually about the appellant is a relevant consideration. In this regard, I find that there is an inherent fairness issue in circumstances where one individual provides detailed personal information about another individual to a government body. In my view, this goes to the autonomy of the individual and his ability to control the dissemination and use of his own personal information, and is reflected in section 1(b) of the Act as one of the fundamental purposes of the Act. This section states:

The purposes of this Act are,

- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

In my view, this conclusion is also applicable to the present appeal. I find this to be a significant factor favouring the disclosure of these records, though it is not among the listed considerations in section 21(2). I give this factor a great deal of weight when balancing the appellant's right of access to this information against the privacy protection of the affected persons and other identifiable individuals.

### **Balancing the Considerations**

In Order PO-1756, I had occasion to address a similar fact situation involving a request for information provided to the Ministry by a third party regarding the requester's suitability to be an adoptive parent. In that case, I concluded that:

Balancing the factors favouring the protection of privacy in section 21(2) against the considerations favouring access, I find that the factors favouring the non-disclosure of these records are more compelling. The information was provided to the Ministry by the affected person with a clearly-stated expectation of confidentiality and makes reference to a number of highly sensitive facts relating to the affected person, the appellant and to other identifiable individuals. Because of the nature of the personal information in these records, particularly that which relates to other identifiable individuals, I must find that the considerations favouring privacy protection outweigh those which favour the appellant's right of access to them.

Appeals involving requests for information provided by third parties to adoption authorities necessarily involve highly-charged, emotional circumstances. Allegations about an individual's ability to be a prospective parent go directly to the root of a requester's personal life and carry with them an evaluative element which is of a most personal nature. This is compounded when the allegations are made between family members and involve historical, emotional and psychological matters which may stretch back for decades.

In the present circumstances, I am required to balance several very compelling considerations which favour privacy protection against similarly persuasive factors favouring the disclosure of the personal information in the records. In my view, the factors favouring the privacy interests of the affected persons and the other identifiable individual contained in the record outweigh those which favour disclosure. The personal information is highly sensitive in nature and I accept that its disclosure would undoubtedly cause the affected persons great emotional distress. I also put great emphasis on the fact that the personal information was only provided to the Ministry and the social worker by the affected persons after repeated assurances of confidentiality were requested and given. I find that from a public policy perspective, it is important that individuals be able to provide the Ministry with information respecting prospective adoptive parents with an assurance of confidentiality, where it is sought.

While the issue of fairness to the appellant and his right to answer the allegations made against him are important, in the circumstances of this appeal, I find that his right of access is outweighed by the more compelling factors favouring privacy protection.

**ORDER:**

1. I order the Ministry to provide the appellant with a copy of pages 10, 11 and 18 by April 26, 2000 but not before April 19, 2000.
2. I uphold the Ministry's decision to deny access to the remaining pages of the record.
3. In order to verify compliance with Provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the pages which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_

Donald Hale  
Adjudicator

\_\_\_\_\_ March 20, 2000