Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3076

Appeal PA11-438

Ministry of Community Safety and Correctional Services

May 4, 2012

Summary: The appellant made a request to the ministry for a copy of a letter about himself written by a probation and parole officer. The ministry located the letter and denied access to it, relying on the exemptions in section 49(a), in conjunction with sections 14(1)(a) and 14(2)(d), section 49(b), in conjunction with sections 21(1) and section 49(e). During the inquiry of the appeal, the ministry disclosed portions of the letter to the appellant and denied access to one sentence, relying on the exemption in section 49(b), in conjunction with section 21(1). In this order, the ministry's decision to deny access to the remaining portion of the letter is upheld and the appeal is dismissed.

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

OVERVIEW:

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

> A copy of letter in my file at probation services in Napanee . . . written by [a probation and parole officer] dated September 20, 2010.

[2] The ministry located the letter and denied access to it, in its entirety, claiming the application of the exemptions in sections 14(1)(a), 14(2)(d), 21(1), 49(a), 49(b) and 49(e) of the *Act*.

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

[4] During the mediation of the appeal, the ministry confirmed its position that no portion of the record may be disclosed. The appellant's position was that he should be provided full disclosure of the letter, as he had been previously provided with partial disclosure of the letter by its author.

[5] The appeal then moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. Representations were received from both parties and shared in accordance with this office's *Practice Direction 7*. In its representations, the ministry confirmed that the appellant had already been provided with access to portions of the letter by its author. The ministry also advised that it consulted with a representative of a social service agency named in the letter, who clarified concerns about the release of the withheld portions of the previously disclosed letter. The ministry further advised that it would be issuing a supplementary decision letter to the appellant, disclosing the letter, in part and that the ministry would no longer be relying on the exemptions in section 49(a), in conjunction with section 14, or on section 49(e).

[6] The ministry then issued the supplementary decision letter, granting access to the letter, withholding one sentence, claiming the application of the exemption in section 49(b) of the *Act*, in conjunction with section 21(1) and the factor in section 21(2)(f).

RECORD:

[7] The information remaining at issue is one sentence contained in a letter dated September 20, 2010.

ISSUES:

A. Does the record contain "personal information" within the meaning of section 2(1) of the Act?

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

C. Did the ministry properly exercise its discretion under section 49(b)?

DISCUSSION:

A. Does the record contain "personal information" within the meaning of section 2(1) of the Act?

[8] 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. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the views or opinions of another individual about the individual.

[9] 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.[1]

[10] The ministry submits that the record contains personal information consisting of an opinion about an individual made by another individual. The ministry also argues that the personal information belongs to both the individual who expressed the opinion and the individual who is the subject matter of the opinion.

[11] The appellant submits that when he previously received a copy of the letter he was advised that the withheld portion contained "third party" information, but that, in his view, the letter should not contain an opinion regarding a third party.

[12] I have reviewed the letter in its entirety and find that it contains the personal information of the appellant. However, I also find that the withheld information at issue contains the personal information of an identifiable individual other than the appellant, as it is an opinion about this individual made by another individual.[2] This information qualifies as the "personal information" of the individual about whom the opinion was given, as contemplated by paragraph (g) of the definition of that term in section 2(1).

[13] However, I do not agree that the withheld information consists of the personal information of the individual who expressed the opinion. Paragraph (e) of the definition of personal information at section 2(1) states that personal information includes the personal opinions or views of the individual except where they relate to another individual [my emphasis]. In addition, the individual who expressed the opinion was doing so in her professional, and not personal, capacity.

[14] Notwithstanding that I have found that the withheld information contains the personal information of an identifiable individual other than the appellant, I will now proceed to consider whether the information is exempt under section 49(b) of the *Act*

---

[1] Order P-11.
[2] The individual expressing the opinion is a representative of a social service agency.

because the record at issue, the letter, contains the personal information of the appellant.

B. Does the exemption in 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] If no section 21(3) presumption applies or the records are claimed to be exempt under section 49(b), 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.[3] The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[4]

[19] The ministry claims that the factor in section 21(2)(f) weighs in favour of non-disclosure of the information at issue. The ministry submits that the withheld information expresses an opinion about an individual who has not been consulted about the record being disclosed and expresses its concerns that disclosure would be highly distressing to this individual. The reasons given are that it is not expected, the information is likely not known by the individual and the content of the opinion.

[20] The ministry also submits that the individual whose opinion is contained in the record was consulted by the ministry and does not want it disclosed. The ministry states that it is concerned that if this sort of personal information is disclosed, individuals will no longer express their opinions to the ministry, jeopardizing its probation and parole mandate, which requires it to collect personal information needed to monitor individuals. Representatives of social service agencies, the ministry argues, need to be able to speak candidly when conferring with ministry probation and parole officers, without fear that whatever they say is subject to subsequent disclosure.

---

[3] Order P-239.
[4] Order P-99.

[21] Lastly, the ministry submits that the absurd result principle does not apply, as the information was not provided by the appellant, and there is no reason to believe that the appellant knows what the withheld information states.

[22] The appellant submits that there should not be opinions made about third parties in the record, that he would like to know what the content of the withheld information is, and that the name of the third party could be blocked out. In addition, he goes on to state that if the information relates to him, it should be disclosed to him.

[23] As previously stated, 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.

[24] In the ministry's supplementary decision letter, it claimed the relevance of the factor in section 21(2)(f), which states that 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. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[5]

[25] I have reviewed the withheld portion of the record, which consists of one sentence setting out the opinion of an individual about another individual. The opinion stated in the record does not relate to the appellant. I am satisfied that the opinion is highly sensitive and that, if disclosed, there would be a reasonable expectation of significant personal distress of the individual to whom the opinion relates. Therefore, I find that the factor in section 21(2)(f) weighs against the disclosure of the information at issue. I also find that none of the other factors in section 21(2) are relevant to this appeal.

[26] Consequently, I find that disclosure of the personal information at issue would result in an unjustified invasion of personal privacy of an individual and that section 49(b) of the *Act* applies to exempt the information from disclosure, subject to my finding on the ministry's exercise of discretion.

C. Did the ministry properly exercise its discretion under section 49(b)?

[27] 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.

[5] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[28] 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.

[29] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[6] This office may not, however, substitute its own discretion for that of the institution.[7]

[30] The ministry submits that it exercised its discretion appropriately in light of the following considerations:

- the disclosure of the withheld portion of the record would reveal information that would constitute an unjustified invasion of personal privacy; and
- the disclosure of the withheld portion of the record could harm the ministry's mandate by discouraging individuals, including the ministry's stakeholders, from being cooperative and candid when speaking with ministry staff.

[31] The appellant's representations did not address the issue of the ministry's exercise of discretion.

[32] Based on my review of the information at issue and the ministry's representations, I find the ministry's exercise of discretion to be proper. The appellant's personal information has been disclosed to him and the remaining information, consisting of one sentence, relates to an individual other than the appellant.

[33] Accordingly, I find that the withheld portion of the record qualifies for exemption under section 49(b).

[6] Order MO-1573.
[7] Section 54(2).

ORDER:

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

Original Signed by: May 4, 2012
Cathy Hamilton
Adjudicator