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

ORDER PO-2778

Appeal PA08-39

Consent and Capacity Board

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NATURE OF THE APPEAL:

The Consent and Capacity Board (the Board) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a legal representative on behalf of their client, for access to records containing information pertaining to complaints about the conduct of an identified lawyer. In particular, the requester sought:

- any complaints to the Board respecting the conduct of the identified lawyer, and any responses to those complaints;

- any complaints and/or correspondence written and/or signed by members and/or other staff of the Board respecting the conduct of the identified lawyer and any responses to those complaints and/or correspondence; and,

- any internal memoranda and/or other internal documents of the Board respecting the conduct of the identified lawyer.

The Board identified records responsive to the request and notified the identified lawyer in accordance with section 28(1)(b) of the *Act*, who objected to the release of any information in the records. The Board then issued a decision letter denying access to the responsive records on the basis that they are exempt under the mandatory exemption at section 21(1) (personal privacy) with reference to section 21(3) (presumed invasion of privacy) of the *Act*.

The requester (now the appellant) appealed the decision.

During mediation, the Board provided the appellant with a detailed index of records and issued a supplementary decision letter clarifying that it relies on the exemption at section 21(1) of the *Act*, with reference to the factor at section 21(2)(f) (highly sensitive), and the presumptions at sections 21(3)(a) (medical, psychiatric or psychological history) and (g) (personal recommendations or evaluations) of the *Act*, to deny access to the responsive records. Also during mediation the appellant took the position that disclosure of the records is relevant to a fair determination of his rights, thereby raising the possible application of the factor at section 21(2)(d) of the *Act*.

Mediation did not resolve the appeal and it was moved to the adjudication phase of the appeal process. I commenced the inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Board, the identified lawyer and two other individuals whose interests may be affected by disclosure (the affected parties). The Board and the identified lawyer provided representations in response to the Notice of Inquiry. One of the affected parties took the position that it was the Board's information that was at issue, and he did not have the right to consent to its disclosure. The other affected party advised that he would not be providing representations in response to the Notice of Inquiry.

I then sent the Notice of Inquiry, along with the non-confidential representations of the Board and the identified lawyer, to the appellant. The appellant provided representations in response. In his representations the appellant advised that access was no longer sought to any response by the identified lawyer to any complaints. As a result, that information is no longer at issue in the appeal. I determined that the representations of the appellant raised issues to which the Board

and the identified lawyer should be given an opportunity to respond. Accordingly, I sent the Board and the identified lawyer a letter inviting their reply submissions, accompanied by the complete representations of the appellant. Only the identified lawyer provided reply representations.

RECORDS:

The records remaining at issue consist of an e-mail and four letters.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" in accordance with section 2(1) of the *Act* and, if so, to whom it relates.

Section 2(1) of the *Act* defines "personal information", 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 where 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", it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

To qualify as personal information, the information also 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, 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 addition, the Government of Ontario amended the *Act* to exclude certain information from the definition of personal information. In particular, sections 2(3) and 2(4) of the *Act* state:

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

In Order PO-2225, former Assistant Commissioner Tom Mitchinson, set out the following two-step process applicable to a determination of whether information is "about" an individual in a business rather than a personal capacity, and therefore does not constitute personal information:

> …the first question to ask in a case such as this is: *"in what context [does the information] of the individuals appear"*? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
> …

> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"*? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature? [emphasis added]

I will apply the analysis described above in my examination of the personal information/professional information distinction in the present appeal.

The appellant agrees that any information in the records that identifies a client of the identified lawyer should be severed. I will not consider this information any further in this discussion that follows.

The Board takes the position that the records contain the personal information of the identified lawyer. The identified lawyer submits that the records contain information about their education (2(1)(b)), were sent to the Board with an explicit or implicit expectation of confidentiality (2(1)(f)) or represent the views or opinions of another individual about the identified lawyer (2(1)(g)).

The appellant submits that the records were created by people acting in their professional, business or official capacity and are about the conduct of a lawyer acting in their professional, official or business capacity. The appellant submits that the complaints do not reflect the personal nature of the identified lawyer; but rather their conduct in their professional capacity. The appellant submits that as a result, the information pertaining to the identified lawyer in the records does not meet the definition of personal information.

Analysis and Finding

Although the information in the records relates to an examination into the conduct of the identified lawyer in that individual's professional role, I find that because this individual was the focus of an investigation into whether their conduct was appropriate, it has taken on a different, more personal quality. As such, I find that disclosure of this information would reveal something personal about the identified lawyer and that it qualifies, therefore, as personal information within the meaning of that term in section 2(1). In that regard, I am following a long line of Orders of this office that have held that information in records containing a complaint about the conduct of an individual and an examination of that conduct contains that individual's personal information under the definition at section 2(1) of the *Act* [See, in this regard Orders P-165, P-448, P-1117, P-1180 and PO-2525].

In my view, therefore, the records contain information about the identified lawyer that meets the definition of "personal information" in paragraphs (g) (views of other individuals about the identified lawyer) and (h) (the identified lawyer's name along with other personal information relating to them).

The records do not contain any personal information of the appellant.

PERSONAL PRIVACY

Section 21 reads, in part:

> (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> (f) if the disclosure does not constitute an unjustified invasion of personal privacy.
>
> (2) 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,
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (f) the personal information is highly sensitive.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

Section 21(1) is a mandatory exemption protecting information whose disclosure constitutes an unjustified invasion of another individual's privacy. Where a requester seeks access to another individual's personal information, section 21(1) prohibits an institution from disclosing this information unless any of the exceptions at sections 21(1)(a) through (f) apply. If any of these exceptions apply, the information cannot be exempt from disclosure under section 21(1). Section 21(1)(f), in particular, permits disclosure only where it "does not constitute an unjustified invasion of personal privacy."

Section 21(2) provides some criteria for the institution to consider in making this determination, section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy, and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in 14(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 21(4) of the *Act*, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

The Submissions of the Parties

Both the Board and the identified lawyer take the position that the personal information in the records falls with the section 21(3)(a) and (g) presumptions. They also take the position that section 21(2)(f) is a relevant factor favouring privacy protection because the information is highly sensitive and its disclosure could reasonably be expected to cause significant personal distress to the affected party. In support of this latter position, the Board relies on Orders M-1053, PO-1681, PO-1736 and PO-2518.

In response, the appellant submits that disclosure of the records is necessary for a fair determination of rights affecting the appellant, referring to the factor favouring disclosure at section 21(2)(d) of the *Act*. In support of this submission, the appellant provides background information and materials explaining that the access request arises out of an appeal to the Superior Court of Justice of a decision in which the appellant has alleged as a ground of appeal that the identified lawyer, acting as his counsel, provided ineffective assistance. The appellant submits that not having access to complaints respecting the identified lawyer's conduct in other cases would adversely affect the fair determination of the appellant's rights in the context of that appeal.

In reply, the identified lawyer submits that information pertaining to any such complaints would be completely and totally irrelevant to that appeal and "the suggestion that it is necessary for the appellant to obtain this information in order for there to be a fair determination of his rights on the appeal which is pending before the Superior Court, is completely untenable." The identified lawyer submits that it will be of no assistance to the Court which is hearing the appeal to know if some other person may have complained in the past about the identified lawyer in respect of a totally unrelated proceeding. The identified lawyer submits that this evidence would not be admissible in the appeal and would not "even come close to meeting the requirements for similar fact evidence". The identified lawyer submits that the information is being sought for no other reason than to attempt to embarrass the identified lawyer.

Analysis and Findings

I will first address sections 21(2)(d) and (f) of the *Act*.

Section 21(2)(d)

For section 21(2)(d) to apply, the appellant must establish that:

(1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and

(2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and

(3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)].

I am satisfied that the rights in question in the appellant's Superior Court matter are legal rights drawn from the concepts of common law or statute law which are related to an existing proceeding. With respect to the third item set out above, however, while the concept of relevance under section 21(2)(d) may be even broader than that suggested by the parties, and it is a point for the Superior Court to consider, some observations are in order. It should be noted that there is a difference between relevance and admissibility. Furthermore, traditional similar fact evidence, such as that sought to be obtained here, is subject to a very high degree of scrutiny and only admissible where its probative value outweighs the prejudice caused by its admission. [See in this regard the discussion in *Sopinka, Lederman and Bryant, the Law of Evidence in Canad*a, 2nd Edition, paragraphs 11.182 to 11.186 and *Toronto (City) v. MFP Financial Services Ltd.* [2005 O.J. No. 3214].

Thus, while such evidence may have some relevance, its bearing on or significance to the determination of the right in question may be remote. In addition, in the appeal before me there is also no indication that the information the appellant seeks is not available through the framework of the pre-hearing cross-examination, or related production processes. As set out in Order PO-1715, the existence of disclosure processes available to parties in the court context reduces the weight accorded the section 21(2)(d) factor in certain circumstances. In my view, therefore, while section 21(2)(d) is a relevant consideration, I would give it little weight.

Section 21(2)(f)

Turning to section 21(2)(f), I am satisfied that the circumstances of any complaint and the focus of the investigation of any complaint, along with the uncertainty as to its outcome, have caused the identified lawyer great discomfort and dismay.

In Order PO-2518 Senior Adjudicator John Higgins revisited the issue of what evidence is required to fall within the ambit of section 21(2)(f). He wrote:

> Throughout the Ministry's representations, it argues that the information at issue is highly sensitive. Previous orders have stated that, in order for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause "excessive" personal distress to the subject individual [Orders MO-1053, PO-1681, PO-1736]. In my view, this interpretation is difficult to apply and a reasonable expectation of "significant" personal distress is a more appropriate threshold in assessing whether information qualifies as "highly sensitive."

I find that, in the circumstances of this appeal, the personal information contained in the records is "highly sensitive" within the meaning of section 21(2)(f) because its disclosure could reasonably be expected to cause the identified lawyer significant personal distress. In my view this is an extremely relevant factor weighing heavily in favour of non-disclosure.

I have considered the submissions of the parties and the circumstances of this appeal and I find that on balance, the factor favouring privacy-protection at section 21(2)(f) outweighs any factors favouring disclosure in this case. Accordingly, I find that the disclosure of the personal information in the records at issue constitutes an unjustified invasion of personal privacy of the identified lawyer. The records do not contain information to which section 21(4) would apply and the application of section 23 was not raised in the appeal. As a result, the information is exempt under section 21(1) of the *Act*.

In light of this finding, it is not necessary for me to consider the application of the presumptions in sections 21(3)(a) or (g) of the *Act*.

SEVERANCE

Where a record contains exempt information, section 10(2) requires the Board to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless", "meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed [Orders PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.)].

Based upon my review of the records, in this case, any such severance would either reveal exempt information or result in disconnected snippets of information being revealed.

Accordingly, I uphold the decision of the Board to withhold the records.

ORDER:

I uphold the decision of the Board to withhold the records.

Original Signed by: April 23, 2009
Steven Faughnan
Adjudicator