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

ORDER PO-2896

Appeal PA09-95

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OVERVIEW:

This order addresses the issues raised in an appeal arising from a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) to the Office of the Public Guardian and Trustee (PGT) for a copy of the requester's PGT file. The PGT granted partial access to the responsive records, but denied access to the remainder pursuant to section 49(a), in conjunction with sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege), and 49(b) (discretion to refuse requester's personal information), together with section 21(1) (personal privacy) of the *Act*.

During the mediation of this appeal, another individual whose interests may be affected by the disclosure of information contained in the records was contacted to determine if he would consent to its disclosure. That individual declined to provide consent. During the inquiry into the appeal, I sought and received representations from the PGT and from the appellant only.

In the discussion that follows, I reach the following conclusions:

- The records contain the personal information of the appellant and other individuals;
- The records do not contain advice or recommendations;
- Some records are exempt because they contain solicitor-client privileged information; and
- Most of the information withheld by the PGT must be released to the appellant because its disclosure would not result in an unjustified invasion of another individual's personal privacy or because not disclosing it would lead to an absurd result.

RECORDS:

The records at issue consist of internal e-mails between PGT staff, correspondence between the PGT and outside parties, and PGT forms.

ISSUES:

A. Do the records contain personal information?
B. Do the records contain advice or recommendations?
C. Do the records contain information that is solicitor-client privileged?
D. Would disclosure constitute an unjustified invasion of another individual's personal privacy under section 49(b)?
E. Should the PGT's exercise of discretion under sections 49(a) and (b) be upheld?

DISCUSSION:

PRELIMINARY MATTERS

Limits of this inquiry

In reading the lengthy submissions from the appellant, as well as the records themselves, it is clear that the circumstances surrounding this appeal are difficult. Therefore, it is important to emphasize the limits of my jurisdiction. This inquiry is governed by a statutory mandate established under *FIPPA*, and is limited to reviewing the decision made by the PGT regarding *access* to the information requested by the appellant. I do not have the power to review any decisions made, or other actions taken, by the PGT in relation to the appellant or the involvement of other individuals. I cannot answer any questions about the manner in which the PGT carried out its own statutory mandate and I cannot make any findings to resolve these concerns in the manner requested (Orders PO-2802-I and PO-2883). Accordingly, I will not be reviewing or commenting upon them further in this order.

Duplicate records

My review of the records at issue in this appeal has identified instances of duplicate records. In the circumstances, it is not necessary for me to review the possible application of the exemptions to each of the duplicates. I find that:

- pages 45, 46, 57 and 290 are all duplicate copies of the same record. I will only consider the possible application of the exemptions in relation to this record as it appears on page 45. While page 57 includes a brief notation, I am satisfied that the notation is not sufficiently significant to affect my finding as to whether the copy is a duplicate;
- page 217 is a duplicate of page 216 and I will only consider the exemption claims in relation to the first occurrence; and
- page 284 is a duplicate of page 287. Although the latter page contains a brief notation, it is not sufficiently significant to affect my finding respecting the duplication.

In my consideration and findings respecting duplication, I have not included records which consist of e-mail strings, notwithstanding the fact that parts of each may duplicate the content of previous e-mails. Each will be considered as a separate record based on the exemption claims noted in the PGT's index.

Undisclosed records and indexing discrepancies

On the final page of the appellant's representations, she provides a list of pages numbers from her PGT file which she claims she has not received. Having reviewed these pages numbers, I find that they correspond closely to the page numbers marked as withheld on the index prepared by the PGT. However, two items – pages 197 and 209 – appeared on the appellant's list as records which were supposed to have been disclosed by the PGT at the decision stage, at least according to the index. Furthermore, 21 pages of records that are marked on the PGT's index as

being disclosed *in full* to the appellant appear in the batch of records provided to me with severances marked.

These discrepancies necessitated seeking clarification from the PGT during the preparation of this order. PGT staff advised this office that the index is incorrect in the following respects: page 197 was withheld in full, while portions of pages 63, 64, 67, 69, 70, 72-74, 90, 100, 102, 105-108, 110, 117-119, and 161 were withheld under section 49(b). Accordingly, the PGT's denial of access to these 21 pages must be reviewed in this order.

On the other hand, since it appears to have been a matter of oversight that page 209 was not sent to the appellant, I will order the PGT to send a copy of it with the other records ordered disclosed pursuant to this order.

A. DO THE RECORDS CONTAIN PERSONAL INFORMATION?

Section 47(1) 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. The parts of section 49 that are relevant in this appeal state:

> 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 [emphasis added];
> >
> > where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

The PGT has withheld information in this appeal on the basis that its disclosure would constitute an unjustified invasion of another individual's personal privacy under section 21(1) (personal privacy) or section 49(b) (discretion to refuse requester's personal information). Information in the records has also been withheld under section 49(a), taken together with sections 13(1) and 19.

The personal privacy exemptions only apply to information that qualifies as "personal information," as defined in section 2(1) of the *Act*. Accordingly, before reviewing the possible application of those exemptions, I must determine if the records contain "personal information" and, if so, to whom it relates.

To satisfy the requirements of the definition in section 2(1) of the *Act*, the information must be "recorded information about an identifiable individual," and it must be reasonable to expect that an individual may be identified if the information is disclosed.[1] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under

[1] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

paragraphs (a) to (h) of the definition of the term in section 2(1) may still qualify as personal information (Order 11).

The PGT argues that the exempted information constitutes the personal information of third parties, "particularly, the Appellant's relatives," and also argues that releasing the withheld names would will render those individuals "readily identifiable." The PGT submits that the information it "considers confidential is information relating to the opinions and financial status of the Appellant's relatives."

> For instance there are several letters written by the Appellant's relative stating his opinions about the Appellant and some documents also contain information about his financial position. There is also correspondence containing detailed information about her relative's bank account.

The appellant submits that the records contain her personal information, as well as that of her brother, a specific PGT staff member and her brother's wife.

Having reviewed the records, I am satisfied that they contain the "personal information" of the appellant and other identifiable individuals within the meaning of the definition of that term in section 2(1) of the *Act*. Specifically, I find that the records contain the personal information of the appellant's brother and father, including their names, telephone numbers, addresses, banking information and financial transactions as described in paragraphs (b), (c), (d) and (h) of the definition.

In addition, I find that the records all contain information pertaining to the appellant that qualifies as her personal information within the meaning of paragraphs (a), (b), (c), (d), (e) and (h) of the definition in section 2(1) of the *Act*.

The exception to this finding relates to page 197, which is merely a photocopy of an envelope with an address on it. There is nothing to identify who that address relates to, and in the absence of other accompanying information to render this address about an identifiable individual, I find that it does not constitute personal information. Since its disclosure could not, therefore, be an unjustified invasion of personal privacy, and no other exemptions were claimed for it, I will order this record disclosed.

Furthermore, I expressly reject the PGT's argument that opinions or views expressed about the appellant by her relative constitute that individual's personal information. According to paragraph (g) of the definition in section 2(1), opinions about an individual constitute the personal information of that individual. Accordingly, I also find that there is undisclosed personal information about the appellant in the records in the form of opinions and views expressed about her. The disclosure of the appellant's own personal information to her cannot constitute an unjustified invasion of another individual's personal privacy and I will order the PGT to disclose those portions of the records containing the appellant's personal information to her.

I will now consider the application of the claimed exemptions, beginning with section 49(a) of the *Act*.

B. DO THE RECORDS CONTAIN ADVICE OR RECOMMENDATIONS?

The PGT claims that section 49(a), in conjunction with section 13(1), applies. For the reasons that follow, I do not uphold the PGT's decision in this regard.

Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[2]

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.[3] Advice or recommendations may be revealed in two ways: the information itself consists of advice or recommendations; or the information, if disclosed, would permit one to accurately infer the advice or recommendations given (see footnote 3).

The types of information that have been found not to qualify as advice or recommendations include: factual or background information; analytical information; evaluative information; notifications or cautions; views; draft documents; and a supervisor's direction to staff on how to conduct an investigation.[4]

The PGT submits that it withheld 56 pages of the records under section 13(1), which contain information that qualifies as advice or recommendations because it suggests a course of action that will ultimately be accepted or rejected by the person being advised. According to the PGT,

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[2] Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

[3] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

[4] Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review, as cited in footnote 3.

"the right to have a free flow of information between staff members would be compromised if the exempted documents containing correspondence were to be released," partly because the records are not for public knowledge, but rather for internal use only. Further, the PGT argues that pages 41-44, 241, 242 and 246 "constitute information contained in memoranda created by and for public servants concerning advice and recommendations" and should be exempt based on past decisions of this office such as Orders 58, 94 and P-522. The PGT submits that pages 3 and 9 to 17 "constitute information from an internal file audit and checklist" that would, if disclosed, permit accurate inferences to be made about advice or recommendations. The PGT also submits that the remainder of the records which it claims to be exempt under section 13(1) are "documents that either give advice and recommendations, or contain information that would lead someone to infer advice and recommendations from them." Finally, the PGT argues that:

> It is believed that if these records were to be released it would set a precedent where government correspondence meant to relay advice and recommendations could be released to a requester. This would greatly inhibit the quality of work done on behalf of the Institution's clients, the general public.

The PGT's representations on section 13(1) conclude with an assertion that none of the mandatory exceptions in section 13(2) or 13(3) apply in the circumstances of this appeal.

The appellant's representations do not directly address the advice or recommendations exemption as it has been interpreted and applied in past orders of this office.

As the PGT claims that many of the records at issue are exempt under section 13(1), I reviewed these records to determine whether they reveal, either directly or by inference, a suggested course of action that would ultimately be accepted or rejected by the decision-maker being advised. For context, it would be useful to begin by outlining the rationale for what was to be the section 13(1) exemption as the issue was canvassed in the Williams Commission Report[5]:

> Although the precise formula for achieving a desirable level of access for **deliberative materials** has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations **prepared for the purpose of participation in decision-making processes.** Second, there is a general agreement that documents or parts of documents containing essentially factual material should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, **it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public**. We are in general agreement with both of these propositions [emphasis added].

[5] Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980, vol. 2 (Toronto: Queen's Printer, 1980), page 288.

I note that the PGT did not direct me to any specific information in the records at issue that could qualify as advice or recommendations beyond referring to page numbers and providing what, in my view, are vague, generalized and unpersuasive arguments in support of the exemption claim. For example, the PGT's expressed reluctance to disclose internal documents such as file audits and checklists (all relating to the appellant's file) on the grounds that these types of documents are not made available to the general public does not constitute sufficient evidence to support a section 13(1) exemption claim.

Based upon my review of the information in the records for which the exemption is claimed, I find that they do not contain the advice or recommendations of a public servant, or of any other person employed in the service of the PGT as contemplated by section 13(1). I also find that disclosure of these records could not reveal advice or recommendations. At most, in my view, these records either set out the factual status of the appellant's file or contain instructions or directions to staff on how to proceed with the appellant's PGT matter. Advice or recommendations, as defined above, implies that the receiver of the information has the latitude to accept or reject it after giving it consideration. I find, therefore, that the information the PGT seeks to withhold under section 13(1) does not fit within the construction given to this exemption by the orders cited above nor, in my view, does it accord with the original legislative intentions behind the adoption of this exemption.

Further, I note that the "memoranda created by and for public servants" consist of notes made by PGT legal counsel for her purposes, with the exception of page 246 which is a file note between two PGT staff. I have already made a finding above that the information contained in these memos does not constitute advice or recommendations. However, the PGT has also claimed that pages 41-44, 241 and 242 are exempt under section 19 and I will review them to determine if they contain solicitor-client privileged information which is exempt.

Therefore, I find that section 49(a), in conjunction with 13(1), does not apply to any of the records for which is it claimed. Where no other exemptions have been claimed for these records, I will order these records disclosed. Next, I will review the possible application of section 49(a) along with section 19 of the *Act*.

C. DO THE RECORDS CONTAIN SOLICITOR-CLIENT PRIVILEGED INFORMATION?

The PGT relies on section 49(a), together with section 19(a), to withhold pages 18, 21, 41-45, 60-62 and 241-242, claiming that it is subject to solicitor-client communication 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.[6]

[6] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

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.[7] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (Orders PO-2441, MO-2166 and MO-1925).

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[8]

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[9] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[10]

The PGT takes the position that the records "constitute correspondence between lawyers and staff members" and should not be released "as they fall under solicitor-client privilege." According to the PGT, the records are direct communications of a confidential nature for the purpose of obtaining or giving legal advice. The PGT also submits that the exempted records constitute a "continuum of communications" between solicitor and client aimed at keeping both informed, as discussed in *Balabel*, *supra*.

The PGT's representations do not identify the legal counsel involved although this can be discerned from the records at issue themselves. The PGT's submissions otherwise merely re-state portions of the precedents which were outlined in the Notice of Inquiry sent by this office to the PGT.

The appellant's representations do not address the possible application of solicitor-client privilege to the records. The appellant does question whether she should not be considered PGT's client in this matter, suggesting that she should be able to obtain access to the information for this reason. However, while the appellant would have been considered PGT's client for the purpose of its administration of matters under the *Substitute Decisions Act*, I find that the solicitor-client relationship in this appeal was between legal counsel for the PGT and the staff members in the program area.

For the following reasons, I will uphold the PGT's solicitor-client privilege exemption claim in part.

To begin, I find that pages 21, 41 to 45 and 241 to 242 form part of the solicitor-client continuum of communications for the purposes of branch 1 of section 19 of the *Act*. In my view, the notes to

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[7] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[8] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[9] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[10] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

file and notations on a document titled Preliminary Legal Issues Checklist, which are all written by legal counsel, suggest that those records form part of that solicitor's "working papers." With regard to whether a record may be considered to be the working papers of legal counsel, I adopt the following reasoning of Adjudicator Steven Faughnan in Order MO-2231:

> It is only where a record contains or would reveal the contents of a communication between the solicitor and client that it would so qualify. For example, where a record reveals the thought processes of the lawyer in formulating legal advice, such as the lawyer's notes of his or her research or comments on or legal impressions concerning the subject matter of the advice, it would qualify under the working papers component of solicitor-client communication privilege.

In the circumstances, I am satisfied that these "working papers" are directly related to seeking, formulating or giving legal advice respecting the appellant's PGT matter, and I find that these records are exempt on that basis (see *Susan Hosiery Ltd. v. Minister of National Revenue*, cited above).

Based on my review of the other records for which section 19 is claimed (pages 18 and 60-62) and the PGT's representations, however, I find that they are not subject to solicitor-client privilege.

Page 18 of the records is, like page 21, also a legal issues checklist. However, in this instance, it does not contain confidential legal advice nor would its disclosure reveal such advice. The brief notation is factual in nature, cannot be confirmed to have been recorded by PGT legal counsel, and I find that it is not related to seeking, formulating or providing legal advice.

Pages 60-62 of the records are different, comprising as they do the solicitor's legal accounts and a case management account inquiry respecting the legal work carried out on the appellant's PGT matter. Following several decisions of the courts and other offices, there is a rebuttable presumption that such records are privileged.[11] In *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*[12], the Court of Appeal held that the presumption will be rebutted if there is no reasonable possibility that disclosure of the fees paid will directly or indirectly reveal any communication protected by the privilege. In Order PO-2483, Senior Adjudicator John Higgins summarized the approach to be taken to this type of record as follows:

> Accordingly, in determining whether or not the presumption has been rebutted, the following questions will be of assistance: (1) is there any reasonable possibility that disclosure of the amount of the fees paid will directly or indirectly reveal any communication protected by the privilege? (2) Could an assiduous

[11] The Court in *Re Stevens and Prime Minister of Canada* (1998), 161 D.L.R. (4th) 85 held that a legal account, including disbursements is privileged in its entirety, stating that this should benefit from a blanket protection. The Courts have indicated that 'the itemized disbursements and general statements of account detailing the amounts charged for that time are all privileged" (*Stevens, supra* at para 52; *Maranda v. Richer,* [2003] 3 S.C.R. 193).

[12] (2004), 70 O.R. (3d) 779. See also *Legal Services Society v. Information and Privacy Commissioner of British Columbia* (2003), 226 D.L.R. (4th) 20 at 43-44 (B.C.C.A.).

> inquirer, aware of background information, use the information requested to deduce or otherwise acquire privileged communications? If the information is neutral, then the presumption is rebutted. If the information reveals or permits solicitor-client communications to be deduced, then the privilege remains

I agree with the approach described by Senior Adjudicator Higgins above and have applied it in reaching my finding. In my view, the legal accounts represented on pages 60-62 are "neutral" information, thereby rebutting the presumption that the information is subject to solicitor-client communication privilege, either at common law or in the context of communication privilege in Branch 1 of section 19. I find that the disclosure of this information would not reasonably lead to the revelation of any solicitor-client communication, nor would it reveal strategic information that might permit an assiduous inquirer to deduce confidential privileged communications (Orders PO-2548 and PO-2673). As the presumption has been rebutted, I find that pages 60-62 are not exempt under section 19 of the *Act*.

In sum, and subject to my review of the PGT's exercise of discretion, I find that pages 21, 41-45 and 241-242 are exempt under section 49(a), together with section 19(a) of the *Act*. My finding with respect to page 45 also applies to the duplicates of this record that appear in the PGT file.

D. DOES SECTION 49(b) APPLY TO THE RECORDS?

Under section 49(b), where a record contains personal information of the appellant and other identifiable individuals, and disclosure of that information *would* constitute an unjustified invasion of the other individual's personal privacy, the PGT may refuse to disclose that information to the appellant. This decision involves a weighing of the appellant's right of access to her own personal information against the other individuals' right to protection of their privacy as regards their own personal information.

It is only where the records contain only the personal information of other individuals and not the appellant that section 21(1) prohibits the disclosure of this information, unless one of the exceptions listed in the section applies. In this appeal, all of the records contain the appellant's personal information, and so each of those remaining at issue must be reviewed under section 49(b).

In this context, I reject the PGT's submission that "section 21(1) is a mandatory exemption and therefore the Head of the Institution cannot disclose information unless it falls in the subparagraphs noted in section 21(1)."[13] As suggested by the preceding paragraph, this submission incorrectly characterizes the approach to be taken by the head of an institution where the records contain the mixed personal information of the appellant and other identifiable individuals.

Regardless of whether the analysis takes place under section 49(b) or section 21(1), sections 21(1) to (4) of the *Act* provide guidance in determining whether disclosure of personal information *would* result in an unjustified invasion of the personal privacy of the individual to whom the information relates. If the information fits within any of paragraphs (a) to (e) of

[13] Page 4, PGT's representations.

section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b).

Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of the personal privacy of another individual. Where one of the presumptions in section 21(3) applies to the personal information found in a record, it cannot be rebutted by either one or a combination of the factors set out in 21(2), but it may be overcome if the personal information falls under section 21(4) or the "public interest override" at section 23 applies because there is a compelling public interest in the disclosure of the records in which the personal information is contained which clearly outweighs the purpose of the exemption.[14] The appellant did not raise the application of section 23 and in my view, neither it nor any of the exceptions in section 21(4) apply in the circumstances of this appeal.

If none of the presumptions against disclosure contained in section 21(3) apply, the PGT is obliged to consider the application of the factors listed in section 21(2) of the *Act* as well as all other considerations which are relevant in the circumstances of the case (Order 99).

Section 21(3)

The PGT submits that the presumptions against disclosure in sections 21(3)(f) and 21(3)(g) are applicable in the circumstances of this appeal because the information "at issue deal[s] in large part with the financial information of third parties, falling under section 21(3)(f)." According to the PGT, the information also includes the personal recommendations and character references of other individuals, thereby falling under section 21(3)(g).

The appellant seeks to rebut the PGT's claim that the presumption against disclosure in section 21(3)(f) applies, arguing instead that it is her finances that are revealed by the records.

For section 21(3)(f) to apply, the personal information must "[describe] an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness." The facts of this appeal relate to the PGT's involvement with the appellant's property under the *Substitute Decisions Act*,[15] and in the circumstances. I agree with the appellant that, for the most part, the financial information in the records that might meet the requirements of section 21(3)(f) is her own personal information, and it has already been disclosed to her. However, on page 145, there is personal information about the appellant's brother that fits within section 21(3)(f). Similarly, the severed information on pages 67, 69, 70, 72, 73, 74, 100, 102, 105, 106, and 107 relates to that found on page 145 and would, if disclosed, also reveal information about another individual that fits within the scope of section 21(3)(f). Subject to my discussion of the absurd result principle, below, the presumption applies to this personal information.

However, I reject the PGT's argument, which was not supported by sufficient evidence, that the presumption in section 21(3)(g) applies to "other individual's personal recommendations and character references." Based on my review of the records, I find that any information in them

[14] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767: (*John Doe*).
[15] S.O. 1992, Ch. 30.

that even comes close to resembling "personal recommendations or evaluations, character references or personnel evaluations" as contemplated by section 21(3)(g) relates only to the appellant, not to other identifiable individuals. Accordingly, I find that the presumption in section 21(3)(g) does not apply in the circumstances of this appeal.

Section 21(2) factors favouring access and weighing against disclosure

I will now consider whether any factors in section 21(2) apply to the personal information that I have not found subject to the presumption in section 21(3)(f). The PGT relies on the factors in section 21(2)(f) (highly sensitive) and 21(2)(h) (supplied in confidence) to deny access to the undisclosed personal information. The PGT submits, without elaboration, that "if the information is released, it would constitute an unjustified invasion of personal privacy as the information is highly sensitive. The personal information has also been supplied in confidence." The PGT does not provide any further explanation nor does it tender evidence in support of these assertions.

The appellant's detailed representations respecting the section 21(2) factors contain information which is, in my view, highly personal and confidential, and I will not reproduce those portions of the submissions. However, I wish to assure the appellant that I have reviewed and considered her submissions in their entirety.

The appellant's representations address all of the factors in section 21(2) and suggest that all of the listed factors are relevant: paragraphs (a) to (d), which favour access to the personal information of other individuals and paragraphs (e) to (h) which favour protecting the privacy of the other individuals whose personal information appears in the records.

Specifically, the appellant argues that disclosure of the information will subject the activities of the PGT to public scrutiny, promote her health and safety, and promote informed choice of goods and services by informing her about the PGT's alleged mismanagement and/or collusion with her relative. Most particularly, the appellant asserts that disclosure of this information is relevant to a fair determination of her rights respecting the PGT's oversight of her trusteeship, as well as her concerns respecting inheritance and property ownership matters. She states that the PGT "could save face by admitting their error of mismanaging my property."

With respect to the factors that favour privacy protection, the appellant also argues that these factors merit consideration. For example, the appellant asserts that the undisclosed information would demonstrate that other individuals have caused "pecuniary or other harm" to her. However, the appellant's representations on the factors in section 21(2)(e) to (h) do not directly respond to the PGT's representations nor do they address the application of the factors regarding the *withholding* of other individual's personal information to protect their privacy, as they are intended to be considered in the weighing of the section 21(2) factors.

With regard to unlisted factors or other relevant circumstances, the appellant argues that disclosure of the information is relevant to improving her present living circumstances and health. The appellant also argues that it would be absurd to withhold the information because she is capable of using it responsibly and would only do so to her own benefit. The appellant's

representations also indicate that one of the individuals identified in the records has been deceased for several years.

My findings with respect to the discretionary personal privacy exemption in section 49(b) largely result from my review of the information actually remaining at issue, which consists primarily of names, addresses and telephone numbers, along with other small snippets of personal information about other identifiable individuals.

First, I find that there is not sufficient evidence before me to establish the application of any of the factors weighing in favour of disclosure of the personal information at issue on the facts of this appeal. Conversely, I also find that there are no factors weighing in favour of privacy protection respecting the personal information of other individuals that is contained in the records. Specifically, I find the PGT's submissions respecting the factors in paragraphs (f) and (h) of section 21(2) to be unpersuasive. Not only did the PGT provide insufficient evidence respecting their application, but the nature of the information contained in the records also militates against a finding that these factors apply to that information.

In Order PO-2518, Senior Adjudicator John Higgins revisited the issue of what evidence is required to bring personal information within the ambit of section 21(2)(f). Noting that past orders had found that 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, he found instead that "a reasonable expectation of 'significant' personal distress is a more appropriate threshold in assessing whether information qualifies as 'highly sensitive'." In the present appeal, I find that disclosure of the type of information remaining at issue would not result in a reasonable expectation of significant personal distress.

Similarly, I am not satisfied that the factor in section 21(2)(h) weighs in favour of protecting the privacy of individuals other than the appellant as regards their personal information. In my view, the context and the surrounding circumstances of this matter are not such that a reasonable person would expect that this particular information would be subject to confidentiality. For the most part, the information consists of names, addresses and telephone numbers belonging to the appellant's relatives. The PGT did not make submissions as to *who* provided the personal information at issue; it appears from my review of the records that at least some of it was provided by the appellant herself. In the circumstances, the PGT has not established the relevance of this factor.

Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of other individuals, I find that the disclosure of those portions of the records withheld under section 49(b) and not subject to the presumption against disclosure in section 21(3)(f) would not result in an unjustified invasion of the privacy of individuals other than the appellant and that it should be disclosed.

Whether or not the factors or circumstances in section 21(2) or the presumptions in section 21(3) apply, where the requester originally supplied the information, or the requester 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 and MO-1323).

The absurd result principle has been applied in appeals where, for example, the requester was seeking access to his or her own witness statement (Orders M-444 and M-451); the requester was present when the information was provided to the institution (Orders M-444 and P-1414); or the information was clearly within the requester's knowledge (Orders MO-1196, PO-1679 and MO-1755). However, the absurd result principle may not apply even if the information was supplied by the requester or is clearly within the requester's knowledge if disclosure would be inconsistent with the purpose of the 49(b) exemption.

This office's approach to the application of the absurd result principle in appeals involving the personal information of other individuals has been described as follows (by Adjudicator Laurel Cropley):

> The privacy rights of individuals other than the appellant are without question of fundamental importance. One of the primary purposes of the *Act* (as set out in section 1(b)) is to protect the privacy of individuals. Indeed, there are circumstances where, because of the sensitivity of the information, a decision is made not to apply the absurd result principle (see, for example, Order PO-1759). In other cases, after careful consideration of all of the circumstances, a decision is made that there is an insufficient basis for the application of the principle (see, for example, Orders MO-1323 and MO-1449). In these situations, the privacy rights of individuals other than the requester weighed against the application of the absurd result principle.[16]

I agree with this general approach to the absurd result principle. However, in the present appeal, I am satisfied that the absurd result principle applies. Having reviewed the personal information that would otherwise have been withheld under section 49(b) in conjunction with section 21(3)(f), I find that this information is clearly within the appellant's knowledge in that it was likely gathered from the appellant, or with her involvement. Accordingly, I reject the Ministry's position that disclosure of this information would result in an unjustified invasion of another individual's personal privacy; in the specific circumstances of this appeal, I do not accept that disclosure of this personal information would be at odds with the purpose of the discretionary exemption in section 49(b).

Under the circumstances, I find that refusing to disclose the personal information contained in the records to the appellant would lead to an absurd result (Orders PO-1679, MO-1755 and PO-2679) and I will order the PGT to disclose it to the appellant.

[16] See Order MO-1524-I, and as quoted in Order MO-2114.

F. SHOULD THE PGT'S EXERCISE OF DISCRETION UNDER SECTION 49(a) BE UPHELD?

After deciding that a record or part thereof falls within the scope of a discretionary exemption, the head is obliged to consider whether it would be appropriate to release the record, regardless of the fact that it qualifies for exemption. An institution must exercise its discretion in this regard.

In this appeal, I have upheld the PGT's decision to withhold pages 21, 41-45, and 241-242 under section 49(a), together with section 19, I must therefore review the PGT's exercise of discretion with respect to these exemptions because the PGT was permitted to disclose information, despite the fact that it could withhold it.

On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations. In such a case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations (Order MO-1573). This office may not, however, substitute its own discretion for that of the institution (section 54(2)).

The PGT suggests that a significant factor in its exercise of discretion was its consideration that disclosing the information would "discourage third parties from providing information" and that it would be "impossible to manage the finances" of its clients without having "some information from third parties." The appellant's representations focus on there being a sympathetic and compelling need on her part to receive the information in the records.

Having considered the PGT's and the appellant's representations generally and in the overall circumstances of this appeal, I find that the PGT has exercised its discretion within appropriate parameters. I am satisfied that the PGT did not err in exercising its discretion not to disclose the information that I have found subject to solicitor-client privilege under section 49(a) and 19, and I will not interfere with it on appeal. I uphold the PGT's exercise of discretion to not disclose pages 21, 41-45 and 241-242.

ORDER:

1. I uphold the PGT's decision to deny access to pages 21, 41-45, and 241-242 in their entirety. These records should not be disclosed to the appellant.

2. I order the PGT to disclose to the appellant by **July 28, 2010**, but not earlier than **July 21, 2010**, the remaining records or parts of records that have not yet been disclosed. This includes the copy of page 209 which was to have been previously disclosed to the appellant in the PGT's decision letter.

3. In order to verify compliance with the terms of this order, I reserve the right to require the PGT to provide me with a copy of the records which are disclosed to the appellant pursuant to order provision 2.

Original signed by: June 22, 2010
Daphne Loukidelis
Adjudicator