



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2230

Appeal PA-030141-1

Office of the Public Guardian and Trustee



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BACKGROUND:

The Public Guardian and Trustee is mandated under the *Substitute Decisions Act* to investigate allegations that a person is incapable of managing property or incapable of personal care and that serious adverse effects are occurring as a result of this incapacity. Allegations are received in a variety of ways, including correspondence, telephone calls and interviews. Each allegation must be fully investigated.

NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (OPGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a letter from a third party to OPGT that “initiated an apparent investigation against [the requester], by the Guardianship Investigation Unit.”

OPGT identified the responsive record and claimed section 49(b) (invasion of privacy) as the basis for denying access to the requester. The requester (now the appellant) appealed the decision.

Mediation did not resolve this appeal, and the file was transferred to the adjudication stage of the appeal process.

I started my inquiry by sending a Notice of Inquiry to OPGT, outlining the facts and issues and inviting representations. OPGT submitted representations, which were then provided to the appellant along with a copy of the Notice. The appellant, in turn, submitted representations. I also sent the Notice to the author of the letter (the primary affected party), who responded objecting to disclosure.

RECORD:

The record consists of a handwritten fax cover-sheet and a three-page handwritten letter from the primary affected party to OPGT’s Guardianship Investigation Unit.

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemption in 49(b) only applied to information that qualifies as “personal information”, as defined in section 2(1) of the *Act*. To satisfy the requirements of the definition, the information must be “about an identifiable individual”, including:

- information relating to the medical, psychiatric or psychological history of the individual or information relating to a financial transaction in which the individual has been involved (paragraph (b));
- the address or telephone number of the individual (paragraph (d));
- the personal opinions or views of the individual except whether they relate to another individual (paragraph (e));

- correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature (paragraph (f));
- the views and or opinions of another individual about the individual (paragraph (g)); and
- 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 (paragraph (h)).

OPGT submits that the record contains the personal information of the appellant, the primary affected person and another individual identified in the letter (the secondary affected person). Specifically with respect to the primary affected person, OPGT submits:

Allegations that an individual is incapable of managing property and/or of personal care and that serious adverse effects are occurring or may occur as a result are issues that a reasonable person treats very seriously. Such matters are inherently private particularly where they relate to a family member or close friend. A reasonable person would expect correspondence describing such allegations to be treated as confidential. Even disclosing the fact that an individual has made such allegations to our office is likely to have a negative impact upon the relationship between the person making the allegations and the person alleged to be incapable. It is therefore submitted that the record contains private or confidential correspondence from the primary affected person, which is the personal information of the primary affected person. This view is consistent with previous IPC Orders that have found such information to be personal information (see P-1261, P-1320, P-1485).

Neither the appellant nor the primary affected party make specific representations on whether the information contained in the record is "personal information" as defined by the *Act*.

Clearly, the record contains the appellant's personal information. It includes information about his medical history and about financial transactions relating to his care (paragraph (b)). The record also contains the views and opinions of the primary affected party about the appellant and the secondary affected party, which constitutes the personal information of both of these individuals (paragraph (g)).

I also accept OPGT's submissions with respect to the application of paragraph (g), and find that the record constitutes correspondence sent by the primary affected party to OPGT with a reasonably held expectation that it be treated confidentially, thereby qualifying as the personal information of the author of the letter.

UNJUSTIFIED INVASION OF ANOTHER'S PERSONAL PRIVACY

Introduction

While section 47(1) of the *Act* gives individuals a general right of access to their own personal information, this right is not absolute. Section 49 lists a number of exceptions to this general right of access, including section 49(b), which deals with the situation where a record contains the personal information of both a requester and another individual.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that disclosure would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution discretion to deny the requester access to his/her personal information.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether section 49(b) applies. Section 21(2) lists a number of factors for the institution to consider in deciding whether disclosure would constitute an unjustified invasion of privacy; and section 21(3) lists certain types of information whose disclosure is presumed to 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 21(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Representations

The appellant's representations do not deal specifically with any of the factors in section 21(2) or the presumptions in section 21(3).

OPGT submits that the factors listed in sections 21(2)(e), (f), and (h) are relevant. These sections read:

A head, in determining whether a disclosure of personal information constitutes and unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

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

(f) the personal information is highly sensitive; and

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

All of these factors favour privacy protection.

Section 21(2)(e)

As far as section 21(2)(e) is concerned, OPGT submits:

Disclosing the name of the person who alleges that a person is incapable of managing property or incapable of personal care and that serious adverse effects are occurring as a result will sometimes have negative consequences for the person making the allegations. Disclosing such information could reasonably be expected to disrupt the relationship between the individual making the allegations and the alleged incapable person. ...

The primary affected party's representations do not specifically refer to section 21(2)(e), but she does express concern for her safety and points out that she has received two letters she considers to be threatening.

Section 21(2)(f)

OPGT also takes the position that the information in the record is highly sensitive, and submits:

Allegations of incapacity and of serious adverse affects are serious matters. Referring such matters to the OPGT Investigations Unit can have significant consequences. Given the intrusive nature of a guardianship investigation and the possibility that the person might be found to be mentally incapable, the commencement of an investigation is often unwelcome.

The fact that a person has alleged that another person is incapable and is in need of protections as a result of their incapacity, is highly sensitive because the disclosure of such information is likely to disrupt the relationship between the person alleging the incapacity and the individual in question. This is a serious result for persons who are related and would cause excessive personal distress to the person making the allegations if the information is disclosed.

Section 21(2)(h)

The primary affected party submits that she provided the letter in confidence and asks that the information in it remain confidential.

OPGT submits:

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 the expectation is reasonable in the circumstances. A number of IPC

Orders have confirmed the OPGT's decisions to refuse access to information relating to guardianship investigations (see P-1261, P-1320, P-1485). In light of these decisions, the OPGT has a reasonable expectation that such information can be kept confidential. This expectation of confidentiality is communicated to members of the public in the OPGT's brochure, Role of the OPGT in Guardianship Investigations...

...

In addition, it is submitted that the content of the information and the circumstances in which it was provided to the OPGT is evidence that the primary affected person had a reasonable expectation of confidentiality when they submitted the information to the OPGT Investigations Unit.

...

It is submitted that it would be difficult for the OPGT to protect mentally incapable adults if it could not receive information from third parties without an expectation that the information would remain confidential. If information received from third parties cannot be treated confidentially then the majority of persons would be reluctant to provide such information. This would have a chilling affect on the OPGT's ability to identify mentally incapable individuals who are in need of protection.

Section 21(2)(g)

Although the appellant does not make specific reference to any of the factors in section 21(2) in his representations, he submits generally that information contained in the record is malicious, vindictive and without merit. I take this to mean that he is challenging the accuracy and reliability of the information in the record, which is a factor listed in section 21(2)(g) which favours disclosure.

Findings

Having reviewed the record and considered the representations, I make the following findings:

- While I acknowledge that disclosing the information in the record might be uncomfortable for the primary affected party, given the acrimonious relationship between her, the appellant and the secondary affected party, the evidence and argument put forward by OPGT and the primary affected party do not persuade me that disclosure would expose the primary affected party to pecuniary or other harm, or that any such harm would be "unfair" in the circumstances. Accordingly, I find that section 21(2)(e) is not a factor under consideration in this appeal.

- I accept that disclosing the record could reasonably be expected to cause excessive personal distress to the primary affected party, thereby satisfying the requirements of “highly sensitive” under section 21(2)(f) (Orders M-1053, P-1681, and PO-1736). Past orders have found section 21(2)(f) to be relevant in the context of a letter written to OPGT alleging inadequate care was being provided to an individual who was physically and mentally ill; an application submitted to OPGT to replace OPGT as the Statutory Guardian of property of another individual; and a letter which initiated an investigation into the competence of a requester (Orders PO-1910, PO-1485 and PO-1320). Section 21(2)(f) is a factor favouring privacy protection and, in my view, it should be accorded significant weight in the circumstances of this appeal.
- I accept the position put forward by both OPGT and the primary affected party that the record was supplied in confidence. As OPGT points out in its representations, section 21(2)(h) applies if both the supplier and the recipient of the information had a reasonable and objective expectation that it would be treated confidentially (Order P-1670). It is clear to me, based on the particular circumstances of this appeal and the more general operational considerations described by OPGT for the administration of its programs, that allegations of the nature described by the primary affected party would be treated confidentially by OPGT and the individual making the allegation. Section 21(2)(h) is another factor favouring privacy protection and, in my view, it should also be accorded significant weight in the circumstances of this appeal (Orders PO-1910, P-1485 and PO-1320).
- The appellant’s representations do not provide a sufficient basis for concluding that the information in the record is **likely to be** inaccurate or unreliable, other than the fact that he is involved in an ongoing dispute with the primary affected person and that they disagree. Accordingly, I find that the section 21(2)(g) factor favouring disclosure is not a relevant consideration in the circumstances of this appeal.

Balancing of the factors and circumstances

In balancing the various section 21(2) factors, I find that those favouring privacy protection clearly outweigh any favouring disclosure. Although the record contains the appellant’s personal information and is predominately about him, in my view, this is not sufficient to outweigh the fact that the information provided by the primary affected party is both highly sensitive and, perhaps most importantly, provided to and received by OPGT in confidence.

Accordingly, I find that the disclosing the information contained in the record would constitute an unjustified invasion of the affected party’s personal privacy, and therefore qualifies for exemption under section 49(b) of the *Act*.

EXERCISE OF DISCRETION

Section 49 is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under this section, OPGT must exercise discretion in deciding whether or not to disclose it. On appeal, this office may review OPGT's decision in order to determine whether it exercised discretion and, if so, whether it erred (Orders MO-1286-F and MO-1287-I).

Having reviewed of all of the circumstances surrounding this appeal and the detailed representations provided by OPGT, I have concluded that OPGT took into account the particular circumstances involving the various parties in reaching its decision to apply the section 49(b) exemption in this appeal. I am satisfied that there was no error in the exercise of its discretion not to disclose the record under section 49(b).

ORDER:

I uphold OPGT's decision not to disclose the record.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

January 27, 2004