Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3110

Appeal PA11-347

Ministry of Health and Long-Term Care

September 20, 2012

Summary: The appellant requested access to certain records maintained by the ministry pertaining to interactions between herself and staff at a long term care facility where her mother lived. Balancing the presumptions in sections 21(3)(a) and (b) and the factors favouring non-disclosure in section 21(2)(f) and (h) against the consideration favouring disclosure in section 21(2)(a), the decision to deny access to the records is partially upheld on the basis that those portions of the records containing only the personal information of the staff members are exempt under section 49(b). The disclosure of the remaining portions of the records containing only the personal information of the appellant and her mother would not result in an unjustified invasion under section 21(1)(f) and this information should be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 21(1)(f), 21(2)(f) and (h), 21(3)(a) and (b), 49(b), 2(1) [definition of personal information].

Orders and Investigation Reports Considered: PO-1733

OVERVIEW:

[1] The Ministry of Health and Long Term Care (the ministry) received an e-mail requesting access to records created by staff at a specified long term care facility about interactions they had with the requester while her mother was a resident at the facility.

The ministry advised the requester that her e-mail request would be responded to in accordance with the *Freedom of Information and Protection of Privacy Act (*the *Act).*

[2] In its decision letter, the ministry advised that it had identified four records (statements) as responsive to the request and had sought representations from the individuals who had written them (the affected parties), pursuant to section 28(1)(b) of the *Act*. A lawyer representing the affected parties provided submissions to the ministry opposing disclosure of their statements.

[3] Accordingly, the ministry denied access to the requested records pursuant to section 21(1) (personal privacy), relying upon the presumptions against disclosure in sections 21(3)(d) and (g) and the factors favouring privacy protection in sections 21(2)(f) and (h) of the *Act.* The requester, now the appellant, appealed the ministry's access decision to this office.

[4] At mediation, the appellant took the position that because the statements which constitute the records at issue in this appeal contain the opinions of staff about the appellant and accounts of her behaviour towards them, the information should be considered her "personal information," which she has a right to obtain. The mediator's review of the records confirmed that they may contain the appellant's personal information, which raises the application of the discretionary personal privacy exemption in section 49(b) of the *Act.* Also during mediation, the appellant raised the possible application of the "public interest override" in section 23 of the *Act*.

[5] Initially, the adjudicator assigned to this appeal sent a Notice of Inquiry to the ministry and to the legal counsel for the nursing home (who had previously provided submissions on behalf of the staff), seeking representations on the issues in this appeal.
[6] Submissions were received from both the ministry and from the legal counsel for the nursing home. Legal counsel for the nursing home is no longer representing several of the affected parties; however, counsel provided the addresses for two of them. Copies of the Notice of Inquiry were also provided to these two individuals though no submissions were received from them.

[7] In the ministry's representations, the possible application of the presumption in section 21(3)(b) of the *Act* was raised as an additional basis for precluding access to the records. The assigned adjudicator then provided a copy of the Notice of Inquiry to the appellant, along with a complete copy of the ministry's representations. The appellant also provided me with extensive and detailed representations. Late in the inquiry process, one of the affected parties also submitted representations objecting to the disclosure of the particular record containing information relating to him/her.

[8] In this order, I uphold the ministry's decision to deny access to the personal information of the affected parties and order the disclosure of the remainder of the records which relate to the appellant and her mother.

RECORDS:

[9] At issue in this appeal are four letters/statements written by the affected parties who were employed at the identified long term care facility (6 pages).

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: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 49(b) exemption?

D: 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?

[10] 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;

[11] 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].

[12] Section 2(3) also relate to the definition of personal information. This section states:

> 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.

[13] 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].

[14] 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].

[15] 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.)].

[16] I have carefully reviewed the contents of each of the records and make the following findings:

- All of the records contain the personal information of the appellant, consisting of her name, along with other personal information relating to her [paragraph (h)], as well as the views or opinions of other individuals about the appellant [paragraph (g)];

- Pages 1, 2, 3, 4 and 5 contain information that qualifies as the personal information of the appellant's mother, who is now deceased, relating to her medical history and treatment [paragraph (b)]; and

- All of the records contain the personal information of the four staff members who interacted with the appellant (the affected parties) and recorded their views about those encounters. This information qualifies as "personal information" as it consists of their educational, psychological and medical history [paragraph (b)], the personal opinions or views of these individuals [paragraph (e)] and the individuals' names along with other personal information relating to them [paragraph (h)].

[17] I find that section 2(3) does not apply to the personal information of the affected parties that appears in the records. The disclosure of the personal information contained in the records would reveal information of a personal nature about each of these individuals, including descriptions of the impact the appellant's actions had on each of them personally and professionally.

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

[18] 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, including section 49(b). That section reads:

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

[19] 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.

[20] 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.

[21] For section 49(b) to apply, on appeal I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy.

[22] In determining whether the exemptions in section 49(b) apply, 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 ministry 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. In addition, if the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy under section 49(b).

[23] In its decision, the ministry relies on the presumptions in sections 21(3)(d) and (g), but its representations refer only to section 21(3)(b). In addition I find that the record contains many references to the medical condition and treatment of the appellant's mother, raising the possible application of the presumption in section 21(3)(a). These presumptions 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] Based on my review of the records, I find that sections 21(3)(d) and (g) have no application to the personal information contained in the records. In support of its position that the section 21(3)(b) presumption applies, the ministry submits that section 25(1) of the *Long Term Care Homes Act, 2007* (the *LTCHA*) provides that ministry inspectors must conduct inspections in order to ensure compliance with its requirements in the event that the ministry receives a complaint about care. In

response to a complaint, a ministry inspector attended at the home in question and obtained copies of the memoranda which have been identified as the responsive records in this appeal. Those records were considered by the inspector as part of his/her investigation into a possible violation of the *LTCHA*.

[25] The ministry also submits that because the records at issue were compiled as part of its investigation into a possible violation of law, the *LTCHA*, the presumption in section 21(3)(b) applies to the information. It goes on to add that:

> Were it not for the ministry's inspection of the Home, the information contained in the record would have remained in the possession of the Home as part of the personnel files of the relevant individuals.
>
> In Order PO-1733, Adjudicator Big Canoe considered the application of s.21(3)(b) of the Act to two investigation reports prepared by Compliance Advisors in the Ministry's Long Term Care Division and concluded that those records fell squarely within the ambit of the presumed exemption given the regulatory scheme and the inspection power circumstances under which those records were created (under the now repealed *Nursing Homes Act* which was subsequently replaced by the *LTCHA*). Although the record was not authored by the Ministry or its inspectors, they were nevertheless collected in the context of an inspection into possible violations of the provisions of the *LTCHA*.
>
> . . .
>
> In addition, previous Orders have also recognized just because a record at issue was not originally created or prepared specifically for a particular investigation into a violation of law, that fact alone does not preclude parties from invoking the presumption in s.21(3)(b) in relation to that record. [Order P-666] The presumption allies as long as the personal information in the relevant record was, at some point, collected or gathered by the institution as part of its investigation. Accordingly, because the Ministry gathered the relevant record as part of its inspection of possible violations of the *LTCHA* at the Home, the exemption applies to the individual's personal information contained in that record.

[26] In addition, the ministry relies on certain factors listed in section 21(2) in support of its contention that the disclosure of the personal information in the records that relates to the employees would constitute an unjustified invasion of their personal privacy. Specifically, the ministry claims the application of sections 21(2)(f) and (h), which read:

> 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,
>
> . . .
>
> (f) the personal information is highly sensitive;
>
> . . .
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and

[27] 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].

[28] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation [Order PO-1670].

[29] The affected party who provided representations indicated her expectation that the information she provided was intended to be treated confidentially. She also states that she considers the records to be highly sensitive because of the very personal nature of the information which they contain.

[30] The appellant's representations are extensive and wide-ranging, providing a great deal of background information pertaining to her impressions of the care afforded her mother at the long term care facility in question. Clearly, the appellant was, and remains to this day, of the view that certain aspects of her mother's care were improper. Her lengthy representations focus on the deficiencies of the facility and the difficulties she encountered while her mother was living there, The appellant's submissions do not, however, address the possible application of the factors and the presumptions in sections 21(2) and (3) directly.

[31] Generally, the appellant alludes to the application of the factors favouring disclosure which are found in section 21(2)(a), (b) and (d), which read:

> 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;
>
> (b) access to the personal information may promote public health and safety;
>
> . . .
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

Findings

[32] Based on my independent review of the contents of the records, I conclude that they contain the appellant's mother's personal information in the form of her medical history, diagnosis and treatment. As such, this information falls within the ambit of the presumption in section 21(3)(a).

[33] As indicated above, the records at issue came into the possession of the ministry as the result of an inspection which followed its receiving a complaint about patient care at the facility. Following the conclusions reached in Order PO-1733, I am also of the view that the records were compiled as part of an inspection/investigation flowing from certain complaints being received which could have resulted in the laying of charges under the *LTCHA* against the operators of the facility if deficiencies were identified in the manner in which its services were being delivered. As a result, I find that the records were compiled and are identifiable as part of an investigation into a possible violation of law, the *LTCHA*, and fall within the ambit of the presumption in section 21(3)(b).

[34] Finally, owing to the nature of much of the personal information relating to the employees of the facility that is included in the records, I find that it is highly sensitive because of the very personal nature of the information which they contain. I also accept the submissions of the affected party that the records were provided to the facility and, ultimately, the ministry, with an expectation that they would be maintained in a confidential manner. Accordingly, I find that the factors favouring the protection of personal privacy in sections 21(2)(f) and (h) are relevant in the circumstances of this appeal.

[35] With respect to the factors under section 21(2) referred to by the appellant, I find that section 21(2)(a) is applicable to the personal information contained in the records that relates to the care of the appellant's mother as it may assist the appellant in subjecting the actions of the ministry or its inspection branch to public scrutiny. I do not agree, however, that this consideration has any relevance to the remaining portions of the records. Similarly, I conclude that section 21(2)(b) has no application as the

disclosure of the personal information in the records cannot reasonably be said to promote public health or safety, as contemplated by that section.

[36] Balancing the single factor favouring disclosure in section 21(2)(a) against the presumptions and considerations in sections 21(3)(a) and (b) and 21(2)(f) and (h), I make the following findings:

- The disclosure of the personal information of the appellant and her mother does not constitute an unjustified invasion of the personal privacy of any other identifiable individual. As is evidenced by the comprehensive submissions of the appellant, every aspect of her mother's care at the facility are well-known to her and to disclose this information to her would not give rise to an unjustified invasion of her mother's personal privacy. Similarly, the appellant is familiar with any personal information that might be contained in the record which relates to her alone. Accordingly, the exception in section 21(1)(f) applies to this personal information and it is not exempt under section 49(b).

- The presumption in section 21(3)(b) and factors favouring privacy protection in sections 21(2)(f) and (h) outweigh the single consideration favouring disclosure in section 21(2)(a) with respect to the personal information pertaining solely to the affected parties. Accordingly, I find that the disclosure of the personal information relating solely to the affected parties would constitute an unjustified invasion of their personal privacy and it is exempt from disclosure under section 49(b), subject to my discussion of section 23 and my review of the ministry's exercise of discretion, below.

[37] Accordingly, I have provided the ministry's Freedom of Information Co-ordinator with a highlighted copy of the records at issue indicating those portions of the records which are **not** to be disclosed because they are exempt under section 49(b).

C: Is there a compelling public interest under section 23 in disclosure of the records that clearly outweighs the purpose of the section 49(b) exemption?

[38] 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.

[39] 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.

[40] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

[41] In considering whether there is a "public interest" in disclosure of the 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].

[42] A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

[43] The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

[44] To begin, I note that the appellant will be receiving a substantial amount of personal information from the records which relates directly to her and her mother. In my view, any public interest that could exist in the records will be adequately addressed through this disclosure to her. In addition, I find that the appellant has not established that there exists any public interest, compelling or otherwise, in the disclosure of the remaining personal information relating solely to the affected persons that might be contained in the records. Rather, the interests being advanced by the appellant are entirely private in nature. I find that the appellant's request and appeal are intended to further her pursuit of what she considers to be accountability on the part of the facility and the ministry with regard to the manner in which her mother was cared for at the facility. In my view, this is a private interest and section 23 has no application in these circumstances and I will not address it further.

D: Did the institution exercise its discretion under section 49(b)? If so, should I uphold the exercise of discretion?

[45] 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.

[46] 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.

[47] 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)].

Relevant considerations

[48] 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.

Submissions and findings

[49] In support of its argument that it exercised its discretion to deny access to the records in an appropriate way, the ministry submits that it took into consideration the following:

- the circumstances surrounding the creation of records, including the fact that it was done pursuant to a statutory obligation under the *LTCHA;*
- the fact that the information was shared by the affected parties with the facility and the ministry with an expectation of confidentiality;
- the fact that the records came into the possession of the ministry as a result of its inspection into possible violations of the *LTCHA* and that unless the inspection had taken place, the existence of the records would never have come to its attention;
- the possibility of a "chilling effect" on the part of other long-term care facility employees to record this type of information in the future, when it is desirable for these records to be kept for the use of ministry inspectors in the future;
- the fact that the appellant's right of access is outweighed by the privacy interests of the affected parties; and
- the fact that there is no public interest in the disclosure of the records.

[50] The appellant's submissions do not address this issue directly though she argues that because the records contain her own personal information, she is entitled to have access to it, including the views or opinions of the affected parties about her.

[51] Based on the representations of the ministry, I find that it exercised its discretion in an appropriate way, taking into account relevant factors and not making its decision to deny access using irrelevant or improper considerations. As a result of this order, the appellant will receive a great deal of the contents of the records, including all of the personal information that relates to herself and her mother. I find that the ministry exercised its discretion to deny access to the remaining personal information relating to the affected parties properly and I will not disturb it on appeal.

ORDER:

1. I uphold the ministry's decision to deny access to those portions of the records which are highlighted on the copy which I have provided to its Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.

2. I order the ministry to disclose those portions of the records which are **not** highlighted on the copies provided to its Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order. The ministry is ordered to disclose this information to the appellant by no later than **October 25, 2012,** but not before **October 19, 2012**.

3. In order to verify compliance with Order Provision 2, I reserve the right to require the ministry to provide me with a copy of the records which it has disclosed.

Original Signed by: September 20, 2012
Donald Hale
Adjudicator