

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3016

Appeal PA10-17

Ministry of Health and Long-Term Care

November 30, 2011

Summary: The appellant is a paramedic who seeks access to records relating to an investigation completed by the Ministry of Health and Long-Term Care (the ministry) into an incident involving himself and a patient. The ministry granted the appellant partial access to the responsive records claiming that disclosure of the withheld information would constitute an unjustified invasion of the personal privacy under section 49(b) of the patient and the appellant's partner, who is also a paramedic. The records were found to contain the personal information of the appellant and the patient. The information relating to the appellant's partner was found not to constitute her personal information. The ministry's decision to withhold the patient's information under section 49(b) was upheld. The ministry was ordered to disclose all of the information which was found not to constitute the personal information of any identifiable individual, including that of the appellant, which could be severed from the patient's personal information. Appeal upheld in part.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) definition of "personal information", 21 and 49(b).

OVERVIEW:

[1] The appellant filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about an incident involving a patient and himself.

[2] The ministry located the responsive records and denied access to them pursuant to section 49(b) (personal privacy) of the *Act*. The appellant appealed the ministry's decision to this office and a mediator was assigned to the appeal.

[3] During mediation, the appellant's representative advised that he was of the view that additional records exist. In response, the ministry conducted a further search and located additional responsive records. The ministry granted partial access to these records but withheld the remaining portions under section 49(b) of the *Act*.

[4] Also during mediation, the appellant's partner who was driving the ambulance during the incident was notified about the appeal. This individual objected to the release of any information she provided relating to the incident.

[5] At the end of mediation, the appellant confirmed that he was seeking access to Records 1g, 1h, 2, 3, 7, 8, 11 and the withheld portions of 1c and 1f.

[6] As mediation did not resolve the issues in this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry. A Notice of Inquiry, setting out the facts and issues in this appeal, was sent to the ministry, the appellant's partner and the appellant. The parties provided representations in response, which were shared in accordance with section 7 of the IPC's Code of Procedure and Practice Direction 7. The appeal was then transferred to me to complete the inquiry process.

[7] In this order, I make the following findings:

- the records contain the personal information of the appellant and the patient only;
- the records do not contain the personal information of the appellant's partner or other individuals acting in their professional capacities;
- the withheld portions of the records which contain the patient's personal information qualifies for exemption under section 49(b); and
- the withheld portions of the records which contain the appellant's personal information, and can be reasonably severed is ordered disclosed.

RECORDS:

[8] The following records are at issue in this appeal:

Record #	General Description	Released?
1c	Email from OPP Constable to Chief of Emergency Medical Services (EMS)	Partial
1f	Email exchange between Deputy Chief EMS to OPP Sergeant and Chief of EMS	Partial
1g	Email from named patient to EMS staff	No

1h	Email from named patient to ministry investigator	No
2	Ministry's investigator's typed interview notes relating to the named patient	No
3	Ministry's investigator's handwritten investigation notes	No
7	Investigations Incident report completed by the appellant's partner	No
8	Audio recording of the appellant's partner's statement to the ministry's investigator	No
11	Audio recording of various 911 and dispatch calls	No

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1)?
- B. Does the discretionary exemption at section 49(b) apply to the information at issue?
- C. Did the ministry properly exercise its discretion?
- D. Does the public interest override at section 23 apply to the information at issue?

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1)?

[9] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. The ministry submits that the records contain the personal information of the appellant, the appellant's partner and a patient. In particular, the ministry claims that paragraphs (a), (b), (c), (d) and (e) of the definition of "personal information" found at section 2(1) applies to this information.

[10] The appellant's partner submitted representations objecting to the release of the records sought by the appellant. However, her representations do not claim that any of the records contain her personal information as defined in section 2(1) of the *Act*

[11] The appellant's representations state:

The Appellant does not disagree with the representations of the Ministry with respect to this issue, save and except for instances in the withheld records where the documents are comprised of [identifiable] individual'(s) personal opinions or views that relate to another individual.

[12] Having reviewed the records, I find that the records only contain the personal information of the appellant and the patient.

What constitutes the personal information of the appellant?

[13] Though the information contained in the records about the appellant relates to an incident which arose in the course of his employment as a paramedic, I find that it qualifies as his personal information because the information reveals something of a personal nature about the appellant [Orders P-1409, R-980015, PO-2225 and MO-2344]. The records relate to an incident involving the appellant and a patient which resulted in a complaint being made by the patient against the appellant. Previous orders from this office have held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to their employment responsibilities or position, unless the information about the individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct (see Order MO-2197).

[14] Accordingly, I find that the views, opinions and observations of other individuals about the appellant contained in the records constitute the appellant's personal information as defined in paragraph (g) of the definition of that term in section 2(1). This information is found in the patient's and police's emails (Records 1c, 1f, 1g and 1h), interview notes (Record 2), investigation notes (Record 3) and audio statement (Record 8). I also find that the 911 and dispatch calls (Record 11) contain the appellant's personal information as the appellant is identified by name [paragraph (h)] or by the identifying number assigned to him [paragraph (c)]. In addition, the calls include the appellant's personal views and opinions [paragraph (e)].

What constitutes the personal information of the patient?

[15] I also find that the withheld portions of each of the records contain the personal information of the patient, including his addresses and telephone numbers [paragraph (c)], personal views and opinions [paragraph (e)], and name, along with other personal information relating to him [paragraph (h)]. The patient's personal information is also contained in the emails he and the police sent to the ministry (Records 1c, 1f, 1g and 1h). In addition, the patient's personal information is contained in the interview notes (Record 2), investigation notes (Record 3) and incident report which includes information an unidentified third party provided the appellant's partner about the patient (Record 7). Finally, the patient is also identified in the 911 and dispatch calls (Record 11) which therefore also contains his personal information.

What information does not qualify as personal information?

[16] In my view, portions of the emails sent by police and the investigation notes (Records 1c, 1f and 3) do not constitute the “personal information” of any identifiable individual. I note that the police emails contain one of the officer’s work cell phone number and describe the actions the police took upon arrival on the scene. I also note that portions of the investigation notes capture the investigator’s efforts to schedule meetings and obtain evidence from individuals acting in their professional capacities. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

[17] The ministry takes the position that the incident report and audio statement (Records 7 and 8) contain the personal information of the appellant’s partner. I note that the information contained in these records were gathered in the course of the appellant’s partner’s professional duties and do not include information about her which is personal in nature. In my view, the information contained in the records which relate to the appellant and the patient which were provided by the appellant’s partner, police, ministry EMS staff or dispatch constitutes the personal information of the appellant and the patient only. These individuals did not provide the information at issue in their personal capacities.

[18] I will order the ministry to disclose certain portions of Records 1c, 1f and 3 because they do not contain the “personal information” of any identifiable individual and thus personal privacy provisions in the *Act* can not apply to this information. In addition, the ministry has not claimed that any other exemptions apply. For the sake of clarity, highlighted copies of Record 1c, 1f and 3 will be provided with the ministry’s copy of this order.

[19] As I have found that the remaining portions of Records 1c, 1f and 3 in addition to Records 1c, 1f, 1g, 1h, 2, 3, 7, 8 and 11 contain the personal information of both the appellant and the patient, I will go on to determine whether this information qualifies for exemption under section 49(b).

B. Does the discretionary exemption at section 49(b) apply to the information at issue?

[20] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access, including section 49(b). Section 49(b) introduces a balancing principle that must be applied by institutions where a record contains the personal information of both the requester and another individual. In this case, the ministry must look at the information and weigh the appellant’s right of access to his own personal information against the patient’s right to the protection of their privacy.

If the ministry determines that release of the information would constitute an unjustified invasion of an identifiable individual's personal privacy, then section 49(b) gives the police the discretion to deny access to the appellant's personal information.

[21] In determining whether the exemption in section 49(b) applies, sections 21(1), (2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the affected person's personal privacy. Section 21(2) provides some criteria for the police to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. The parties have not claimed that any of the exclusions in section 21(4) apply and I am satisfied that none apply.

[22] Section 49(b) states:

A head may refuse to disclose to the individual to whom the information relates personal information where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[23] The ministry claims that section 49(b) applies to the information remaining at issue. It claims that the presumption at section 21(3)(b) applies. The ministry also claims that the information relating to the patient constitutes his personal health information which, in my view, gives rise to the presumption at section 21(3)(a). Sections 21(3)(a) and (b) state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation
- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

[24] In addition, the ministry takes the position that the personal information of the appellant can not be reasonably severed from the patient's personal information contained in the records.

[25] The appellant's representations state that he does not "challenge the Ministry's finding that all of the records were compiled as part of an investigation of a possible violation of law". However, the appellant claims that the combination of the factors at

section 21(2)(a) and (d) outweigh any presumption that may apply. Sections 21(a) and (d) state:

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

21(3)(a): *medical history*

[26] Having regard to the records, I find that certain portions of the withheld personal information about the patient relates to his medical diagnosis, condition, treatment or evaluation. Accordingly, I find that the presumption at section 21(3)(a) applies to this information.

21(3)(b): *investigation into violation of law*

[27] As noted above, the appellant does not dispute that the presumption at section 21(3)(b) applies in the circumstances of appeal. I am also satisfied that the personal information at issue in this appeal was compiled and is identifiable as part of an investigation into a possible violation of law. As noted above, the records relate to an incident involving the appellant and the patient which resulted in a complaint being made by the patient. The ministry subsequently initiated an investigation under section 4(1)(e) of the *Ambulance Act*, which could lead to a prosecution under section 23 of the *Ambulance Act*. Section 23(4) of the *Ambulance Act* states:

An individual who is convicted of an offence under this section is liable,

- (a) for a first offence, to a fine of not more than \$25,000 or to imprisonment for a term of not more than 12 months, or both; and
- (b) for a subsequent offence, to a fine of not more than \$50,000 or to imprisonment for a term of not more than 12 months, or both.

[28] Accordingly, I find that the presumption at section 21(3)(b) applies to the information I found constitutes the appellant's and patient's personal information.

21(2)(a): public scrutiny

[29] This section contemplates disclosure in order to subject the activities of the government (as opposed to the actions of private individuals) to public scrutiny [Order P-1134]. The appellant submits that disclosure of the personal information at issue would subject the ministry's practices "when investigating employment-related complaints" to public scrutiny. In my view, disclosure of the personal information at issue would not serve to subject the ministry's investigative practices concerning employment-related complaints to public scrutiny. The information I found to constitute the personal information of the appellant and the patient does not describe the ministry's investigation practices or techniques related to the investigation of employment-related complaints. Accordingly, I find that the factor at section 21(2)(a) has no application to this appeal.

21(2)(d): fair determination of rights

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

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

[31] [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.)].

[32] The appellant's representations indicate that the ministry's investigation into the complaint has concluded and did not result in criminal charges being laid against him. Given that the investigation is concluded and I have not been provided with evidence establishing that the personal information at issue is required to prepared for a specific

proceeding or to ensure an impartial hearing, I find that the factor at section 21(2)(d) has no application to this appeal.

[33] In summary, I find that the presumptions at sections 21(3)(a) and (b) apply and that the factors favouring disclosure at sections 21(2)(a) and (d) have no application to this appeal. Accordingly, I will now go on to determine whether disclosure of the personal information at issue would constitute an unjustified invasion of personal privacy under section 49(b), if disclosed to the appellant.

Decision and Analysis

[34] With respect to the personal information which relates to the patient, I find that disclosure of this information to the appellant would constitute an unjustified invasion of personal privacy, taking into consideration the presumptions at sections 21(3)(a) and (b). This information is contained in the police's and patient's emails (Records 1 c, 1f, 1g and 1h), interview notes (Record 2), investigation notes (Record 3), incident report (Record 7), audio statement (Record 8) and all of the 911 and dispatch calls (Record 11). Though the information which relates to the patient's medical condition and history was also provided to the appellant in the course of his professional duties, I find that applying the absurd result principle to all of this information would be inconsistent with the purpose of the exemption, which is to protect the privacy of individuals. Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444 and MO-1323]. However, previous decisions from this office have found that if the disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [See Orders M-757, MO-1323, MO-1378, PO-2622, PO-2627 and PO-2642].

[35] However, I find that, with one exception, the absurd result principle does apply to the information contained in the calls placed by the appellant. Denying the appellant access to these calls, which the appellant himself made and which predominantly contain his personal views and opinions, would result in an absurdity. Accordingly, I find that the recording of these calls should be disclosed to the appellant but for the portion where specific reference is made to the patient's name. This information is contained in the last call the appellant placed and is in response to a specific question the dispatch operator asked the appellant. I find that disclosing the patient's name in this context, even to the appellant who made the call, would be inconsistent with the purpose of the exemption.

[36] In summary, I find that only the calls the appellant made himself, but for the reference to the patient's name should be released to the appellant. In my view, the remaining portions of the 911 and dispatch calls made by other individuals, including the patient, the appellant's partner, dispatch and EMS ministry staff which may contain the appellant's personal information, cannot reasonably be severed from the patient's personal information. Section 10(2) of the *Act* obliges institutions to disclose as much of any responsive record as can be reasonably severed without disclosing material which is exempt.

[37] Having regard to the above, I find that the personal information which relates to the patient, including the reference to his name contained in the 911 and/or dispatch calls placed by the appellant is exempt from disclosure under section 49(b), subject to my review of the ministry's exercise of discretion and the appellant's submission that the public interest override at section 23 applies to this information. This information is contained in records 1c, 1f, 1g, 1h, 2, 3, 7, 8 and 11.

[38] Turning now to the portions of the records which predominantly contain the appellant's personal information. Unlike the 911 and dispatch calls where information relating to the appellant and patient are exchanged between callers simultaneously in an effort to respond to an emergency situation, the investigator's interview of the appellant's partner was conducted so that her views and opinions about the appellant were limited to responses to specific questions contained in the audio statement (Record 8). Consequently, I find that the following portions of the audio statement can be severed from the portions of the statement that contain the patient's personal information:

- introduction up until the investigator starts to list the patient's medical condition;
- views and opinions about the decision to use restraints;
- views and opinions about circumstances surrounding the decision to medicate the patient, up until the subject-matter turns to the appellant's partner's observations of the patient at the hospital;
- views and opinions of paramedic care given by both the appellant and appellant's partner; and
- views and opinions of the appellant's demeanor.

[39] I find that disclosure of the above-referenced portions of the audio statement (Record 8) to the appellant would not reveal any identifiable personal information of the patient, and therefore cannot constitute an unjustified invasion of personal privacy under section 49(b).

[40] I also find that disclosure of the portions of the records (Records 1c and 1f) which contain the police's and appellant's partner's views and opinions about the appellant would not constitute an unjustified invasion of personal privacy under section

49(b) if disclosed to the appellant. This information is found in the emails at Records 1c and 1f. However, I find that disclosure of the patient's views and opinions about the appellant contained in his emails and statement would constitute an unjustified invasion of the patient's personal privacy under section 49(b).

[41] Finally, I find that disclosure of the 911 and dispatch calls (Record 11) the appellant himself placed, except for the portion which identifies the patient by name, would not constitute an unjustified invasion of personal privacy under section 49(b), if disclosed to the appellant.

[42] Having regard to the above, I will order the ministry to disclose the information I found would not constitute an unjustified invasion of personal privacy under section 49(b) if disclosed to appellant. For the sake of clarity, a highlighted copy of Records 1c, 1f and 3 will be provided to the ministry with its copy of this order.

E. Did the ministry properly exercise its discretion?

[43] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so.

[44] In addition, this office may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[45] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[46] The ministry submits that it exercised its discretion properly and took into account relevant factors such as the personal privacy interests of the patient and the highly sensitive nature of the information. The ministry also submits that the information it already released to the appellant demonstrates that it exercised its discretion properly.

[47] The appellant's representations focus on the ministry's decision to withhold the information provided by the appellant's partner. However, in this order I have directed

the ministry to disclose the portions of this information which relates solely to him. The appellant also questions ministry's position that the records it has already released demonstrate that it exercised its discretion properly.

[48] In my view, the ministry's evidence demonstrates that it properly exercised its discretion and in doing so took into account relevant considerations such as the sensitive nature of the withheld information and the significance and sensitivity attached to it. I find that the ministry took into consideration that the records contain the personal health information of the patient and one of the purposes of the *Act* is that the privacy of individuals should be protected. I also took into consideration that the patient's information was provided to the ministry initially for medical purposes and then subsequently gathered in the course of its investigation into a potential violation of law by the appellant. Finally, I also considered that one of the purposes of the *Act* includes the principle that requesters should have a right of access to their own information. However, in my view, the personal nature of the remaining information that relates to the patient and the sensitivity of it outweigh this principle. I am also satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose, nor is there any evidence that it took into consideration irrelevant considerations.

[49] Accordingly, I conclude that the ministry properly exercised its discretion in deciding to withhold the records I found exempt under section 49(b).

F. Does the public interest override at section 23 apply to the information at issue?

[50] Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[51] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[52] The appellant argues that there is a compelling public interest in the disclosure of records which would inform the public about the ministry's review of employment-related complaints. In support of his position, the appellant states that "transparency in the employment review process is critical and public confidence in government, both as an employer and as a watchdog of private employers, must not be undervalued."

[53] The ministry's representations state:

In this case, the Appellant is not someone who is concerned, from a public perspective, with the adequacy of the Government's oversight of paramedics, and he has made no submission to indicate he wished to promote public debate on the Government's role in overseeing paramedics. Rather, the Appellant wants access to the records for personal reasons. The Appellant's private interest in the records relates to one very particular fact scenario that involved the Appellant personally, as an employee, of a municipally operated [Emergency Medical Services]. In [his] submissions, the Appellant describes how the information in these records affect[s] his "professional life on a daily basis", which the Ministry submits demonstrates that the Appellant's primary interest in the records is of a very personal nature.

[54] In considering whether there is a "public interest" in the disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Orders P-984 and PO-2556].

[55] For the same reasons that I found that the factor at section 21(2)(a) of the *Act* has no application to the circumstances of this appeal, I find that the public interest override at section 23 does not apply. In my view, disclosure of the patient's personal health information would not serve the purpose of informing the public about the ministry's activities. In addition, I find that the appellant's interest in the records is essentially private in nature. Previous decisions from this office have found that a public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. As a result, I am not satisfied that disclosure of the remaining personal information would shed light on the ministry's operations.

[56] In any event, even if a compelling public interest in the disclosure of the remaining information at issue were to exist, for the section 23 override provisions to apply, the compelling public interest must clearly outweigh the purpose of the personal privacy provisions of the *Act*. In this case, the purpose of the exemption at section 49(b) is the protection of the privacy of individuals. In my view, the issues raised by the appellant do not clearly outweigh these privacy interests.

[57] Accordingly, I find that the public interest override at section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold the ministry's decision to withhold the information I found constitutes the patient's personal information.
2. I order the ministry to disclose the remaining information to the appellant by **January 10, 2012** but not before **January 5, 2012**. For the sake of clarity, I have highlighted the portions of Records 1c, 1f and 3 that **should not** be disclosed in the copies of those records enclosed with the ministry's copy of the order. The ministry is to rely on the information contained in the order when severing Records 8 and 11.
3. In order to verify compliance with Order Provision 2, I reserve the right to require a copy of the information disclosed by the ministry to be provided to me.

Original Signed By: _____

Jennifer James
Adjudicator

November 30, 2011