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

ORDER PO-2910

Appeal PA08-313

Ministry of Community and Social Services

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NATURE OF THE APPEAL:

One of the programs operated by the Ministry of Community and Social Services (the ministry) is the Family Responsibility Office (FRO), which collects and distributes court-ordered child and spousal support payments under the authority of the *Family Responsibility and Support Arrears Enforcement Act, 1996* (the *FRSAEA*). According to the ministry's website, FRO is responsible for enforcing existing support orders and domestic contracts filed with the courts, but is not involved in modifying support orders or other entitlement issues.

The appellant is a support recipient residing in the United States who submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "all the releasable information" in her FRO case file. According to the appellant, she is seeking the information to assist her in understanding why her jurisdiction "dropped its attempt" to pursue support modification on her behalf.

The ministry granted partial access to 564 pages of responsive records. Access to approximately 320 pages was denied, either in part or in full, pursuant to the exclusion in section 65(6)3 (labour relations and employment records) of the *Act*, and the exemptions in section 49(a) (discretion to refuse requester's own information), taken together with sections 14(1)(a) and (e) (law enforcement), 19 (solicitor-client privilege) and 20 (danger to health or safety), and section 49(b) (personal privacy). The ministry waived the fee for processing the request pursuant to section 57(4)(b) (financial hardship) of the *Act*.

In a supplementary decision letter, the ministry disclosed additional information, provided an index of records, added section 14(1)(l) to its list of exemption claims, and specified the application of the presumptions against disclosure in sections 21(3)(d) and (f).

Following appeal of the ministry's decision to this office, a mediator was appointed to explore resolution of the issues. As a mediated resolution of the appeal was not possible, it was transferred to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. During the inquiry, I sought and received representations from the ministry, the appellant and an individual identified in the records as the support payor (the affected party), as that individual's interests could be affected by the outcome of this appeal.

On review of the appellant's representations, I asked the ministry to provide reply submissions. In this way, I confirmed that the appellant was not seeking access to the names of FRO employees which may appear in the records. As the ministry's claim that certain information was excluded from the operation of the *Act* applied only to FRO employees' names, the possible application of section 65(6)3 to that information was removed as an issue for consideration in this appeal.

In the discussion that follows, I reach the following conclusions respecting the ministry's access decision:

- The records contain the personal information of the appellant and other individuals;

- Most of the information withheld by the ministry under section 49(b) 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;
- Some records are exempt under section 49(a), together with section 19, because they contain solicitor-client privileged information;
- Neither section 14 (law enforcement) nor section 20 (health or safety) apply; and
- The ministry's exercise of discretion is upheld.

RECORDS:

There are approximately 290 pages of records at issue, consisting of database screenshots, case log notes, court orders, enforcement records, panel lawyer reports, support payor correspondence, and miscellaneous documents.

DISCUSSION:

PRELIMINARY MATTERS

Limits of this inquiry

In consideration of the submissions from the appellant, as well as the records themselves, it is clear that the surrounding circumstances, particularly the appellant's expectations, present a challenge for adjudication. Therefore, it is important to emphasize the limits of my jurisdiction. This inquiry is governed by a statutory mandate established under the *Act*, and is limited to reviewing the decision made by the ministry regarding *access* to the information in the FRO file that was requested by the appellant. I do not have the power to review any decisions made, or other actions taken, by the ministry in relation to the underlying support matter or the manner in which the ministry carried out its own statutory mandate under the *FRSAEA* (Orders PO-2802-I and PO-2883). Accordingly, I will not be reviewing or commenting upon them further in this order.

Duplicate records and inconsistent decisions

The ministry identified several instances of duplicated records in its representations, explaining that such records may have been included in the package of responsive records provided to me in duplicate because, for example, they had different printout dates or included handwritten notes.

Furthermore, there are records that are listed on the ministry's index that are marked as having been disclosed, but which also appear in the batch of withheld records. An example is pages 331 and 442-444, which are computer-generated ledgers of support amounts. Although page 331 is a duplicate of 327, which was disclosed (according to the index), it is marked on the index as being withheld in full, even though no exemptions are identified. In my view, this represents a clerical error and I am satisfied that this record was disclosed. However, pages 442-444 consist of a three-page support ledger, the first page of which duplicates page 331, in part, but the former pages have been withheld under section 19. While it may be argued that disclosure of the information on page 331, where it is duplicated on page 442, is moot, I will nevertheless review

these three pages together as part of the records for which the ministry claims section 19 (solicitor-client privilege) generally.

However, my own review of the records in their entirety has also identified many other instances of duplicate records. In some of these instances, there are brief markings or differences in form, but these minor variations are not sufficiently significant to affect my finding as to whether the copies are duplicates. In such cases, I will not review the possible application of the exemptions to each of these duplicates. In a very few other instances, the variation in form or content of the notation is significant enough that I will review these versions of the record separately.

I find that the following records are duplicates of one another: pages 324-327=328-331; 343=345=387; 397=410=495=496[1]; 417=421; 450=451; 452-454=460-462; 466=539; 467-472=524-529=540-545; 474-478=498-502; 486-487=493-494.

Accordingly, the parties should note that the findings set out in this order with respect to the application of the exemption claims may cite only the first occurrence of a duplicated record, or bundle of similar records.

In addition, my review of the records shows that some information the ministry has purported to withhold under the exemptions, including section 19 (in conjunction with section 49(a)) have been effectively disclosed. There are inconsistent decisions with respect to the same information where it appears in different places. Some information marked as being withheld appears, based on the ministry's highlighting of severed information, to have been disclosed to the appellant. For example, information withheld from case log entry 349 on page 63 was disclosed where it appeared in entry 356 on page 64, which is duplicated at entry 380 on page 69. Furthermore, some records provided during the adjudication stage of this appeal noted disclosures of previously withheld information, but also purported to withhold portions of records that had not been severed from the original versions of the same records. These inconsistencies were particularly notable in the case log entry records from pages 1 to 101.

In appeals before the Commissioner, the issue to be determined is whether a record, or portion of it, should be disclosed to a requester because it is not subject to an exemption or exclusionary provision under the *Act*. Where the record has previously been disclosed by the institution, the issue of mootness is raised. In the present appeal, this consideration is raised, in my view, because the ministry disclosed duplicated information. In the circumstances, I conclude that I should not proceed with a determination of the exemptions claimed respecting that information, both because I conclude that there remains no live issue between the parties respecting that information and because there is not sufficient public interest to justify making such a determination nonetheless.[2] There being, in my view, no useful purpose to be served by proceeding with my inquiry in relation to certain disclosed information, I will not proceed with a determination of whether the exemptions claimed for this particular information in fact apply.

[1] The appellant provided a copy of this record with her representations.
[2] See Order P-1295, which contains a discussion of the leading Canadian case on the issue of mootness: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. See also Orders PO-2046, MO-2049-F and MO-2525.

In this order, where a record has already been partially disclosed, inadvertently or not, to the appellant, and the ministry's decision is inconsistent with respect to it, I will consider the possible application of the relevant claimed exemptions only in relation to the portions that remain withheld.

I would add that my review of the records for the purpose of determining the ministry's exemption claims was especially challenging because the version of the records sent to this office had, in addition to highlighted severances, other information that was outlined or circled but not highlighted, and lacking any explanatory notations. I would encourage the ministry (and FRO) to provide clean copies of responsive records to this office with highlighting or markings *only* applied to information withheld under exemption claims in future appeals.

Scope of the appeal and section 65(6)3

As stated previously, the ministry withheld the names of FRO employees from the records identified as responsive to the request on the basis of the claim that this information was excluded from the *Act* pursuant to the jurisdictional exclusion for labour relations and employment records in section 65(6)3. Essentially, the ministry claimed that disclosure of FRO employee names under the *Act* would violate the terms of a consent order of the Grievance Settlement Board (GSB) which settled a grievance filed by FRO employees under the *Crown Employees Collective Bargaining Act, 1993* (*CECBA*).

In the present appeal, however, at several points in the appeal process, the appellant stated that she was not interested in pursuing access to the names of FRO employees. The ministry responded by confirming that it is not claiming section 65(6) with respect to any other information aside from FRO employee names. The ministry also confirmed that the exclusion may be removed from the scope of the appeal since the appellant does not seek this information.

Accordingly, I find that the following pages (of the case logs, particularly) are removed from the scope of the appeal since the only information that was withheld from these records is the full name, or only the surname, of FRO employees: pages 46, 47, 50-53, 58, 61, 62, 66, 75, 77, 78, 81-86, 88, 90, 93-95, 102, 297, 343 (and duplicates), 381, 385, 386, 391, 392, 396, 400, and 422.

There are several apparent anomalies to the ministry's severances under section 65(6)3, which also included FRO employee telephone numbers on, for example, pages 379, 380, 417 and 431. Several pages also had an employee email address severed. In my view, FRO employee email addresses which include that employee's name falls within the same category as the names, which I have removed from the scope of the appeal because the appellant does not wish to pursue access to them. Accordingly, I find that FRO employee email addresses may be removed from the scope of this appeal. However, since neither the GSB consent order nor the ministry's representations appear to include any provision for withholding employee telephone numbers, I will proceed with a determination respecting them under my analysis of the definition of personal information, below.

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 ministry has withheld certain 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 14(1)(a), (e) and (l), 19 and/or 20.

However, 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.

The definition of personal information is found in section 2(1) of the *Act*. To satisfy the requirements of the definition in section 2(1), the information must be "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 if 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. 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, older orders of this office established that 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).

On April 1, 2007, amendments relating to the definition of personal information in the *Act* came into effect. Essentially, the amendments formalized the distinction made in previous orders of this office between personal and professional (or business) information for the purposes of the *Act*. Sections 2(3) and (4) 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 this appeal, the appellant seeks access to information in her FRO file to understand why the support office in her jurisdiction appears to have "dropped its attempt" to pursue a child support modification application in the courts. She states,

> … I have a right to my own personal information, and part of what I am seeking from FRO is probably my personal information.

The appellant states that the records likely contain personal information about her, her child's father (the affected party, also the support payor) and her child, all of whom are known to each

other. In this way, she submits, "there is no personal identity to hide." She also submits that the information in the records about her and her child's father would be both personal and business/professional.

The ministry submits that the records contain the personal information of the support payor, including his birth date, address and employment information, which the ministry contends constitutes his personal information. Referring to Orders P-1056, P-1269 and P-1340, the ministry notes that the IPC has previously found that communication between a support recipient and FRO is the support recipient's personal information and argues that the same finding should apply to support payors and their communications with the FRO. The ministry suggests that "[e]ven the mere fact that a support payor or support recipient contacted FRO should be considered their personal information."

The ministry takes the position that due to the nature of the relationship between support payors and support recipients, the payor's employment information is "personal information" in this context. Further, the ministry submits that

> Even though s. 2(3) of *FIPPA* excludes professional, official or business information from being considered personal information, in the context at hand, the information is personal in nature.

The affected party's representations do not specifically address the definition of personal information contained in section 2(1) of the *Act*. However, the affected party submits that all information in his FRO case file "is personal and confidential."

Based on my review of the records, I find that they contain the name, address, date of birth, social insurance number, employment history, views, financial information and other details relating to the affected party, which qualifies as that individual's personal information under paragraphs (a), (b), (c), (d), (e), (f) and (h) of the definition of that term which is contained in section 2(1) of the *Act*. I also find that some of the records contain the personal information of the appellant's child, including that individual's name and date of birth.

In addition, I find that all of the records 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*. Furthermore, I find that some of the records also contain personal information about the appellant as contemplated by paragraph (g) of the definition in section 2(1) since it includes the views or opinions of FRO employees about the appellant.

I find, therefore, that the records contain the personal information of the appellant, her child and the affected party. Since the records contain both the personal information of the appellant and other individuals, the request falls under Part III of the *Act* and the relevant personal privacy exemption is the discretionary one found in section 49(b) (Order M-352).

However, there is information contained in the records that I find does not constitute "personal information" under the definition in section 2(1) of the *Act* because it falls within the scope of

section 2(3) of the *Act* which defines "business identity information." Section 2(3) specifically provides that the "name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity" does not constitute personal information for the purposes of the *Act*. There are several categories of information in this appeal that I find fit within the parameters of section 2(3).

First, I find that information relating to FRO employees, other than their names, is not addressed either by the grievance consent order nor does it qualify as personal information under the *Act*. This includes employee telephone numbers which were severed in some places in the records, but inconsistently so. I find that wherever employee telephone contact numbers appear in the records, they fit within section 2(3) of the *Act* and do not constitute the personal information of any FRO employees.

Second, I find that under section 2(3) of the *Act*, the names and contact information related to individuals working in their professional capacities with the employer of the support payor, both historical and current, do not qualify as personal information.

Given my finding that the contact information of the individuals identified in the preceding two paragraphs does not fit within the definition of "personal information" in section 2(1) of the *Act* because it falls under section 2(3), it cannot be withheld under section 49(b) since only "personal information" qualifies for exemption under the personal privacy exemptions.

Not included in my findings about section 2(3) of the *Act* is information relating to the affected party in the context of his employment. Specifically, I find that the contact information relating to his place of business (employer name and address) qualify as his personal information. I accept the ministry's submission that the context in which the affected party's employment information appears is relevant. In my view, the context in which this information appears – his involvement with the Family Responsibility Office - relates to, and identifies, this individual in a personal, not business, capacity. In the circumstances, I find that this particular information about the affected party qualifies as his personal information according to the definition in section 2(1) of the *Act*.

I also note that the ministry severed other information from the case log reports, including column headers and information appearing under them. While some of the information consists of the names of FRO employees and is, consequently, removed from the scope of the appeal because the appellant does not seek access to it (see above), the rest of the severed information appears to have been withheld under section 49(b). The ministry's representations do not directly address why or how these headers and the information under them could constitute personal information. With very few exceptions, almost exclusively for information appearing under one of the headings in particular, "Description," I find that the withheld column headers and accompanying information do not fall within the definition of personal information in section 2(1) of the *Act*. As this information is not personal information, it does not qualify for exemption under section 49(b). However, for the sake of completeness, I will review this particular information (headers and their content) under the exemptions claimed with section 49(a), where these are specified on the records themselves.

I will now review whether the personal information at issue qualifies for exemption under the discretionary exemption at section 49(b).

WOULD DISCLOSURE RESULT IN AN UNJUSTIFIED INVASION OF PERSONAL PRIVACY?

As noted previously, in circumstances where a record contains both the personal information of the appellant and other individuals, the relevant personal privacy exemption is section 49(b). Under section 49(b), the ministry has the discretion to deny the appellant access to her own personal information in that record if the ministry determines that the disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy. Conversely, upon weighing the appellant's right of access to her own personal information against another individual's right to protection of their privacy, the ministry may choose to disclose a record with mixed 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).

Regardless of whether the analysis takes place under section 49(b) or section 21(1), sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether the disclosure of personal information *would* constitute an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of 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, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or the "public interest override" at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767). The "public interest override" in section 23 has not been raised in this appeal and, in my view, it would not apply.

If none of the presumptions against disclosure contained in section 21(3) apply, the ministry is obliged to consider the possible 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 P-99).

In this appeal, the ministry argues that none of the exceptions in section 21(1) apply, adding that it would not have been appropriate to ask the support payor for consent to disclose his personal information under section 21(1)(a). The ministry submits that the presumptions against disclosure in sections 21(3)(d) and (f) apply to the payor's employment history and financial information. According to the ministry, the information that falls within the presumptions is scattered through the records at issue and forms "an essential component of the FRO file" because it is required for enforcement purposes.

The ministry also takes the position that three of the factors in section 21(2) weighing against disclosure of the support payor's personal information are relevant, and for the following reasons:

- Section 21(2)(e) (unfair pecuniary or other harm): since the relationship between support payors and recipients is often adversarial and acrimonious, disclosing the personal information of one to the other could expose that party to potential harm ranging from unwanted verbal contact to domestic violence;

- Section 21(2)(f) (highly sensitive) and 21(2)(h) (supplied in confidence): given the relationship between support payors and recipients, and the role of FRO as buffer between them, disclosure of the support payor's personal information could reasonably be expected to cause significant personal distress to him; and because any communication between FRO and the payor is made in confidence, the payor's privacy should be protected (Orders P-1056, P-1269 and P-1340).

Regarding the possible application of the absurd result principle in the present appeal, the ministry submits:

> FRO takes every effort to disclose information in a manner that is not absurd or inconsistent with the spirit of *FIPPA*. There are many means by which information is provided to FRO. Although FRO acts with due diligence to ensure that documents are identified appropriately in each file, it is not always possible to identify the origins of a document. FRO does not disclose information where that information is highly sensitive, includes personal information, or where there are issues about the integrity of a document.

According to notes in the appeal file made by the mediator, the appellant indicated during mediation that "other people's personal information and/or identifiers" were not of interest to her. However, in the representations provided during this inquiry, the appellant expresses the view that the support payor's personal financial information may be the key to explaining why her jurisdiction will not pursue support modification on her behalf. She suggests that the ministry's decision to withhold "information germane to my exercising my son's right to paternal support (by seeking a modification of the existing support order)" directly affects her child's health and welfare. It is in this context that the appellant suggests that the exceptions in section 21(1)(b) (compelling circumstances affecting health and safety), (d) (Ontario or Canadian law authorizing disclosure) and (f) (disclosure not an unjustified invasion of personal privacy) should apply. Respecting section 21(1)(d), the appellant submits

> There is a reciprocal agreement between the USA and Canada with regard to child support matters (enforcement and modification and initial orders). (Uniform Reciprocal Enforcement of Support Act or URESA in US, and Interjurisdictional Support Orders Act or ISO (Canada) and Reciprocal Enforcement of Maintenance, REMO (Canada).

In response to the ministry's reliance on the presumptions against disclosure in section 21(3)(d) and (f), the appellant suggests that "insofar as this [employment and financial] information is necessary to facilitate a child support modification," the exception in section 21(4)(b) (personal services contract with institution) may apply.

The appellant takes the position that her child's health, welfare and future education is more important than the affected party's right to privacy. Although the appellant suggests that all four of the considerations favouring disclosure in sections 21(2)(a) to (d) may apply in this appeal, her representations focus on sections 21(2)(a) and (d). Regarding the desirability of subjecting government activities to public scrutiny (section 21(2)(a)), the appellant submits that:

> FRO has not explained the lack of cooperation with the US support office re a modification originally sought several years ago, nor has FRO been forthcoming with other information (or I have been told different contradictory stories at different times) with regard to timeliness of payments/how arrears could be erased without telling me about the court case, and others. I do think FRO should be accountable publicly, but I am not sure to what degree that is the issue here, as the issue is my son's right to fair & equitable support.

The appellant argues that the factor in section 21(2)(d) should apply because: (1) her son has a legal right to fair support from each of his parents; (2) the right is related to a proceeding which is both existing (current support order enforcement) and contemplated (support modification); (3) the current financial information and other case information that shows why FRO did not cooperate is germane to the support modification; and (4) the information is necessary in order to prepare for a support modification proceeding.

The appellant's submissions also briefly address the factors weighing against disclosure of the affected party's personal information that are found in section 21(2)(e) to (i). She states that her child's right to fair support "supersedes any pecuniary harm that might be claimed" by his father. The appellant also acknowledges that the factor in section 21(2)(h) may apply because "FRO recipients and payors would expect that information would not just be made available at whim to the public or the other party." Further, regarding the possibility that the absurd result principle might apply to disclosure of the personal information at issue, the appellant opines that "protecting the father's right to financial privacy over the child's right to equitable support" should be considered absurd.

The affected party submits that FRO representatives assured him that all information he provided to FRO, including the content of his conversations with FRO staff, "would remain confidential and go no further than their office."

In reply, the ministry addresses the appellant's position on the application of section 21(1)(d) in the following manner:

> Section 21(1)(d) of *FIPPA* states that "a head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, under an Act of Ontario or Canada that expressly authorizes the

> disclosure." In other words, if the ISO Act [Interjurisdictional Support Orders Act, or *ISOA*] expressly authorizes the Ministry to disclose the information at issue, it would have an impact in this case because *FIPPA* would allow such disclosure under s. 21(1)(d).
>
> The [*ISOA*] does not impact this case because the [*ISOA*] does not expressly (or otherwise) authorize the disclosure of personal information. As a result, the Ministry is not required by the [*ISOA*] to disclose the requested information, and s. 21(1)(d) of *FIPPA* does not apply.

With respect to the impact of the *ISOA* on the consideration of section 21(2)(d) in this appeal, the ministry explains that the statute provides for the registration, establishment or variation of orders from reciprocating jurisdictions, which can be filed with the FRO for enforcement when one party lives in Ontario. In the present matter, the ministry states that the appellant's support order from her jurisdiction was filed with FRO for enforcement under the *ISOA* after it was registered with the Ontario Court of Justice. According to the ministry, the appellant does not require access to the affected party payor's personal information to secure a fair determination of her, or her child's, right to financial support from him.

The ministry submits that the appellant does not require the support payor's personal information prior to commencing a modification application in her jurisdiction under the *Uniform Interstate Family Support Act* (*UFISA*).[3] Rather, the ministry states that the appellant would commence a modification application under that statute by setting out her own personal information which is then sent to the reciprocating jurisdiction "*for the court in that jurisdiction* to request disclosure of the support payor's personal information [emphasis in original]." The ministry explains that it is the court that must obtain personal information directly from the support payor in order to determine the issues related to support modification process.

Analysis and Findings

In this appeal, the relevant parts of section 21 state:

> (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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny; …
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[3] The ministry notes that the *Uniform Reciprocal Enforcement of Support Act* (*URESA*) referred to by the appellant was replaced in 1992 by the *UFISA*.

> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive; …
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

Based on the nature of some of the personal information in the records, I agree with the ministry that the presumptions against disclosure in section 21(3)(d) and (f) apply. Moreover, on my own review of the records, I am also of the view that some of the personal information fits within the presumption in section 21(3)(e) (tax information).

Respecting section 21(3)(d), past orders of this office have held that a person's name, occupation, location and employer do not, without more detail, attract the application of the presumption in section 21(3)(d) (Orders P-219, PO-2298 and PO-2877). In this appeal, where the ministry has claimed section 21(3)(d) in relation to this same information about the affected party, I find that it does not constitute a sufficiently detailed description of his "employment history" to fit within the presumption in section 21(3)(d). However, I find that the information about the affected party's employment appearing on pages 48 and 49 of the records provides a sufficient degree of detail about his employment history to fall under section 21(3)(d).

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." On my review, I agree with the ministry that the presumption in section 21(3)(f) applies to the personal information in a number of the records. The records that fit within section 21(3)(f) include financial statements and budgets submitted by the support payor that relate to the enforcement of the support order and the past pursuit of accrued arrears. These records contain financial information that pertains to him, including statements of his income and expenses at that time, as well as his proposed budgets. I find that this information satisfies the requirements of section 21(3)(f) and that its disclosure is presumed to constitute an unjustified invasion of the affected party's personal privacy (see Order PO-2425). I note, however, that some information in the case log entries for which the ministry has relied on section 21(3)(f) merely refers to the financial information, without more detail. In my view, this cannot be said to

"describe" the affected party's finances for the purpose of section 21(3)(f), and I find that the presumption does not apply to this information.

The records also include the support payor's Notice of Assessment and other taxation information required for enforcement. Although the ministry claimed the application of the presumption in section 21(3)(f), I find that this information also qualifies under the presumption in section 21(3)(e) of the *Act* and that its disclosure would constitute an unjustified invasion of the affected party's personal privacy.

I acknowledge the appellant's suggestion that the exception in section 21(4)(b) applies to override the presumptions against disclosure in section 21(3)(d) and/or (f). However, section 21(4)(b) would only apply to the information if it included the "details of contracts for personal services between an institution and a consultant or independent contractor." In this appeal, there is no contractual relationship of any kind between the ministry (on behalf of FRO) and the affected party. In the circumstances, the exception in section 21(4)(b) of the *Act* does not apply (Orders MO-1361 and PO-2435).

I will now review the factors in section 21(2) in relation to the personal information that is not subject to one of the presumptions in section 21(3).

To begin, I accept the ministry's submission respecting the factor in section 21(2)(a), and I find that public scrutiny is not a relevant factor weighing in favour of the disclosure on the facts of this appeal before me. In my view, the appellant's interest in seeking the personal information of the affected party to assist her in understanding the FRO's involvement in the support modification process represents a private interest. I agree with past orders of this office that have established that disclosure for the purpose of ensuring that justice is done in a private, or civil, proceeding does not promote the objective of the factor in section 21(2)(a) of ensuring public scrutiny of government activity (Order P-1014).

Turning to the consideration of the factor in section 21(2)(d), the appellant must satisfy four requirements to establish its relevance.[4] In the circumstances of this appeal, and with regard to the personal information at issue, I am satisfied that the first two elements of the test are established: first, the personal information at issue touches upon a legal right of the appellant's, the determination of support modification respecting her child; and second, that the legal right arises in the context of a contemplated proceeding, namely the modification proceeding referred to by the appellant in her submissions. Regarding the third part of section 21(2)(d), I find that the evidence before me that the personal information at issue may have some bearing on the determination of the identified legal right is less persuasive, although I accept that it may.

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

In my view, however, it is with respect to the fourth requirement of section 21(2)(d) that the evidence falls short. Based on the evidence before me, I do not accept the appellant's position that the disclosure of the personal information of the affected party is *required* to prepare for, or even proceed with, the identified proceeding or to ensure its fairness. In saying this, I accept the ministry's submission that the information necessary to proceed with a support modification application is available through the framework of the U.S. statute, *UFISA*, even if it must first be provided to the courts. Past orders of this office have established that the existence of disclosure or production processes concurrently available to an appellant in court matters reduces the weight accorded to the section 21(2)(d) factor in certain circumstances (see Orders PO-2715, PO-2778 and MO-2448). In my view, therefore, while the factor in section 21(2)(d) applies, I would accord it little weight in the specific circumstances of this appeal.

Further, the evidence before me does not support the application of the factors in sections 21(2)(b) or (c) weighing in favour of the appellant's access to the personal information of other individuals contained in these records. Accordingly, I find that there is only low weight to be accorded to the factor in section 21(2)(d) weighing in favour of the disclosure of the personal information of the affected party.

The ministry relies on the factors in sections 21(2)(e), (f) and (g) in the present appeal in support of protecting the privacy of the affected party. Respecting section 21(2)(e), the ministry submits that the frequently adversarial nature of the relationships between support payors and recipients militates against disclosure of the personal information of one to the other because it could lead to harm ranging from "unwanted verbal contact to domestic violence." In my view, the ministry's submission on this factor is insufficiently particularized to the facts of this appeal to persuade me that section 21(2)(e) applies. Moreover, I accept the suggestion implicit in the appellant's argument that any pecuniary impact on the affected party as a result of a support modification proceeding would not meet the unfairness requirement. Accordingly, I find that the factor in section 21(2)(e) does not apply.

The ministry's position that sections 21(2)(f) and (h) apply is also grounded in this same description of the adversarial relationship between support payors and recipients, and FRO's role as buffer between them. I am also mindful of the affected party's submission that he provided information to FRO with the assurance that it would remain confidential. In the circumstances, I agree that the factors in sections 21(2)(f) and 21(2)(h) are relevant considerations in this appeal.

I am satisfied that the disclosure of some of the personal information remaining at issue could reasonably be expected to result in significant personal distress to the affected party given the circumstances. In Order PO-2518, Senior Adjudicator John Higgins considered 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'" (see also Orders PO-2617, MO-2262 and MO-2344). In the present appeal, I accept that the information and the context in which it was gathered are inherently sensitive. I find that disclosure of some of the affected party's personal information

would result in a reasonable expectation of significant personal distress. For other personal information of the affected party, I find that it does not reach the evidentiary threshold for a reasonable expectation of *significant* personal distress with disclosure. Overall, however, this factor weighs in favour of the protection of privacy, and I find that it should be accorded moderate weight.

Furthermore, I also find that the factor in section 21(2)(h) weighs in favour of protecting the privacy of the affected party as regards access to his personal information. In my view, the context and the surrounding circumstances of this matter are such that a reasonable person would expect that information supplied by him to FRO would be subject to a degree of confidentiality (PO-1910). Having said this, however, I acknowledge that some degree of disclosure of the affected party's personal information is to be expected in any court proceedings involving these parties. Balancing these considerations, I find that section 21(2)(h) carries moderate weight in favour of protecting the privacy of the affected party.

Having balanced the competing interests of the appellant's right to disclosure of information against the privacy rights of the affected party, I find that the disclosure of certain portions of the records which contain personal information which is "highly sensitive" or "supplied in confidence" would constitute an unjustified invasion of the affected party's personal privacy. An example of this is the affected party's social insurance number and certain other details of his interactions with FRO (Orders PO-2636-I, PO-2874 and PO-2877).

Accordingly, subject to the possible application of the absurd result principle and my review of the ministry's exercise of discretion below, I find that the discretionary exemption in section 49(b) applies to some of the affected party's personal information.

Absurd result

Where the appellant 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 personal privacy exemption (Orders M-444, MO-1323 and PO-2679).

The absurd result principle has been applied in appeals where, for example, the appellant was present when the information was provided to the institution (Orders M-444 and P-1414); or the information was clearly within the appellant'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 appellant or is clearly within the appellant's knowledge if disclosure would be inconsistent with the purpose of the section 49(b) exemption.

This office's approach to the application of the absurd result principle in appeals 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.[5]

I agree with this general approach to the absurd result principle. 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), including documents filed with the courts, I find that some of this personal information is clearly within the appellant's knowledge in that it was likely gathered from the appellant, or with her involvement. I reject the ministry's position that disclosure of this information would result in an unjustified invasion of the affected party's personal privacy.

In the specific circumstances of this appeal, I do not accept that disclosure of this personal information, or other personal information about the affected party, would be at odds with the purpose of the discretionary exemption in section 49(b). Also included in the withheld information is the personal information of the appellant's child that appears in court documents from her jurisdiction. These are documents the appellant has seen. I find that refusing to disclose this personal information to the appellant would lead to an absurd result (Orders PO-1679, MO-1755 and PO-2679), and I will order the ministry to disclose to the appellant the information identified in the copy of the records provided to the ministry with this order.

DO THE RECORDS CONTAIN SOLICITOR-CLIENT PRIVILEGED INFORMATION?

Although the ministry's index notes reliance on section 19(b), the ministry's representations refer to both sections 19(a) and/or 19(b) as the basis for withholding the records. These provisions state:

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

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]

[5] See also Order MO-1524-I, as quoted in Order MO-2114.
[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]

Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons. The statutory solicitor-client communication privilege in branch 2 applies to a record that was "prepared by or for Crown counsel for use in giving legal advice."

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege. Waiver of privilege is ordinarily established where it is shown that the holder of the privilege knows of the existence of the privilege, and voluntarily evinces an intention to waive the privilege.[11] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[12]

Waiver has been found to apply where, for example: the record is disclosed to another outside party; the communication is made to an opposing party in litigation; and the document records a communication made in open court.[13] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example, the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties (*Chrusz, supra*).

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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.) [*Chrusz*].
[11] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)
[12] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[13] Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.); Orders MO-1514 and MO-2396-F; and Orders P-1551 and MO-2006-F.

The ministry submits that counsel who work in FRO's Legal Services Branch are employees of the Ministry of the Attorney General and act as counsel for the FRO director and her employees. The ministry also takes the position that its panel lawyers, retained by FRO from outside law firms to litigate on FRO's behalf, are also in a solicitor-client relationship with FRO program staff.

Regarding common law solicitor-client privilege, the ministry states that it is claiming this type of privilege over records prepared by in-house counsel and panel lawyers, including case log notes respecting communication between FRO employees and counsel, court results/reports prepared by counsel attending court, as well as memorandum and opinions relating to the support order enforcement. According to the ministry, there was an express understanding that communications of the latter type were confidential and an implied one that other communications between FRO staff and counsel were confidential. The ministry maintains that solicitor-client privilege over them has not been waived.

The ministry asserts that litigation privilege also applies to the records because they were produced in contemplation of, or for use in, litigation, namely a default hearing that took place in 1999-2000. According to the ministry, any materials prepared in relation to that proceeding including case log notes, legal opinions and memoranda, court results/reports and other communications between counsel and the Director or FRO employees were for the purpose of litigation. Furthermore, the ministry notes that because the FRO is still enforcing the support order in question, there remains a possibility that FRO could be involved in further litigation on the matter. In addition, the ministry states that because the director has not voluntarily disclosed any privileged information to an outside party, litigation privilege has not been waived.

Respecting the statutory privilege in branch 2, the ministry advises that FRO counsel are appointed pursuant to the *Ministry of the Attorney General Act* and represent ministries of the Crown. The ministry submits that the records identified in its representations relating to the common law solicitor-client communication and litigation privileges are also subject to the statutory privileges, and for similar reasons, given the involvement of Crown counsel. The ministry also argues that there has been no waiver of either of the statutory privileges by the Director of the FRO, or disclosure of privileged information outside the zone of privacy.

The appellant refers to the court proceedings from 2000 and the resulting order and states:

> I did not see that court order until years later. I am going to enclose a copy of that court order, because on that order it states that I was represented by a FRO lawyer, yet I never even was notified of the court case & only found out when I kept questioning why monies were being returned to FRO (twice) and/or held without being released by FRO (several times). If FRO represented me as that court order shows, then the solicitor client privilege would be between myself and FRO … and hence it seems I have a perfectly legal right to information being withheld under solicitor-client privilege…

The appellant states that if her intention to initiate support modification proceedings constitutes intent to engage in litigation, then for the same reasons expressed previously about her possible

relationship with FRO as client, the information should be available to her since it would be "absurd" to withhold it under litigation privilege.

The appellant suggests that the ministry has shared information with the support enforcement office in her jurisdiction that it has not shared with her. The appellant argues that if this is the case, FRO has waived privilege over that information. The appellant submits that

> The [support enforcement office in my jurisdiction] is no longer handling this case as they stated they could not help me with a modification order because Canada (FRO) was not cooperating. FRO denies lack of cooperation, but the records sent to me show some evidence of [my jurisdiction] requesting information to proceed with a modification, and FRO not responding with the info requested (or not releasing [it] to me).

Further, the appellant submits that the "common interest" principle should operate in her child's best interest, and that withholding any information that impacts the success of a modification application also effectively harms her child.

Analysis and Findings

To support the claim that solicitor-client communication privilege applies, the ministry is required to provide evidence that the record constitutes "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.)). To establish the ministry's alternate position that litigation privilege applies, the ministry must provide sufficient evidence to establish that the record was "prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation."

Having considered the circumstances of the creation of these records, I find that FRO lawyers from the Legal Services Branch of the Ministry of the Attorney General, and so-called "panel lawyers" hired from outside law firms, are in a solicitor-client relationship with FRO program staff and management. I find that the lawyers in question are also "Crown" counsel for the purposes of section 19(b).

The appellant suggests that she should be considered FRO's client in this matter, thereby entitling her to obtain access to the information withheld under the solicitor-client exemption. However, while the FRO was acting on the appellant's behalf for the purpose of administering the provisions of the *FRSAEA*, I confirm my finding above that the solicitor-client relationship in this appeal under the *Act* was between ministry legal counsel and FRO program staff and management.

Based on the ministry's representations, and my review of the records, I am upholding the ministry's section 19 exemption claim in part.

To begin, I find that some of the withheld case log report entries are exempt because they form part of the solicitor-client continuum of communications for the purposes of branch 1 of section

19 of the *Act*. Disclosing these entries would reveal the nature of the legal opinion sought from legal counsel, the substance of the opinion provided or certain steps taken in response to the provision of the opinion, the disclosure of which would reveal the confidential legal advice. My finding in this regard applies to the following withheld entries: entry 90 (page 15); entries 92 and 93 (page 16); entry 98 (page 17); duplicated at entry 111 (page 19); entries 375, 376 and 377 (page 68) and entry 387 (page 70).

In my view, however, the remaining case log entries that have been withheld under section 19 represent FRO program staff documentation of administrative steps relating to the legal opinion requested. I find that these entries do not constitute a part of the continuum of communications between solicitor and client nor would their disclosure reveal solicitor-client privileged information. Furthermore, I find that they were not prepared "by or for" counsel for the ministry for use in giving or seeking legal advice and, therefore, branch 2 also does not apply. Accordingly, I find that the following entries do not qualify for exemption under section 19: entry 350 (page 63); entry 357 (page 65); entry 373 (page 67); and entry 388 (page 71).

In addition, and as noted in the Preliminary Matters section of this order, information from entry 356 on page 64 (duplicated at entry 380 on page 69) was disclosed to the appellant while the same information was severed from entry 349 on page 63. As I said in that section, the adjudicated disclosure of that particular, duplicated, information is moot. However, with respect to the portions of entries 349 (380) and 356 that have not been disclosed, and whose adjudication is not moot, I find that these portions contain information of a more administrative nature. I find that these entries are not exempt under either of branches 1 or 2, for the same reasons articulated in the previous paragraph. Therefore, I find that these entries do not qualify for exemption under section 19.

Although not described as such by the ministry in its representations, pages 432 to 448 appear to represent the "Continuing Record" for the default proceedings held in 2000, and certain other related records. On my review of these records, I find that they do not contain confidential legal advice, nor would their disclosure reveal such advice. In fact, many of the pages are blank, except for headings suggesting content to be added to these portions of the Continuing Record (pages 434, 436-438, 447-448). However, for those pages that actually contain information, I find that privilege over them has been waived by their disclosure to the support payor and his legal counsel, or as a consequence of their being filed with the Superior Court of Justice as required for the proceeding. It is worth noting, in my view, that pages 445 and 446 represent a two-page order from 1995 obtained from the appellant's jurisdiction, which formed at least part of the basis of the default proceedings. In the circumstances, I find that none of the information in pages 432 to 448 qualifies for exemption under either branch of section 19 of the *Act*.

Page 449 is a one-page form titled "Request for legal opinion," filled out by FRO management, with a legal opinion provided by legal counsel at the bottom of the form. I am satisfied that this record constitutes a written confidential communication between FRO program staff and legal counsel for the purpose of seeking legal advice. Moreover, I am also satisfied that it contains confidential legal advice. Accordingly, I find that page 449 is exempt under branch 1 of section 19.

Page 450 (and its duplicate at page 451) is a fax cover sheet from one of the ministry's internal legal counsel to the ministry's external legal counsel. I find that the cover page is exempt from disclosure under branch 1 of section 19 as it forms part of the continuum of communication between solicitor and client. The fax cover sheet accompanied pages 452 and 453 (and their duplicates at page 460-461), which each consist of a one-page "Panel Lawyer Report." I am similarly satisfied that these records are confidential written communications from solicitor to client that fall within the continuum of communications aimed at keeping both solicitor and client informed regarding ongoing legal matters. I find that pages 452 and 453 qualify for exemption under both of sections 19(a) and 19(b) of the *Act*.

Page 454 (and its duplicate at page 462) appears to have formed part of the same facsimile transmission as the panel lawyer reports. It is the finalized Endorsements page containing the judge's order, which was withheld in its blank form at page 437. In the circumstances, I find that this record does not fit within the scope of branch 1 of section 19 as part of the continuum of communications. Alternatively, I find that there has been a waiver of privilege over this record for reasons similar to those that led to my finding that privilege over pages 432 to 448 has been waived. In this instance, the Endorsements page of the Continuing Record was prepared by a judge of the Superior Court of Justice and was provided to FRO by legal counsel for the support payor. It forms part of a public record. In my view, it would be absurd to withhold a public document of this nature. In the circumstances, I find that the waiver of privilege is implicit and, moreover, that "fairness and consistency require" that the record be disclosed (see *S & K Processors, supra footnote 11* and *Big Canoe (1997), supra footnote 13*).

This page is followed by two pages 455 and 456, consisting of a single record, the Minutes of Settlement regarding the default hearing. On the first page of the Minutes of Settlement is a notation that appears to have been made by ministry legal counsel. I am satisfied that this notation is directly related to the formulating of legal advice in the circumstances. As such, I find that this record forms part of that solicitor's "working papers," thereby bringing the record within the scope of section 19 (Orders MO-2231 and PO-2896). In this regard, 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.

However, where these same Minutes of Settlement are reproduced on pages 463 and 464, this same notation on the first page is not present. Moreover, the content of the minutes is fairly represented on the following page (465), which is a proposed draft of the order ultimately obtained in the default proceedings, neither of which varies in any material way from the final order. In this situation, I find that any aspect of solicitor-client privilege established as regards the copy of the Minutes of Settlement upon which ministry legal counsel recorded notations has been waived as this record appears on pages 463 and 464. Further, the final order is in the

appellant's possession and was provided by her during this inquiry. This final order is also filed with the court and is clearly a public document. In such circumstances, I also find that there has been a waiver of privilege over the draft version of the final order at page 465.

In sum, and subject to my review of the ministry's exercise of discretion, I find that case log entries 90 (page 15), 92 and 93 (page 16), 98 (page 17), 375, 376 and 377 (page 68) and 387 (page 70), as well as pages 449-453 and 455-456 in their entirety, are exempt under section 49(a), together with section 19(a) of the *Act*.

I will now review the possible application of section 49(a), together with section 14 of the *Act*.

WOULD DISCLOSURE INTERFERE WITH LAW ENFORCEMENT?

According to the final version of the ministry's index, sections 14(1)(a) and (l) apply to information withheld from pages 2, 7-9, 13[14], 223, 225[15], and 457-459 of the records. However, as it appears that there are discrepancies between the index and the records, I have decided to proceed by reviewing the possible application of these exemptions where a corresponding notation appears on the records themselves.

I also note that I have upheld the ministry's exemption claim under section 49(b) in relation to pages 7-9. Accordingly, it is unnecessary to review the possible application of section 14 to those pages. The ministry's reliance on section 14(1)(e) is no longer at issue given the removal of FRO employees' names from the scope of the appeal.

The relevant parts of section 14(1) state:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter; …
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,

[14] The ministry's index mistakenly identifies a severance under section 14(1)(a) and (l) on page 14, but my review of the records reveals that it actually appears on page 13.

[15] Although the ministry's index identifies page 225 as containing severances under section 14, on the version of records provided to this office, there is a hand-drawn line through the section 14(1)(a) and (l) reference. For the sake of completeness, I will review this page as though the section 14 claim had been maintained.

> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, or
>
> (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[16] Where section 14 uses the words "could reasonably be expected to," the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[17]

According to the ministry, under section 61(5) of the *FRSAEA*, the FRO Director is "deemed to be engaged in law enforcement activities" for the purpose of section 14 of the *Act*. In support of this assertion, the ministry refers to FRO's authority to commence default proceedings in which a court may imprison a defaulting support payor for up to 180 days. The ministry also submits that FRO's activities fall within the scope of the definition of "law enforcement activities" in section 2(1) of the *Act* since they consist of investigations or inspections that lead or could lead to proceedings in a court or tribunal during which penalty or sanction may be imposed.

Respecting the application of section 14(1)(a), the ministry submits that disclosure of the records could reasonably be expected to interfere with a specific and ongoing law enforcement matter because the enforcement of the support order in this appeal is ongoing. The ministry claims the application of section 14(1)(a) to records which identify methods used by FRO to enforce payment, as well as determining the whereabouts of a defaulting payor. The ministry states that FRO has access to confidential databases and other sources that are known only to a small FRO "trace and locate" unit, and it argues that disclosure of these tools may permit support payors to make efforts to frustrate support enforcement by "circumventing" the tools available to FRO. Further, the ministry submits that

> revealing this information could compromise the efficacy of the methods themselves (e.g., if support payors discover what methods are used and when they are used), and thus would interfere with FRO's ability to enforce other support orders filed with FRO.

The ministry takes the position that the same arguments that support the application of section 14(1)(a) also apply to section 14(1)(l). Specifically, the ministry asserts that

> the release of law enforcement information could reasonably be expected to facilitate the commission of an unlawful act: support payors could use the information to manage their affairs in such a way as to avoid paying support and thus not comply with an order from the court.

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[16] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

[17] Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)

The appellant states that she is not interested in the procedures FRO uses to obtain information in its support enforcement matters but rather "the content of the information in this … case file for the purpose of supporting my son's welfare & right to fair support…." She adds that she has a right to know if there is an ongoing law enforcement matter, other than the continuing enforcement of the original child support order. With regard to section 14(1)(l), the appellant simply states, "This makes no sense to me as I don't see how the records I am requesting could be expected to 'hamper the control of crime' or 'facilitate the commission of an unlawful act'."

In reply representations, the ministry states that the appellant is already fully aware of the enforcement status of this matter. Specifically, the ministry states:

> The support payor is in full compliance with his support obligation (as can be seen in the record titled "Director's Statement of Arrears"). Therefore, there is no active enforcement on the case except for income source deductions.

Analysis and Findings

Pursuant to the *FRSAEA*, the Director of the FRO is under a duty to enforce all "support orders," (as defined in that act) which are filed with the office. Where a support payor is in arrears, the *FRSAEA* gives the Director the mandate and the authority to enforce the order through various means set out in that statute. Past orders of this office have held that the powers and duties of the Director of the FRO in enforcing support and support deduction orders under the *FRSAEA* (and its predecessor statutes) are sufficient to bring the Director's activities within the ambit of the definition of "law enforcement" in section 2(1) of the *Act*, and also for the purpose of section 14.[18] I agree. Accordingly, I find that the FRO activities described in the records qualify as "law enforcement" for the purposes of section 14(1) of the *Act*.

As an aside, I note that the ministry relies on section 61(5) of the *FRSAEA* in support of the assertion that the FRO Director is "deemed to be engaged in law enforcement *activities*" for the purpose of section 14 of the *Act*. Section 61(5) of the *FRSAEA* states:

> 61. (5) The Director shall be **deemed to be engaged in law enforcement** for the purposes of section 14 of the *Freedom of Information and Protection of Privacy Act* **when collecting information**, under section 54 [Director's access to information] or otherwise, for the purpose of enforcing a support order or support deduction order under this Act. 2005, c. 16, s. 34 (2) [emphasis added].

In my view, the ministry's submission respecting the meaning to be attributed to section 61(5) of the *FRSAEA* is overbroad. As I understand it, this provision establishes that the Director's collection of personal information, about support payors in particular, may be carried out in order to facilitate the enforcement of support and support deduction orders, and without contravening the provisions of the *Freedom of Information and Protection of Privacy Act*. The powers of the Director for collecting "enforcement-related information," accessing other government-held records and disclosing information are developed more fully in section 54(2) and the rest of Part VIII (Miscellaneous) of the *FRSAEA* in which it appears. In my view, it is the overall scheme

[18] Orders P-589, P-1198, P-1269 and P-1340.

and authority for support enforcement activities outlined in the *FRSAEA* as a whole, and not the single provision mentioned by the ministry, that supports an interpretation that FRO support enforcement activities qualify as "law enforcement" for the purposes of the *Act*.

Clearly, the analysis does not end with the determination that FRO is carrying out a law enforcement mandate in administering the provisions of the *FRSAEA*. The quality and cogency of the evidence respecting the possible application of section 14(1) must be reviewed on a case-by-case basis against the individual circumstances and context of an appeal, and the actual content of the records for which the exemption is claimed (Order PO-2789).

Section 14(1)(a) — interference with a law enforcement matter

The purpose of the exemption in section 14(1)(a) is to provide an institution with the discretion to deny access to records in circumstances where disclosure of the records could reasonably be expected to interfere with an ongoing or existing law enforcement matter (Orders MO-1945, PO-2563 and PO-2657). Under section 14(1)(a), the term "matter" may extend beyond a specific investigation or proceeding.[19]

For the section 14(1)(a) exemption to apply, I must be satisfied: first, that FRO's activity in the circumstances of this appeal constitutes "law enforcement"; second, that there is a "matter" in existence to which these records relate; and third, that the disclosure of the records at issue in this appeal could reasonably be expected to interfere with the law enforcement matter.

In keeping with my finding above, I find that FRO's activities in the circumstances of this appeal pertain to "law enforcement" for the purposes of the definition of that term in section 2(1) of the *Act*.

Respecting part two of the test for exemption under section 14(1)(a), I am satisfied that the information in the records relates to an existing law enforcement matter. Although no "active enforcement" is currently required (according to the ministry), the ongoing nature of the support obligation and income source deductions in this case are sufficient to satisfy me that the information relates to an *existing* law enforcement matter.

To meet the third part of the test for exemption under section 14(1)(a), I must be satisfied by the evidence that there is a *reasonable* expectation that disclosure of the specific information at issue would interfere with the identified law enforcement matter. However, I conclude that the ministry has failed to tender persuasive evidence respecting the harms anticipated as a result of disclosure of this information. Although the ministry alleges that disclosure of the "tools" used to enforce support orders may permit some support payors to frustrate enforcement by "circumventing the tools," the ministry did not provide me with sufficiently detailed and convincing evidence to establish a link between the withheld information and enforcement in this particular matter. The ministry's submissions are not sufficiently particularized to the circumstances of this appeal to illuminate such a connection. Moreover, the tools referred to in the records appear on my review to be tools specifically provided for in the *FRSAEA*, and are

[19] (*Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 4233 (Div. Ct.).

known to the public. As the ministry has failed to establish a reasonable expectation of harm under section 14(1)(a) resulting from disclosure of the information at issue, I find that section 14(1)(a) does not apply.

Section 14(1)(l) – facilitate commission of an unlawful act

In responding to the ministry's representations on the possible application of section 14(1)(l), the appellant expresses disbelief that disclosure of the information could have the effect of facilitating an unlawful act, namely that "support payors could use the information to manage their affairs in such a way as to avoid paying support and thus not comply with an order from the court." I share the appellant's view.

Because of its lack of specificity to the circumstances of this appeal, I find that the ministry's evidence is insufficient to establish a connection between the information at issue and a reasonable expectation of harm resulting from its disclosure. As I have not been provided with the requisite detailed and convincing proof that disclosure of this information would facilitate the commission of an unlawful act or hamper the control of crime under section 14(1)(l), I find that this exemption does not apply.

Notably, the personal information of the appellant appears on page 459 and the only exemption claim made in relation to that page is section 14(1)(a) and (l). In light of my finding that these exemptions do not apply, I will order this information disclosed. Further, as I have not upheld the sole exemption claims made with respect to pages 457-459, the ministry should disclose these pages in their entirety, with the exception of the FRO employee(s) identified, whose names may be severed because this information has been removed from the scope of the appeal.

COULD DISCLOSURE THREATEN HEALTH OR SAFETY?

The ministry is relying on section 49(a), in conjunction with section 20, to deny access to the affected party's "business information." The ministry's original reliance on section 20 to withhold the names of FRO employees is no longer at issue. Section 20 of the *Act* states:

> A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

For this exemption to apply, the ministry is required to demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the ministry must satisfy me that a reasonable basis exists for believing that endangerment will result from disclosure. In other words, the ministry must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[20] An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption (Order PO-2003).

[20] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.) (*Office of the Worker Advisor*).

The ministry submits that due to the "sometimes volatile and unpredictable nature" of relationships between support payors and recipients, it must exercise "extreme caution" regarding the information it chooses to disclose in response to an access request from one party so as not to jeopardize the other party's safety or health. The ministry adds that

> Even in cases where there is no indication of a history of domestic violence, it is impossible for FRO to know for certain the current status of the relationship. As a result, FRO never releases certain information, including employer-related information, about one party to the other party. In the case at hand, while there may not be any indication of domestic violence, any reference to the support payor's employer was severed under s. 20 to ensure against any unwanted contact between the support recipient and the support payor.

The appellant submits that she is not a danger to the support payor and that "it is not reasonable to think [she] is a danger to anyone. I do not seek any direct contact with the support payor."

Analysis and Findings

The question to be asked in reviewing the possible application of section 20 is whether the ministry has provided sufficient evidence to demonstrate that disclosure of the specific information at issue could reasonably be expected to threaten the affected party's health or safety. Past orders relating to this exemption have emphasized the need to consider both the type of information at issue and the behaviour of the individual who is requesting the information.

The lead authority on this exemption is the Ontario Court of Appeal decision in *Office of the Worker Advisor* where the court refers to the necessity of considering the nature of the information at issue and, more specifically, whether it is "potentially inflammatory." In the present appeal, the ministry's submissions appear to be limited to the affected party's "business information," although what that means precisely is not specified. Based on my own review of the records, I have concluded, therefore, that the information remaining at issue under section 20, the affected party's "business information," is not in itself inflammatory.

The analysis under section 20 does not end with this conclusion. *Office of the Worker Advisor* also provides guidance respecting the evaluation of the risk of threat from an appellant. In *Office of the Worker Advisor*, affidavit evidence of threatening behaviour exhibited by the appellant in that case towards staff from the institution's program offices had been provided and the evidence was uncontroverted. The court stated that uncontroverted evidence of this type was required to establish the evidentiary foundation for the second requirement of this exemption, which is that the appellant could reasonably be expected to pose a threat to safety or health to an individual if the information at issue were to be disclosed.

In the appeal before me, the ministry has provided *no* evidence, let alone uncontroverted evidence, of threatening behaviour on the part of the appellant. Nor do the ministry's representations clearly and directly link specific behaviour on the part of the appellant to the information at issue and a corresponding, reasonable expectation of harm with its disclosure (see Orders PO-1939 and MO-2229).

In my view, the ministry's vague and non-specific representations respecting the application of section 20 are insufficient to support a finding that there is a reasonable expectation of threat to the safety or health of any individual with disclosure of the records. Accordingly, I find that section 20 does not apply in the circumstances of this appeal.

EXERCISE OF DISCRETION

In situations where an institution has the discretion under the *Act* to disclose information even though it may qualify for exemption, this office may review the institution's decision to exercise its discretion to deny access. In this situation, this office may determine whether the institution erred in exercising its discretion, and whether it considered irrelevant factors or failed to consider relevant ones. The adjudicator, in reviewing the exercise of discretion by an institution may not, however, substitute his or her own discretion for that of the institution.

As previously noted, sections 49(a) and 49(b) are discretionary exemptions, and I have upheld the ministry's decision to apply them to deny access to certain records, or portions of records. I must now review the ministry's exercise of discretion in doing so. To be clear, my review of the ministry's exercise of discretion is restricted to the information that I have not ordered disclosed pursuant to this order.

The appellant submits that she has a sympathetic and compelling need to receive the information because her son's welfare is at the heart of her request. Noting that she has been trying to seek modification of the support order since 2001, she submits that the information she has received has been inconsistent and conflicting and she refers to the court order from 2000 that cancelled some of the arrears owing without notification to her.

The ministry submits that it considered all relevant factors, did not act in bad faith or for an improper purpose and has therefore exercised its discretion appropriately under sections 49(a) and 49(b). The ministry submits that

> FRO is committed to fulfilling [its] statutory mandate to enforce support orders, and safeguarding the information of support payors and recipients while being open and transparent.

According to the ministry, the factors taken into account in the exercise of discretion included:

- the purpose of the *Act*, namely the principle that information should be available to the public. As such, the Director disclosed information to the appellant that would not interfere with the program's ability to meet its statutory obligation to enforce support orders or which was the personal information of another individual;
- the principle that the appellant should have access to his [sic] own personal information;
- the exemptions from the right of access should be limited and specific to those records which would interfere with the program's ability to meet its statutory obligations;
- the unknown nature of the relationship between the appellant and the support payor;
- the highly sensitive nature of the personal information in FRO files;

- the interaction of FRO enforcement services officers with a volatile client base in some circumstances;
- the appellant's ability to access the information from other sources such as the courts.

My review of the ministry's exercise of discretion relates to section 49(a) in conjunction with section 19 (solicitor-client privilege) and section 49(b) (personal privacy).

On a preliminary note, the ministry's submission that "FRO does not disclose information where that information is highly sensitive, includes personal information, or where there are issues about the integrity of a document," is troubling to the extent that it is, in my view, suggestive of a fettering of discretion. Further, the lack of particularization of the ministry's representations regarding the application of section 49(a) in conjunction with section 20 in the specific circumstances of this appeal was concerning for the same reason. However, I did not uphold the ministry's claim of section 49(a), together with section 20, nor did I uphold its claim to section 49(b) in its entirety and, as a consequence, the scope of the information under review for the purpose of the ministry's exercise of discretion is now significantly more narrow.

Based on my own review of the information remaining withheld under sections 49(a) and 49(b), I agree with the ministry that the nature and sensitivity of the context and the information gathered for FRO support enforcement matters are relevant factors which must be considered in the exercise of discretion. In my view, it is also relevant that the appellant has recourse through *UFISA* for obtaining the information necessary for support modification.

In consideration of the overall circumstances, I find that the ministry has properly exercised its discretion in withholding the information I have found to qualify as solicitor-client privileged information, as well as some of the affected party's personal information. Accordingly, I will not interfere with the ministry's exercise of discretion on appeal.

ORDER:

1. I uphold the ministry's exemption claim under section 49(a), together with section 19, or section 49(b), in relation to the following records, or portions of them:

   1-37, 39-43, 48-49, 55-56, 59, 68, 70, 73, 76, 98-99, 104, 106-110, 112-113, 188-197, 199-200, 204, 207-214, 216, 223-225, 228, 259, 261, 263, 266, 268-269, 272, 276, 280-289, 291-292, 294, 305-306, 308-309, 311-313, 315, 322-323, 332, 337-338, 340, 358, 449-453, 455-456, 460-461, 466, 473-494, 497, 503-518, 520-523, 530-539, 546-547.

   I have marked the portions of the records that are not to be disclosed in orange highlighter on the copy of the records sent to the ministry with this order. Copies of records which are to be withheld in their entirety are not included with this order.

2. I order the ministry to disclose the records or portions of records which I have found do not qualify for exemption to the appellant by **October 5, 2010** but not before **September 30, 2010**.

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 disclosed to the appellant pursuant to Provision 2.

August 31, 2010

Daphne Loukidelis
Adjudicator