



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

ORDER PO-1910

Appeal PA_000322_2

Public Guardian and Trustee



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NATURE OF THE APPEAL:

A lawyer on behalf of a requester (the appellant) submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Public Guardian and Trustee (the PGT) as follows:

Recently [the appellant] applied to the [PGT] to replace the [PGT] as Statutory Guardian of Property of [the affected person] . . . The [PGT] was not satisfied that [the appellant] was a suitable applicant for the reason that several family members of [the affected person] did not support [the appellant's] application. In expressing this disapproval, [the appellant] believes that they wrote letters to the [PGT]. [The appellant] would like an opportunity to review these letters. To date the [PGT] has refused to provide them.

The PGT located four responsive records (consisting of five pages) and decided to deny access to them in full, on the basis of section 21 (personal privacy) of the *Act*.

The appellant then appealed the PGT's decision to this office. In her appeal letter the appellant stated that "the records contain information about [the appellant] only, and the disclosure of these records would not invade the author's privacy whatsoever."

During the mediation stage of the appeal, the PGT issued a revised decision letter, in which it stated it was relying on section 49(b), in conjunction with section 21, to deny access to the records.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the PGT, the four authors of the letters (the primary affected persons), and another affected person, the appellant's husband (the secondary affected person). Only the PGT and the secondary affected person provided representations in response. The PGT provided representations in support of its position to withhold the records, while the secondary affected person consented to any information about him being disclosed to the appellant. I then sent the PGT's representations and a Notice of Inquiry to the appellant, who provided representations in response.

RECORDS:

The records at issue in this appeal are four letters, consisting of five pages, from four individuals to the PGT concerning the appellant's application to the PGT.

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. The PGT submits that the records contain personal information relating to the appellant and the affected persons. The appellant makes no specific submissions on this issue. I agree with the PGT's submission. 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

The records contain three categories of personal information as follows:

- (i) information about the appellant and/or the secondary affected person only, including the views or opinions of the primary affected persons about the appellant and/or the secondary affected person [paragraphs (e) and (g); see Reconsideration Order R-980015];
- (ii) information about the appellant and/or the secondary affected person, combined with information about the primary affected persons; and
- (iii) information about the primary affected persons only; this information includes these individuals’ names, since disclosure of the names would reveal other personal information about these individuals, specifically that they provided information to the PGT about the appellant’s guardianship application [paragraph (h)].

The records also contain small portions of information which do not qualify as personal information, including names and business addresses of PGT employees. This information cannot qualify for exemption under section 49(b) of the *Act*.

RIGHT OF ACCESS TO ONE’S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF OTHER INDIVIDUALS’ PRIVACY

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”.

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.

Section 21(3): presumptions against disclosure

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

. . . [T]he information contained in the records consists of evaluations made by third parties regarding the appellant. The information also contains character references with respect to the appellant.

Given that the information contained in the record falls under one of the presumptions listed in Section 21(3), the release of this information would constitute an unjustified invasion of personal privacy. The only way information could be disclosed would be where the personal information falls under Section 21(4) of the *Act* or where a finding is made that there is a compelling public interest in the disclosure of the record pursuant to Section 23 of the *Act*. It is submitted that none of these apply in this case and therefore the information should not be released.

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 and/or the secondary affected person (who has consented to his information being disclosed to the appellant), by virtue of paragraph (g) of the definition of “personal information” in section 2(1) of the *Act* [see Order PO-1670]. Therefore, disclosure of this information cannot be presumed to constitute an unjustified invasion of the personal privacy of individuals other than the appellant and the secondary affected person, within the meaning of section 49(b) and section 21(3)(g). Accordingly, the presumption at section 21(3)(g) does not apply. The PGT has not claimed that any other presumptions are applicable in the circumstances, and I find that none applies. Therefore, section 21(3) does not apply to the records.

Section 21(2): factors in favour of or against disclosure

Introduction

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;

Representations

The Ministry submits:

It is clear that the information contained in the records is highly sensitive as it relates to views of third parties with respect to the applicant. The third parties have not consented to the release of this information and it may cause undue hardship to release these records to the appellant. The third parties are relatives of the appellant and the disclosure of this information may cause disruption in the family unit.

Furthermore, as stated earlier, the information was provided in confidence and therefore Section 21(2)(h) applies to the records in question.

I have been asked to comment on the applicability of Orders P-1320 and PO-1670 in the circumstances of this appeal. Our review of Order P-1320 indicates that the facts are extremely similar to the facts in this case. In that case, the [PGT] was also asked to release information relating to the name of an individual who made an allegation that the requester was incapable. The information was not released as it was considered to be confidential information of the individual who made the allegation. The appellant appealed our decision and Inquiry Officer Laurel Cropley upheld our decision not to release the information as the information was provided to our office in confidence.

Given the similarity of the issues in this appeal with Order P-1320, I would submit that this Order should be followed in this case.

I must distinguish Order PO-1670 from the current appeal. David Goodis, Senior Adjudicator who signed Order PO-1670 found that the personal information was not supplied by the individual in confidence and this was one of the reasons why the records were ordered to be released. It is quite clear, however, that in the current case the information supplied by the third parties was given to the [PGT] in confidence.

I cannot emphasize enough that it would be extremely difficult for the [PGT] to carry out its duties as guardian of property if it could not receive the information from third parties without expectation from these parties that the information would remain confidential. This information must be given an expectation of confidentiality, otherwise the [PGT] would not be receiving information that would assist in making crucial decisions. The individuals would be fearful that the information would be released to other parties and therefore no information would be forthcoming due to the concern for disclosure. It is therefore submitted that Section 21(2)(h) is the crux at issue and is the main difference between Order PO-1670 and Order P-1320.

There have also been other orders which have come to the same conclusion as Order P-1320. All of these orders deal with similar fact scenarios. Inquiry Officer Donald Hale found in favour of the [PGT] in Order P-1485 when the [PGT] refused to release the names of individuals who made an allegation that the appellant was mentally incompetent. The [PGT] was in receipt of letters about the appellant and the appellant wished these letters released. Inquiry Officer Hale found that there was a "reasonably-held expectation of confidentiality within the meaning of Section 21(2)(h)" and therefore ordered that the information not be released.

I submit that there was a similar "reasonably-held expectation of confidentiality" in this particular case.

The information in the records cannot be disclosed to the appellant in a severed fashion as it is all confidential information.

The appellant submits:

. . . Third parties were permitted to evaluate my character. I have a conscience. I am honest and trustworthy, financially and morally. These "third parties" are allowed to hide behind a curtain of "confidentiality" . . . Are you not obviously inviting the opportunity for "third parties" (especially non-supportive ones) to claim untruths, embellish, or fabricate inaccuracies by providing them the "protection of confidentiality." If what they say is in fact true, would I not already be privy to this information? The mere fact that any of the allegations against my character were not required to be proven and verified causes me to question their validity. Perhaps I'm mistaken, but I know of no one that was contacted by the PGT in their investigation to validate the information in these letters written by "third parties." Perhaps they felt they had no moral responsibility to do so. I do not know whether it was their legal duty to determine if the information was reliable, truthful and accurate.

There is no social interaction between the certain family members who wrote the letters, so there can be no injury to a relationship that does not exist . . .

Character is extremely important to me and is something that I take pride in and teach my teenagers about as well as being responsible and honest.

My character and integrity have suffered a great deal as a result of these letters. My other relatives . . . whom I respect very highly, encouraged and supported my application but have questioned me as to why I was denied. These doubts have damaged my character. Again, I value my character.

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I cannot believe that anyone has the right to say whatever they like about an individual (albeit true or false) and have their confidentiality protected. If that is their right, then where is my right. My right to protect and uphold my dignity. My character has been tarnished and I deserve the right to defend something I value and work hard to maintain.

Section 21(2)(f): highly sensitive

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). The PGT submits that disclosure of the information “may cause undue hardship” because the primary affected persons are relatives of the appellant, and “may cause disruption in the family unit”. In response, the appellant submits that “there is no social interaction between the certain family members who wrote the letters, so there can be no injury to a relationship that does not exist . . .” As indicated above, the primary affected persons provided no submissions. In the circumstances, particularly in the absence of submissions from the primary affected persons, I am not persuaded that disclosure of the personal information of the primary affected persons would cause excessive personal distress to those individuals. Therefore, the section 21(2)(f) factor is not applicable here.

Section 21(2)(h): supplied in confidence

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 [Order PO-1670].

The PGT submits that the primary affected persons provided their comments in confidence, but provides little or no evidence or argument to support this assertion. For example, the PGT has not indicated whether or not it gave assurances of confidentiality to the primary affected persons at the time it solicited their views. Further, I have no submissions from the very individuals who submitted the information as to what their expectations were when submitting the letters. Despite this, given the context and surrounding circumstances, I accept the PGT’s submission that information in the records was supplied by the primary affected persons in confidence. Although there may not have been any explicit assurances of confidentiality, the circumstances are such that a reasonable person would expect that information they supplied about themselves to the PGT (with the exception of their names, as discussed below) would be held in confidence. Therefore, the factor weighing against disclosure at section 21(2)(h) applies. This finding is

consistent with those in earlier orders in similar circumstances [see, for example, Order P-1320]. In the circumstances, I assign this factor moderate weight.

Despite the above, I find that the “supplied in confidence” factor does not apply to the names of the primary affected persons. As I found above, the names of these individuals in the context of these records is personal information, because it reveals other personal information about these individuals, specifically that they provided information to the PGT about the appellant’s guardianship application. In my view, on an objective assessment, neither the PGT nor the primary affected persons had a reasonable expectation that the names of the primary affected persons would be treated confidentially. This finding is supported by paragraphs (e) and (g) of the definition of personal information which read:

“personal information” means 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,

In my view, these provisions suggest that there is a diminished privacy interest in the identity of an individual who provides a view or opinion about another individual. If the views or opinions of an identifiable individual about another person are not the opinion-holder’s personal information, and can be disclosed, it is reasonable to expect that the opinion-holder’s identity, standing alone, could attract only a minimal privacy expectation at best, barring exceptional circumstances.

Section 21(2): other factors

While the appellant has provided her reasons why she would like access to the records, she has not tied these submissions to any of the section 21(2) factors favouring disclosure and, in the circumstances, I find that none applies.

Section 21(2): balancing of factors and conclusions

Based on the above, I find that disclosure of personal information in the records relating to the primary affected persons in conjunction with the appellant and/or the secondary affected person [category (ii) in the personal information discussion above], and the primary affected persons alone [category (iii) in the personal information discussion above], would constitute an unjustified invasion of personal privacy under section 49(b) of the *Act*. This information was supplied in confidence under section 21(2)(h), and there are no applicable factors weighing in favour of disclosure.

However, as indicated above, any personal information in the records which relates *solely* to the appellant and/or the affected person, including the primary affected persons' views or opinions about the appellant and/or the affected person, cannot qualify for exemption under section 49(b). In addition, any information which does not qualify as personal information cannot be exempt under section 49(b). Finally, because no factors apply in relation to the names of the primary affected persons, this information is not exempt under section 49(b).

I acknowledge the PGT's argument concerning the need for some degree of confidentiality in the type of process at issue here. I found this consideration to be applicable to the extent that it relates to personal information of individuals other than the appellant and the secondary affected person (with the exception of the names of the primary affected persons).

While it may be the case that previous orders of this office have found section 49(b) and 21 to apply to records in their entirety [for example, P-1320, P-1485], those results may have been reached because, in contrast to this case, it was not possible to sever the particular records without unjustifiably invading the privacy of individuals other than the appellant.

In the circumstances, I find nothing improper in the PGT's exercise of discretion in withholding the exempt portions of the record from the appellant.

ORDER:

1. I uphold the PGT's decision to withhold the records from the appellant, with the exception of the information described in order provision 2 below.
2. I order the PGT to disclose to the appellant the information relating solely to the appellant and/or the secondary affected person, as indicated on the copy of the record included with its copy of this order, no later than **July 5, 2001**, but not earlier than **June 28, 2001**.
3. In order to verify compliance with this order, I reserve the right to require the PGT to provide me with copies of the material provided to the appellant in accordance with provision 2.

Original Signed By: _____ May 31, 2001
David Goodis
Senior Adjudicator