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

ORDER PO-2560

Appeal PA-030255-1

Ministry of Health and Long-Term Care

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NATURE OF THE APPEAL:

The Ministry of Health and Long-Term Care (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information about a complaint the requester had made to the Ministry. The requester was a former patient of a psychiatrist (the affected party) and had submitted the complaint, which related to the affected party's billing practices. During its investigation of the complaint, the Ministry had received a copy of the requester's medical record compiled by the affected party.

The Ministry located 34 responsive records, one of which includes the medical record. Before issuing its decision in response to the request, the Ministry notified the affected party of the request pursuant to section 28 of the *Act* and sought his views on disclosure of the records. In response, the affected party indicated to the Ministry that he had concerns that disclosure of the records could prejudice the health of the appellant, and could also raise concerns about the safety of the affected party.

The Ministry decided to grant the appellant partial access to the records, relying on the following exemptions in the *Act*:

- section 49(a) (denial of access to one's own personal information) in conjunction with section 20 (danger to health or safety);
- section 19 (solicitor-client privilege);
- sections 21(1) and 49(b) (personal privacy); and
- section 49(d) (harm to the health of the requester).

The Ministry also provided the appellant with an index describing the records at issue.

The requester (now the appellant) appealed the Ministry's decision. Mediation did not resolve the appeal, which therefore moved on to the adjudication stage of the appeal process.

I began the adjudication by sending a Notice of Inquiry to the Ministry and the affected party, setting out the facts and issues and inviting them to provide representations. In response, both the Ministry and the affected party provided representations. I then sent a Notice of Inquiry to the appellant enclosing the non-confidential portions of the Ministry's representations. The representations of the affected party were withheld because they are confidential. I then received representations from the appellant.

The appeal raises the issue of whether disclosure of the medical record and a letter from the affected party to the Ministry could reasonably be expected to prejudice the mental or physical health of the appellant (section 49(d)) or seriously threaten the safety or health of an individual (sections 49(a)/20). Upon reviewing the representations I received, I decided to retain a medical expert to review the records for which these sections had been claimed in order to obtain an expert opinion as to whether the harms identified in these exemptions could reasonably be expected if these records were disclosed. Before doing so, I invited comments from all parties on the *curriculum vitae* of the expert I proposed to retain, who is a psychiatrist licensed to

practice in Ontario, and also a member of the Law Society of Upper Canada. When I did not receive any objections, I retained the expert as proposed.

The expert then reviewed these two records, as well as the Notice of Inquiry and the representations of the parties I had received to that point, and provided his report to me. I gave the Ministry and the affected party an opportunity to review the report and make comments on its findings. I received representations from the affected party on this issue. The Ministry informed this office that it would not be providing any response to the expert report. No further representations were sought or received.

Large portions of the affected party's medical record, particularly the affected party's clinical notes of his sessions with the appellant, were extremely difficult to read. Fortunately, the affected party had a transcribed copy which he provided to this office. As this record is not under the custody or control of the Ministry, only the handwritten version of the notes is at issue in this appeal. The typed version of the notes might be available from the affected party if the appellant asks for them under the *Personal Health Information Protection Act*.

By way of further background, the appellant also made a complaint to the College of Physicians and Surgeons of Ontario (CPSO) about the affected party, and initiated a Small Claims Court action against him. I understand that the complaint has now been resolved and the Small Claims Court action has been withdrawn.

RECORDS:

In its representations, the Ministry indicates that it is prepared to disclose a copy of a cheque written by the appellant that appears at page 2 of Record 14. This information is therefore not at issue. If the Ministry has not already disclosed page 2 of Record 14, it should do so immediately. The 10 records that remain at issue in this appeal, in whole or in part, are described in the index set out below.

Record Number	Description	Exemption claimed	Withheld in part or in whole
1	Handwritten note from file folder	section 21	Withheld in part
14	Letter from the affected party to the Ministry including the appellant's medical records	section 49(a) in conjunction with section 20, sections 49(b) and 49(d)	Withheld in part
17	Investigations/Recoveries Phone Log	section 21	Withheld in part
18	Notes to file of legal counsel	section 19	Withheld in full
21	Letter from the affected party to the Ministry	sections 49(b) and (d)	Withheld in full
23	Letter from the Ministry to the affected party	section 21	Withheld in part

Record Number	Description	Exemption claimed	Withheld in part or in whole
24	Notes to file	section 21	Withheld in part
26	Ministry email attaching draft letter to the appellant and draft letter to the affected party	section 21	Withheld in part
29	Ministry email attaching draft letter to the appellant and draft letter to the affected party	section 21	Withheld in part
33	Affected party's physician billing record	section 21	Withheld in full

DISCUSSION:

SCOPE OF REQUEST/PERSONAL INFORMATION

The appellant's representations do not specifically address which records constitute personal information and/or to whom that personal information relates. His comments concerning this issue pertain to what information he actually seeks to obtain by means of this appeal:

> While I have no interest in information such as the billing number of the Doctor and have no issue with such information and other irrelevant information (i.e. Current status with CPSO, educational history, solicitor/client privilege information, etc.) being blocked in any documents shared, I do have issue with any information concerning the Appellant not being shared….
>
> …
>
> …[A]ny records not containing personal information about the appellant are of little or no interest to me. The only exception would be where there are representations made about billings in this case or … supposed discussions with the appellant regarding billings in this case.

As a consequence of this submission, information identified by the appellant as information to which he does not seek access is not at issue. Accordingly, any records that do not contain the appellant's own personal information, information about billings by the affected party and/or discussions with the appellant about billings are not at issue in this appeal. I will identify the information that is not at issue in the analysis that follows.

As well, in order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is

defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In its representations, the Ministry submits that all of the records contain personal information. The Ministry categorizes the records in three groups, as shown in the following table:

Group Number	**Group 1**	**Group 2**	**Group 3**
Description	Records containing only the affected party's personal information	Records containing personal information of both the appellant and the affected party	Records containing only the appellant's personal information
Records	Records 1, 17, 18, 24, 33 and page 1 of record 21.	Records 23, 26, 29, page 1 of record 14 and pages 3-4 of record 21	The body of record 14.

The affected party did not provide representations concerning this issue.

Group 1

The Ministry submits that Records 1, 17, 18, 24, 33 and page 1 of record 21 contain the personal information of the affected party only.

In particular, the Ministry submits that the affected party's service provider or "billing" number in Record 1 is the affected party's personal information. The Ministry also submits that, within Records 1, 17, 18, 24 and page 1 of record 21, all billing-related information and information about the Ministry's investigation into the affected party's billing practices qualify as the affected party's personal information. The Ministry also submits that Record 33 contains the affected party's personal information.

While in some instances it might be argued that the affected party's billing information is professional information and not personal information, the investigation into the affected party's billing practices indicates that, in the context of this appeal, such information is in fact the affected party's personal information, and this is reflected in the record-by-record analysis that follows. An important qualification in this regard is that, even when he is responding to the Ministry's investigation, opinions expressed by the affected party *about the appellant* that arose in the context of their professional relationship are the personal information of the appellant only (see paragraphs (f) and (g) of the definition of personal information). Such opinions relate to the affected party in his professional capacity only and are not his personal information.

Turning to the specific records, and beginning with record 1, it is clear from the appellant's submissions (referred to above) that the affected party's billing number in this one-page handwritten record is not at issue. I therefore need not determine whether or not the billing number is personal information. I find that the remaining severed information in record 1 (which relates to the affected party's billing practices) is the affected party's personal information, and

remains at issue because of its subject matter. This record contains no personal information of the appellant.

Regarding record 17, I find that some of the severed information consists of another identifying number relating to the affected party, which is not at issue as it falls within the information the appellant indicates he does not seek to obtain. The remaining severed information is not personal information as it clearly relates to an individual strictly in her professional capacity. However, this information is not the appellant's personal information, and is also not information about billings by the affected party and/or discussions with the appellant about billings. Accordingly, I find that none of the severed information in record 17 remains at issue. I will not discuss this record further.

Record 18 consists of notes prepared by a solicitor with the Ministry in relation to the investigation of the affected party's billing practices in response to the appellant's complaint. Although only the affected party is identified by name in this record (insofar as I am able to read it), it also refers to the "patient". In my view, this individual is reasonably identifiable as the appellant, and accordingly, I disagree with the Ministry that the record contains only the affected party's personal information. I find that it contains the personal information of both the affected party and the appellant. This record remains at issue because of its subject matter.

Record 21 consists of four pages. It is a fax from the affected party to the Ministry in response to a query from the Ministry during its investigation of the appellant's billing complaint. Pages 1-2 are a fax cover, and pages 3-4 are a letter from the affected party to the Ministry. The Ministry submits that page 1 belongs in Group 1, containing only the personal information of the affected party, and that pages 3 and 4 belong in Group 3, *i.e.*, they contain the personal information of both the affected party and the appellant. The Ministry does not make submissions about whether page 2, which contains very little text, contains personal information. In my view, this record, which was faxed as a unit, should be viewed as a totality.

I find that page 1 of record 21 contains the affected party's personal information only, and page 2 does not contain personal information about anyone. However, pages 1-2 are simply a fax cover page for a letter from the affected party to the Ministry, and contain neither the appellant's personal information nor information about billings by the affected party and/or discussions with the appellant about billings. Pages 1-2 of record 21 are therefore not at issue.

I find further, concerning record 21, that the letter itself (pages 3-4) contains the personal information of both the affected party and the appellant. I also note, however, that the great bulk of this record consists of the affected party's professional views concerning the appellant, and as discussed above, this is the appellant's information, not the affected party's. The affected party's business address is also not his personal information, as conceded by the Ministry in its representations. Pages 3-4 of record 21 remain at issue because they contain the appellant's personal information and, as well, include information about the Ministry's investigation of the affected party's billing practices.

The information withheld from Record 24 is, in my view, about an individual in her professional capacity, and not personal information. However, it is also not the appellant's personal information, nor does it contain information about billings by the affected party and/or discussions with the appellant about billings. I therefore find that the severed information from this record is not at issue. I will not discuss this record further in this order.

Record 33 contains information about the affected party's CPSO status, education and billings, which, as noted previously, is not at issue based on the appellant's submissions. The record contains further information about the affected party that is not the appellant's personal information, nor information about billings by the affected party and/or discussions with the appellant about billings, and this is also not at issue. The remainder of the record relates to the affected party's OHIP billing history, constitutes the affected party's personal information for the reasons indicated earlier, and is at issue. Record 33 does not contain the appellant's personal information.

Group 2

The Ministry submits that records 23, 26, 29, page 1 of record 14 and pages 3-4 of record 21 contain the personal information of both the appellant and the affected party. I have dealt with record 21 in its entirety under Group 1, above.

I agree with the Ministry that record 23, a letter to the affected party from the Ministry, contains the personal information of both the appellant and the affected party. It relates to the investigation of the appellant's billing complaint. I make the same finding about the withheld portion of record 26, which is correspondence from the Ministry to the affected party concerning the appellant's billing complaint. A different version of the correspondence withheld in record 26 appears as the severed portion of record 29, which I also find to contain the personal information of both the appellant and the affected party. In view of the contents of these records, they remain at issue.

Page 1 of record 14 is a brief cover letter from the affected party to the Ministry enclosing his medical record concerning the appellant. Given that it relates to the Ministry's investigation of the appellant's billing complaint against the affected party, I find that this letter contains the affected party's personal information. As noted previously, this does not include the affected party's professional address, which is professional information and therefore not personal information. The affected party's information in this record is not the appellant's personal information, nor does it contain billing-related information, and I therefore find it is not at issue. In fact, this page of the record contains no billing-related information. With respect to the appellant's personal information in this page of the record, he is not named but his health number appears and qualifies as his personal information because it is an "identifying number" (paragraph (c) of the definition). However, no purpose would be served by ordering disclosure of a severed copy of the record showing only the appellant's health number. This would be an isolated piece of meaningless information and I will not order it disclosed (see *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)* (1997), 102 O.A.C. 71

(Div. Ct.), also reported at [1997] O.J. No. 1465). I will therefore not refer to page 1 of record 14 again.

Except for a copy of a cheque found at page 2 of record 14 (which I found above was not at issue), the affected party's medical record concerning the appellant comprises the remainder of record 14. The medical record is discussed under Group 3, below.

Group 3

The Ministry submits that the remainder of record 14, comprising the affected party's medical record concerning the appellant, contains only the appellant's personal information. Given that it includes the consultation notes taken by the affected party in connection with the appellant, I find that it contains the appellant's personal information. In my view, references to the affected party in this record, and to several other professionals whom the appellant had previously consulted, relate to these individuals in their professional capacity and are not their personal information. In view of the appellant's descriptions of interactions with his wife, I find that this part of the record contains the appellant's wife's personal information. The record also documents information discussed by the appellant and the affected party about several members of the appellant's family, which I find to be their personal information. Given its content, this record remains at issue in this appeal.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

Section 49(d)

The Ministry claims that the medical record in record 14 and pages 3-4 of record 21 are exempt under section 49(d), which states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > that is medical information where the disclosure could reasonably be expected to prejudice the mental or physical health of the individual;

In *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395, the Court of Appeal said that the requirement for "detailed and convincing" evidence to establish a reasonable expectation of harm that applies in the context of section 17 and other exemptions is too high for situations involving threats to bodily integrity such as the harms contemplated in sections 14(1)(e) and 20. For those exemptions, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must

demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated. In my view, this same standard ought to apply in the case of section 49(d), since it applies where disclosure "could reasonably be expected to prejudice the mental or *physical health* of the individual" (emphasis added).

Turning to the potential application of the exemption, it is clear that the parts of the records for which it is claimed consist of "medical information," since they are the affected party's consultation notes of psychiatric counselling sessions with the appellant (Record 14), and a letter to the Ministry responding to a question, in which the affected party explains an aspect of his treatment of the appellant (pages 3-4 of Record 21). The analysis that follows therefore addresses the issue of whether disclosure "could reasonably be expected to prejudice the mental or physical health" of the appellant.

The Ministry submits that it relies on the affected party's professional opinion on this question, which he provided at the request stage in response to the Ministry's notice under section 28 of the *Act*. The Ministry further submits that its approach is consistent with the Supreme Court of Canada's decision in *McInerny v. MacDonald*, [1992] 2 S.C.R. 138, which establishes that the physician has the onus to justify a denial of access to his/her patient. The Ministry also states that it does not have the professional expertise to assess the affected party's assertions, or to assess whether the appellant's mental health would in fact be prejudiced by the disclosure of these records.

The affected party asked that his representations remain confidential, and they were not shared with the appellant during this inquiry. The representations included a copy of his letter to the Ministry in response to the section 28 notice. Under section 49(d), the affected party's essential position is that disclosing the records to the appellant would be prejudicial to the appellant's mental health.

The appellant submits that it is "far too convenient" to withhold information based on the affected party's professional opinion concerning the appellant, in circumstances where the appellant has complained about the affected party's conduct.

McInerny v. MacDonald (cited above) relates to a patient's right of access to medical records at common law. Given that the request and appeal before me arise in the distinct statutory context of the *Act*, and not under the common law, the relevance of the *McInerny* decision requires further analysis. *McInerny* sets out a general right of access and then goes on to note exceptions to it, as follows (at para. 31 of the judgment):

> If a physician objects to the patient's general right of access, he or she must have reasonable grounds for doing so. Although I do not intend to provide an exhaustive analysis of the circumstances in which access to medical records may be denied, some general observations may be useful. I shall make these in a response to a number of arguments that have been advanced by the appellant and in the literature for denying a patient access to medical records. These include: (1) disclosure may facilitate the initiation of unfounded law suits; (2) the medical

> records may be meaningless; (3) the medical records may be misinterpreted; (4) doctors may respond by keeping less thorough notes; and (5) disclosure of the contents of the records may be harmful to the patient or a third party.

In my view, it is significant that of these five exceptions, only the one identified as item (5) is closely tied to an exemption under the *Act*. As well, *McInerny* places the onus on the physician to justify the denial of access. Under section 53 of the *Act*, the onus is on the Ministry to prove the application of an exemption it relies on, while under the general law of evidence, other parties (including affected parties) must also demonstrate the veracity of facts they rely on. These are significant and highly relevant distinctions. Accordingly, although *McInerny* may provide helpful guidance with respect to the accessibility of medical records generally, I find that it is not determinative here, and does not relieve the Ministry of its burden of proof in this case, although comments provided by the affected party may assist the Ministry in that regard.

As well, particularly given the appellant's complaints to the Ministry and the CPSO concerning the affected party, and the appellant's Small Claims Court action against him, I share the appellant's concern that the affected party may not be the most objective arbiter of whether disclosure could reasonably be expected to "prejudice the mental or physical health" of the appellant.

For this reason, I decided to retain an expert and seek his advice on this issue, as noted at the beginning of this order. In relation to section 49(d), the expert was asked to comment on whether disclosure of the records could reasonably be expected to prejudice the mental or physical health of the appellant. The expert examined the submissions of all parties I had received to that point, and also the Notice of Inquiry and records 14 and 21.

As previously described, record 14 is the affected party's medical record concerning the appellant. The first two pages of record 14 are no longer at issue, as discussed above. The remainder of record 14, the "medical record" includes one page of basic medical information about the appellant (which he may have filled out himself), the affected party's consultation notes, several summaries the affected party prepared concerning the appellant, and a number of pages photocopied from a legal text book. The portion of record 21 that is at issue (pages 3-4) consists of a letter from the affected party to the Ministry in response to the complaint that largely consists of the affected party's professional opinion concerning the appellant.

The expert's report reviews these two records and the relationship between the affected party and the appellant in some detail. It concludes that disclosure could not reasonably be expected to prejudice the appellant's physical or mental health. The expert states that the affected party bases his concerns on:

> … some identified criminalistic (per the Affected Party) tendencies, other personality pathology that includes problems with authority, impulsivity, self-centeredness and grandiosity, fairly attenuated angry outbursts during therapy, and some, for the most part unproven information … alleging more marked aggressive and criminalistic tendencies. …

The expert continues:

> The Affected Party does not say that he has any specific concerns about the risk of self-harm to the Appellant, nor does he have any specific information whatsoever regarding whether the Appellant had maintained the *status quo*, from a psychological and emotional perspective, some two plus years (it is now four) since he last saw him. He has no factual information concerning any potential more recent perturbations in the Appellant's mental state, animosity towards him (or anyone), etc. In brief, there is no meaningful current information to in any way suggest that the appellant harbours any aggressive feelings towards the affected party, his ex-wife, her family, or himself. Nor is there any clear information that the Affected Party has ever been threatened by the appellant, even at times when the latter engaged in an episode of shouting in the affected party's office.
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> … the Affected Party has seemingly [in the context of their psychotherapy sessions] provided the Appellant with his views concerning the Appellant's shortcomings, criminal propensities, self-centeredness, problems with authority, impulsivity, controlling nature, and lack of commitment to therapy. The Affected Party's summary reviews of the Appellant's progress are thematically consistent with what the Affected Party has already said to the Appellant over the course of therapy.
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> …
>
> [I] understand that the evidence must establish a reasonable basis for believing that endangerment will result from disclosure.… In other words, it must be demonstrated that the reasons for resisting disclosure are not frivolous or exaggerated.
>
> In the end, my review of the records and the surrounding circumstances does not disclose a reasonable expectation of … prejudice to the Appellant's mental or physical health.… As such, I cannot see any reason from a psychiatric perspective for withholding the requested records from the appellant. In my opinion, the stated reasons for withholding the records are exaggerated.

As noted previously, both the Ministry and the affected party were provided with an opportunity to comment on the expert's report. Only the affected party did so. In his response to the report, the affected party provides a detailed analysis in an attempt to rebut the expert's description of the nature and course of the affected party's therapeutic work with the appellant. In my view, these submissions are, at best, only marginally relevant to the issue at hand, namely whether the evidence supports a finding that disclosure of the record to the appellant could reasonably be expected to prejudice the appellant's physical or mental health. The affected party then sets out his professional qualifications, and seeks to characterize the appellant and his actions in a

manner that supports his view that this exemption should apply. The affected party requests that these representations remain confidential, and accordingly, I will not go into factual detail concerning them.

In my view, the affected party's view of the evidence is speculative, exaggerated and lacking in objectivity. For example, the affected party refers to the appellant's lawfully undertaken complaints and other actions as "… a vicious and malicious campaign against me." I also note that these comments were made more than four years after the termination of the therapy.

By contrast, although the expert has the disadvantage of not having met the appellant, he provides a reasoned, arms' length assessment of the evidence. I also note that his assessment is based on his review of the representations (except the affected party's response to the expert's report, which was received later), records 14 and 21 in their entirety, and a typed transcript of the affected party's consultation notes (the handwritten version of which forms part of record 14). The transcript of the consultation notes appears to be a fairly complete record of the affected party's therapeutic sessions with the appellant. The affected party's synopses of the course of the appellant's therapy also form part of record 14 and were reviewed by the expert. In my view, these materials put the expert in a very good position to assess the evidence and the question of whether disclosure of records 14 and 21 could reasonably be expected to result in the harms addressed in section 49(d) (and also section 20, discussed later in this order.) Accordingly, I prefer the evidence and approach of the expert, who has concluded (as quoted above) that the appellant's concerns in relation to section 49(d) are exaggerated.

As well, I consider it significant that the information in the consultation notes, which comprise the great bulk of record 14, is well known to the appellant, since he was present at the sessions they record. As the expert states in his report, the notes make it clear that the affected party "… held very little, if anything, back from the Appellant" during the sessions, and "at no point sugar-coated what he felt inclined to say to the Appellant." Record 14 also includes typed synopsis pages prepared by the affected party, and I agree with the expert that these portions of the record do not "… contain either fresh information or impressions, or views that were not, in one way or another shared with the Appellant." The summary medical page (page 3 of record 14) also contains information that is well known to the appellant, and does not contain clinical observations of the affected party in any event. The remaining pages of record 14, which in my view cannot reasonably be expected to lead to the harm addressed in section 49(d), consist of photocopied pages from published text books.

To summarize regarding record 14, I am not persuaded by the affected party's interpretation of the evidence. I agree with the expert that the affected party's concerns are exaggerated. Moreover, the fact that the information in record 14 is known to the appellant, and the age of this record, significantly undermines the affected party's claim that disclosure could reasonably be expected to prejudice the appellant's mental or physical health.

Similarly, record 21 is entirely concerned with the course of the appellant's therapy and the affected party's decision to discuss some of the appellant's issues with legal counsel. This record sets out the affected person's professional views concerning the appellant in terms similar

to record 14. As demonstrated by the consultation notes found in record 14, the affected party's decision to consult legal counsel is well known to the appellant, as are the history of the therapy and the affected person's professional views concerning the appellant. Although record 21 uses strong language, there is nothing here to suggest a different result than for record 14.

In conclusion, I find that the affected party's concerns about disclosure of the medical record in record 14, and pages 3-4 of record 21, are exaggerated. I have carefully reviewed the records, the submissions of all parties, and the expert's report. I find that the Ministry and affected party have not met the burden of proving that disclosing the portions of the records for which section 49(d) is claimed could reasonably be expected to prejudice the mental or physical health of the appellant. I find that section 49(d) does not apply.

Section 49(a)

Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the certain exemptions in part II of the *Act* (which deals with general records as opposed to one's own personal information) would apply to the disclosure of that information. Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, **19**, **20** or 22 would apply to the disclosure of that personal information; [emphases added]

With respect to record 14, the Ministry claims that section 49(a) applies in conjunction with Section 20 (danger to safety or health). With respect to record 18, the Ministry relies on the exemption in section 19 of the *Act* (solicitor-client privilege).

Because I have found, above, that record 18 contains the appellant's personal information, section 19 must be reviewed in conjunction with the section 49(a) exemption, and I will conduct my analysis in that context.

I will deal with these two records in turn.

Record 14

The Ministry claims section 49(a) in conjunction with section 20 for the parts of this record that remain at issue. Section 20 states:

> 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.

As noted above in the discussion of section 49(d), the Ontario Court of Appeal discussed the standard of evidence required under section 20 in the *Minister of Labour* case. The Court indicated that where this exemption is claimed, rather than the "detailed and convincing" standard that applies in other "reasonable expectation" exemptions such as section 17, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated. This is the same standard I applied above under section 49(d).

The arguments of the Ministry, the affected party and the appellant relating to this exemption closely parallel those under section 49(d), but with a different focus. Under section 20, the issue is whether disclosure could reasonably be expected to seriously threaten the safety or harm of "an individual." Under section 49(d), I have already decided that disclosure could not reasonably be expected to prejudice the mental or physical health of the appellant and for the same reasons articulated under section 49(d), I also find that it is not reasonable to expect a serious threat to his health or safety under section 20. The remaining question to consider in relation to section 20 is whether this could reasonably be expected in relation to other individuals such as the affected party.

The positions of the parties, including the expert retained by this office, are substantially outlined above under section 49(d). With respect to possible endangerment to other individuals, the affected party refers to a number of alleged incidents which I will not review in detail here because they were described in confidential representations he provided. One of these incidents has not been tied to the appellant at all, and I am not satisfied that the others are sufficient to demonstrate a reasonable expectation of a serious threat to any individual's health or safety if these records are disclosed to the appellant. As the expert notes:

> In brief, there is no meaningful current information to in any way suggest that the appellant harbours any aggressive feelings towards the affected party, his ex-wife, her family, or himself. Nor is there any clear information that the Affected Party has ever been threatened by the appellant, even at times when the latter engaged in an episode of shouting in the affected party's office.

In my view, the affected party's concerns about a possible violent reaction by the appellant to reading the records are exaggerated, and I find that a reasonable expectation of the harm referred to in section 20 is not established. Therefore this section provides no basis for applying section 49(a) to record 14.

Record 18

The Ministry claims that this record is exempt under section 19 (solicitor-client privilege). As noted above, since the record contains the appellant's personal information, I will consider whether it is exempt under section 49(a) in conjunction with section 19. At the time of the

request, section 19 stated as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches. In this case, the Ministry relies on branch 1.

Branch 1: common law privilege

Branch 1 of the section 19 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

In particular, the Ministry relies on the solicitor-client communication privilege component of branch 1. Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice (*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)). The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Order P-1551).

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

In its representations, the Ministry made the following comment with respect to record 18:

> It was written by counsel in the Ministry's Legal Services Branch, and provides legal advice to the Provider Services Branch regarding the affected person's billing practices… The client has treated the record as a confidential communication and has not waived the privilege.

I have carefully examined record 18, which consists of Ministry counsel's handwritten notes. I am satisfied, based on its contents and the Ministry's representations, that it is a working paper prepared by legal counsel and that it directly relates to providing advice on the appellant's complaint. On this basis, I find that record 18 qualifies for exemption under section 19 and is therefore exempt under section 49(a).

PERSONAL PRIVACY

The Ministry claims that records 1, 17, 23, 24, 26, 29 and 33, as well as page 1 of record 14 and pages 1, 3 and 4 of record 21, are exempt under section 21(1) and/or 49(b) (personal privacy). I have found, above, that the withheld parts of records 17 and 24, page 1 of record 14 and pages 1-2 of record 21 are not at issue. I will therefore not consider whether they are exempt from disclosure.

Although not claimed by the Ministry, I have also found that the medical record portion of record 14, starting at page 3 of the record, contains the personal information of the appellant and other individuals. I will therefore consider whether section 21(1) and/or 49(b) apply to records 1, 14 (except pages 1-2), 23, 26, 29, 33 and pages 3-4 of record 21.

Under the discretionary exemption provided by section 49(b), where a record contains personal information of both the requester and another individual and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

Under the mandatory exemption found at section 21(1), where a record contains personal information *only* of an individual other than the requester, the institution *must* refuse to disclose that information unless one of the exceptions in sections 21(1)(a)-(f) applies. In this case, the only exception that could apply is section 21(1)(f), which provides an exception to the mandatory exemption "if the disclosure does not constitute an unjustified invasion of personal privacy".

To summarize, these two exemptions are both intended to protect personal privacy and apply, respectively, to records that contain personal information of *other individuals only* (section 21(1)), or personal information of *both the appellant and others* (section 49(b)). Because I have found that records 1 and 33 contain the personal information of the affected party only, I will consider whether section 21(1) applies to them. Because I have found that record 14 (of which all but pages 1-2 are at issue), record 21 (of which pages 3-4 remain at issue), and records 23, 26 and 29 all contain the personal information of the appellant and other individuals, I will determine whether they are exempt under section 49(b).

Under both sections 49(b) and 21(1), sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met.

If any subsection of section 21(4) applies, disclosure is not an unjustified invasion of personal privacy.

If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under sections 49(b) and 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies. Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or

more factors or circumstances under section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767].

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b) or 21 [Order P-239].

Section 21(1) – Records 1 and 33

Record 1 consists of one page containing a few handwritten notes. It includes the affected party's physician number which, as noted previously, is not at issue. The severed information in this record that remains at issue pertains to the Ministry's investigation of the affected party.

The portion of record 33 that remains at issue consists of statistical information pertaining to the affected party's OHIP billing history.

The Ministry submits that section 21(3)(b) applies to the information in records 1 and 33 that remains at issue. This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The Ministry submits that the information was compiled and is identifiable as part of an investigation into a possible violation of law, namely the *Health Insurance Act* and/or the *Health Care Accessibility Act*. I agree. I find that the presumption at section 21(3)(b) applies to the information remaining at issue in both records 1 and 33. It is therefore not necessary for me to address the presumptions in sections 21(3)(d) and (f), which the Ministry also cites.

The appellant's submissions refer to his reasons for wanting the information but these relate to factors and/or circumstances under section 21(2), and cannot override section 21(3)(b) (*John Doe*, cited above). I further find that section 21(4) does not apply, nor does section 23.

Accordingly, the exception to the mandatory section 21(1) exemption provided by section 21(1)(f) does not apply. I therefore find that the information at issue in records 1 and 33 is exempt under section 21(1).

Section 49(b) - Records 14, 21, 23, 26 and 29

Record 14

The portion of record 14 that remains at issue is the appellant's medical record as compiled and maintained by the affected party. Although the Ministry took the position that this part of record 14 contains only the personal information of the appellant, I have found that it also contains the personal information of his wife and several family members. Virtually all of this information was provided to the affected party by the appellant during their sessions together, and to the extent that it reflects comments by the affected party, these were part of the conversations that took place during the therapy sessions between the affected party and the appellant, which are recorded in part of the record. In the Ministry's hands, I am satisfied that this information was compiled as part of the Ministry's investigation, which as discussed above raises the application of the presumed unjustified invasion of privacy set out in section 21(3)(b). In many cases, this would result in this information being exempt under section 49(b).

However, where the requester originally supplied the information, or is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444, M-451]

- the requester was present when the information was provided to the institution [Orders M-444, P-1414]

- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principal may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders M-757, MO-1323, MO-1378].

In the case of record 14, it is clear that the personal information of other individuals was supplied to the affected party by the appellant or, at a minimum, discussed during their sessions together as reflected in the medical record. In the circumstances of this case, there is nothing to suggest that disclosure would be inconsistent with the purpose of the exemption. I find that it would be absurd to apply section 49(b) in order to withhold the information provided by the appellant about other individuals or discussed by the appellant and the affected party during the course of the therapy. Accordingly, I find that section 49(b) does not apply to record 14.

Records 21, 23 and 26

As noted, only pages 3 and 4 of record 21 remain at issue. These pages are a letter to the Ministry written by the affected party in relation to the Ministry's investigation of the appellant's complaint about his billing practices. Most of the personal information in the record relates to the appellant only. The letter describes the affected party's therapeutic process with the appellant and refers briefly to his discussions with legal counsel about the appellant's behaviour, which the affected party undertook as an adjunct to the therapy. The letter also contains the affected party's personal information because it is his response to an inquiry by the investigator in the context of the appellant's complaint about him. As already noted, the affected party's professional address is not personal information and therefore not exempt under section 49(b).

However, the main focus of the discussion in the letter is the appellant and the affected party's opinions about him. This is the appellant's personal information and cannot be exempt under section 49(b) as its disclosure could not, by definition, be an unjustified invasion of another individual's personal privacy. As revealed by the affected party's consultation notes with the appellant that form part of record 14, the appellant is aware of the affected party's discussions with legal counsel concerning the appellant and, to the limited extent that this is the affected party's personal information, I have concluded that the "absurd result" principle (outlined in detail above) applies. As well, in my view, disclosure of this information would not be inconsistent with the purpose of the exemption. I find that record 21 is not exempt under section 49(b).

Record 23 is a letter from the Ministry to the affected party. The severed portion confirms certain information provided in record 21. For the same reasons I have just outlined with respect to record 21, it would, in my view, be absurd to withhold the severed portion of this record from the appellant, and disclosing it would not be inconsistent with the purpose of the exemption. I find it is not exempt under section 49(b).

The undisclosed portion of record 29 is a draft of record 23. The same considerations apply to this as those applied to record 23. The undisclosed portion of record 29 is therefore not exempt under section 49(b).

Record 26

Record 26 is a covering e-mail and two attached letters to be prepared for signature and mailing. The cover e-mail and the attached letter to the appellant have already been disclosed and are not at issue. The attached letter to the affected party has not been disclosed.

While this record deals with issues similar to those addressed in records 21, 23 and 26, it relates primarily to the Ministry's investigation of the affected party. The appellant would not be aware of its specific contents. I am satisfied that it was compiled and is identifiable as part of an investigation into a possible violation of law, and disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(b). Sections 21(4) and 23 do not apply. Because the appellant is unaware of its contents, withholding this record would not be an absurd

result. Disclosure would therefore be an unjustified invasion of the affected person's personal privacy, and I find that record 26 is exempt under section 49(b).

ORDER:

1. I order the Ministry to disclose in their entirety record 14 (except pages 1 and 2, which are not at issue) and records 21, 23 and 29 to the appellant by sending him copies not later than **May 3, 2007** but not earlier than **April 27, 2007.** The Ministry should also disclose page 2 of record 14 to the appellant if it has not already done so.

2. I uphold the Ministry's decision to deny access to the remaining records at issue.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: March 28, 2007
John Higgins
Senior Adjudicator