

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3082

Appeal PA11-346

Ministry of Community Safety and Correctional Services

May 30, 2012

Summary: The ministry received a request for a report regarding a telephone call the requester's ex-husband made to her place of employment. The ministry denied access to the report, citing the personal privacy exemption in section 49(b). This order upholds the ministry's decision.

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, 49(b), 21(2)(f).

OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for the following information:

Around the week of [date] documentation was written at my place of employment [named institution] regarding myself and my [named] separated spouse, regarding a phone call he had made to the institution.

[2] The ministry located the responsive record and issued a decision advising that access to it was denied pursuant to the discretionary exemption in section 49(b) (personal privacy) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision.

[4] The parties were unable to arrive at a mediated resolution and the file was referred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the ministry seeking its representations. I received representations from the ministry which I sent to the appellant, along with a Notice of Inquiry. The appellant did not provide representations in response.

[5] In this order, I uphold the ministry's decision and dismiss the appeal.

RECORDS:

[6] At issue is a one page occurrence report

ISSUES:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[7] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment

history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

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

[9] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

- (2) Personal information does not include information about an individual who has been dead for more than thirty years.
- (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.

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

[11] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

[12] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

[13] The ministry submits that the record contains the personal information of the appellant and her former spouse in accordance with paragraphs (a), (b), (d), (e), (g) and (h) of the definition of personal information in section 2(1).

Analysis/Findings

[14] Based upon my review of the record, I agree with the ministry that the record contains the personal information of the appellant and her former spouse in their personal capacities in accordance with paragraphs (a), (b), (d), (e), (g) and (h) of the definition of personal information in section 2(1).

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

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

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

[17] If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access

to his or her own personal information against the other individual's right to protection of their privacy.

[18] Sections 21(1) to (4) provide guidance in determining whether the unjustified invasion of personal privacy threshold is met. 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). If any of paragraphs (a) to (d) of section 21(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 49(b). Neither paragraphs (a) to (e) of section 21(1) nor section 21(4) apply to the record.

[19] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b). In this appeal, the ministry does not rely on any of the presumptions in section 21(3).

[20] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy under section 49(b) [Order P-239].

[21] The ministry states that the record contains highly sensitive information. The ministry submits that the factor in section 21(2)(f) applies. This section reads:

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,

the personal information is highly sensitive;

[22] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed [Orders PO-2518, PO-2617, MO-2262 and MO-2344].

Analysis/Findings

[23] In this appeal, the appellant was asked both at mediation by the mediator and at adjudication in the Notice of Inquiry whether her ex-husband could be contacted to seek his representations concerning disclosure of his personal information in the record. During mediation of this appeal, the appellant instructed the mediator not to contact her ex-husband due to the acrimonious nature of her relationship with him. The appellant did not respond to the Notice of Inquiry at all and, therefore, did not provide representations detailing any factors that could weigh in favour of disclosure.

[24] I agree with the ministry that the personal information in the record is highly sensitive and that the factor in section 21(2)(f) applies and weighs against disclosure of the record. In the absence of being provided an opportunity to submit representations, and considering the contents of the record, I find that disclosure of the personal information in the record of the appellant's ex-husband would be an unjustified invasion of his personal privacy. Furthermore, the personal information of the appellant's ex-husband is so intertwined with that of the appellant that severance is not possible. Therefore, subject to my review of the ministry's exercise of discretion, the information in the record is exempt by reason of section 49(b).

C. Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[25] 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, the Commissioner may determine whether the institution failed to do so.

[26] In addition, the Commissioner 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.

[27] 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)].

[28] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information

- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[29] The ministry submits that it took into account that the appellant is an individual rather than an organization. It also states that it considered the apparent acrimonious relationship between the appellant and her former spouse. The ministry also considered that the appellant may have a compelling or sympathetic need to access the requested record. The ministry states that:

The historic practice of the ministry when responding to personal information requests for records is to release as much information as possible in the circumstances. Where such a request involves the personal information of more than one person and the ministry is contemplating releasing the requested record, affected party notice in the interests of fairness is conducted in appropriate cases.

In the circumstances of this particular request, the ministry in its exercise of discretion was of the view that it was not possible to release the requested record in the absence of having the opportunity to conduct affected party notice.

Analysis/Findings

[30] Based upon my review of the ministry's representations and taking into account the contents of the record, I find that the ministry exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. Accordingly, I am upholding the ministry's exercise of discretion.

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 30, 2012