Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3238

Appeal PA12-295

Ministry of Community and Social Services

August 13, 2013

Summary: An individual submitted a request for access to his complete Family Responsibility Office (FRO) file. The FRO granted access to the records, in part, and relied on section 49(a), with sections 14, 19 and 20, section 49(b), as well as the exclusion in section 65(6)3, to deny access to portions of the records. During efforts to mediate the appeal, the appellant decided not to pursue access to certain information, which resulted in several issues being removed from the scope of the appeal, including the exclusion in section 65(6). In this order, the adjudicator finds that the records contain the personal information of the appellant and an affected party, the support recipient. She upholds the FRO's claim of the personal privacy exemption in section 49(b) to most of the withheld information in the records, but orders the non-exempt information disclosed. The adjudicator finds that the solicitor-client privilege exemption does not apply. Finally, the adjudicator upholds the FRO's exercise of discretion under section 49(b).

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"), 19, 21(1)(f), 21(2)(d)-(f) & (h), 21(3)(c), 21(3)(f), 49(a), 49(b).

Orders and Investigation Reports Considered: Orders MO-2114, PO-2910, and PO-2917.

OVERVIEW:

[1] This order addresses an individual's request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a complete copy of his Family Responsibility Office (FRO) case file.

[2] Operated by the Ministry of Community and Social Services (the ministry), the FRO[1] collects and distributes court-ordered child and spousal support payments under the authority of the *Family Responsibility and Support Arrears Enforcement Act, 1996*. 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.

[3] In response to the request, the ministry identified 446 pages of responsive records and issued a decision letter, granting partial access to them. 170 pages were disclosed in their entirety, while 276 pages were fully or partially withheld. The ministry relied on section 49(a) (discretion to refuse requester's personal information), together with sections 19 (solicitor-client privilege) and 22 (publicly available), as well as section 49(b) (personal privacy), to deny access to the withheld information.

[4] In addition, the ministry claimed that sections 14(1)(e) (endanger life or physical safety), 20 (danger to safety or health), 21(1) (unjustified invasion of privacy) and 65(6)3 (employment-related matters exclusion) of the *Act* "also apply to your records, as generally there are concerns that the health and safety of [FRO] employees are at risk if their names are disclosed to the public." With respect to one page (page 285), the ministry's index of records indicated that access was denied, in part, based on sections 14(1)(a), (b), (c) and (l), which are various law enforcement exemptions in the *Act.* Lastly, some records were not disclosed as they were identified by the ministry as duplicate records. The ministry charged a fee of $59.00 to process the request.

[5] After the appellant appealed the ministry's decision to this office, mediation was successful in resolving several matters. The ministry withdrew section 22 of the *Act* because it had been mistakenly included in the decision letter. The appellant clarified that he did not seek the names of FRO employees, so this removed severances from many pages, as well as sections 14(1)(e), 20 and 65(6)3, from the scope of this appeal. In addition, since the appellant did not seek access to the records that the ministry identified as duplicates, or to specified addresses, case file numbers and the support recipient's birthdate, additional pages were removed from the scope of this appeal.

[6] The appellant continued to seek access to the remaining information withheld under sections 49(a) (with section 19) and 49(b) of the *Act.*

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[1] The terms "FRO" and "ministry" are used interchangeably in this order although the ministry is considered to be the "institution" under the *Act.*

[7] Further, although the appellant did not seek access to the information severed on page 285 under sections 14(1)(a), (b), (c) and (l) of the *Act*, the ministry subsequently issued a revised decision to disclose page 285, in its entirety. This revised decision removed the remainder of the law enforcement exemptions from the scope of this appeal.

[8] The appellant had also initially questioned whether additional records related to specified case log numbers should exist. The ministry explained that some of the records the appellant thought should exist were, in fact, located, but are withheld in their entirety, or in part, pursuant to section 21(1) of the *Act.* This explanation satisfied the appellant and, consequently, the adequacy of the ministry's search is not at issue.

[9] As it was not possible to completely resolve all issues in this appeal through further mediation, it was transferred to the adjudication stage, in which an adjudicator conducts an inquiry. I started my inquiry by sending a Notice of Inquiry seeking representations from the ministry, initially. After I received the ministry's representations, I sent a copy of them to the appellant along with a modified Notice of Inquiry, inviting his submissions. The appellant decided not to submit representations.

[10] In this order, I find that the records contain the personal information of the appellant and at least one other individual. I order the ministry to disclose certain portions of the records containing the appellant's personal information because disclosure would not result in an unjustified invasion of another individual's personal privacy under section 49(b). I also order the ministry to disclose the panel lawyer report because it does not contain solicitor-client privileged information and is not exempt under section 49(a), together with section 19. Finally, I uphold the ministry's exercise of discretion.

RECORDS:

[11] In the ministry's representations, the approximately 170 pages of records at issue are grouped into certain categories, as follows: case log notes; panel lawyer report; support recipient correspondence; account inquiry printouts; and miscellaneous records.[2]

[2] The records at issue are listed as pages 1-3, 5-10, 12-23, 25-33, 35, 37-45, 47-66, 70, 72-75, 78, 79, 82, 83, 150, 151, 157, 158, 184, 200, 208-284, 289, 290, 292, 295, 298, 300-303, 306, 307, 310, 343-345, 355, 414, 417, 420-422, and 424. Some of these pages are removed from the scope of the appeal as a preliminary matter.

ISSUES:

Preliminary Matters: duplicate records, other information removed from scope and inconsistent severances

A. Do the records contain personal information?

B. Is the personal information in the records exempt under section 49(b)?

C. Does section 49(a), with the solicitor-client privilege exemption in section 19, apply to the panel lawyer report?

D. Should the ministry's exercise of discretion be upheld?

DISCUSSION:

Preliminary Matters:

Duplicate records

[12] The appellant confirmed during the mediation stage of the appeal that he did not seek access to records that had been identified by the ministry as duplicates of other records. As noted above, certain records have already been removed from the scope of the appeal for this reason. During my inquiry, either the FRO's representations or my own review identified additional duplicated pages, which can be removed from the scope of the appeal, as follows:

- Pages 185 and 387 are duplicates of page 184.
- Page 290 is a duplicate of page 289, except that page 289 has a FRO administrative stamp on it. This minor variation is not sufficiently significant to affect my finding as to whether the two pages are duplicates.[3]
- Page 344 is a near-duplicate of page 298. Although page 344 has minimally different content at bottom, the withheld information on both pages is identical.
- Pages 343 and 355 are the first and second pages of the same document. This record is duplicated at pages 421 and 422. Since the record appears on consecutive pages in the latter instance, I will remove pages 343 and 355.

[13] Therefore, pages 185, 290, 343, 344, 355 and 387 are removed from the scope of this appeal and will not be reviewed in this order.

[3] See Order PO-2910.

Other information removed from scope

[14] During mediation, the appellant also advised that he did not wish to pursue access to certain information; specifically, office address, FRO case numbers and the support recipient's birth date. As with the duplicated copies of certain pages, above, this information can be removed from the scope of the appeal as a preliminary matter. Accordingly, I find that the office address and case number on page 292 and the support recipient's birth date on pages 417, 420, 424 are removed from the scope of this appeal and are no longer at issue.

Inconsistent severances

[15] Certain information withheld by the FRO under section 49(b) from some case log entries appears to have been disclosed to the appellant because it was not (on my copies) severed from other entries. Specifically, I identified inconsistent severances with respect to information withheld from case log entry 142, but disclosed in entry 132; information withheld from case log entry 158 on page 27 and entry 161 on page 28 that was partially disclosed where it appears in entry 165 on page 29; and the content of case log entry 446 on page 79 was disclosed, where identical information appears to have been withheld from entry 447. In Order PO-2910, where there was a similar situation, I considered how to approach the review of the FRO's exemption claims where there had been inconsistency in their application (at page 3):

> 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.[4] 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.
>
> 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

[4] Order P-1295 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.

> the relevant claimed exemptions only in relation to the portions that remain withheld.

[16] I adopt these reasons and the approach I took in Order PO-2910 in the present appeal and will not review the application of section 49(b) to previously disclosed information, as identified above.[5]

A. Do the records contain personal information?

[17] Section 47(1) gives individuals a general right of access to their own personal information held by an institution, but this right of access is qualified by section 49 of the *Act*, which states, in part:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) 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];
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

[18] Most of the information severed from the responsive records in this appeal has been withheld by the FRO on the basis that its disclosure would constitute an unjustified invasion of another individual's personal privacy under ssection 21(1) (personal privacy) or section 49(b) (discretion to refuse requester's personal information). The ministry has also denied access to the panel lawyer report on page 184, pursuant to section 49(a), in conjunction with section 19.

[19] Since section 49 can only apply to information that qualifies as "personal information," as defined in section 2(1) of the *Act*, it is necessary to determine first if the records contain "personal information" and, if so, to whom it relates. "Personal information" is defined in section 2(1) of the *Act* as "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

[5] This finding does not affect the removal of the FRO employees' names that are interspersed with these case log entries from the scope, as discussed.

> 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;

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

[21] 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.[6] 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.[7]

[22] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[8]

[23] According to the ministry, the records contain information about the support recipient that fits within paragraphs (b), (c), (d) and (f) of the definition of personal information in section 2(1) of the *Act.* Mentioned specifically are the support recipient's address and contact information, financial information, date of birth and confidential correspondence and communications. The FRO's representations do not comment on whether the records also contain the appellant's personal information.

[24] As stated, the appellant did not submit representations for my review in this appeal.

Analysis and findings

[25] To begin, I note that the support recipient's date of birth is no longer responsive to the appellant's request following the clarification provided by him during the mediation stage. However, based on my review of the records, I otherwise accept the FRO's position that the records contain the support recipient's personal information, as that term is defined in section 2(1). Specifically, I find that the records contain information fitting within paragraphs (a), (c), (d) and (f) of the definition, such as financial transactions, her social insurance number, her address and telephone number and correspondence from her to the FRO.

[26] I also find that the records contain the personal information of the appellant in that they relate to his employment and contain the personal opinions or views of others about him, according to paragraphs (a) and (g) of the definition. Regarding paragraph (a), although the information may be about the appellant in an employment context, the relationship between his employment and the FRO support matter lead me to conclude that this particular information qualifies as "personal information," rather than fitting into section 2(3) of the *Act.*[9]

[27] As the records contain the mixed personal information of the appellant and others, the relevant personal privacy exemption is the discretionary one in section 49(b).

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[6] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[7] Orders P-1409, R-980015, PO-2225 and MO-2344.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[9] See Orders PO-2910 and PO-3051.

[28] Notably, there are several categories of information in the records that I find do not generally qualify as "personal information." First, a limited number of the severances include information that instead fits within the scope of section 2(3) of the *Act* as "business identity information." Section 2(3) 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*. Specifically, I find that the names and contact information of individuals identified in their professional capacities with the appellant's employers do not qualify as personal information pursuant section 2(3) of the *Act*. As the names and contact information of these individuals does not fit within the definition of "personal information," it cannot be withheld under section 49(b). As no other exemptions are claimed in relation to this information, I will order it disclosed.

[29] I also note that the FRO severed other information from the records, including column headers and information appearing under them in the case logs; for example: "Event Group," "Event Description" and "Date." Some of this severed information consists of the names of FRO employees and has been removed from the scope of the appeal. There are also acronyms severed from page 295, a FRO form that was otherwise disclosed to the appellant. This type of information is withheld under section 49(b). The representations from the FRO do not specifically explain how these acronyms, headers and the information under them could constitute personal information. For the most part, I find that this type of withheld information does not fit within the definition of personal information in section 2(1) of the *Act* and, therefore, that it does not qualify for exemption under section 49(b). However, I find that because some of the column headers and information in the case logs could reasonably be expected to identify an individual if disclosed, they qualify as personal information.

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

B. Is the personal information in the records exempt under section 49(b)?

[31] Under section 49(b), the ministry has the discretion to deny the appellant access to his own personal information if the disclosure of a record containing mixed personal information *would* constitute an unjustified invasion of another individual's personal privacy. Conversely, upon weighing the appellant's right of access to his own personal information against another individual's right to protection of their privacy, the FRO may choose to disclose a record with mixed personal information.

[32] In this appeal, the FRO has withheld, fully or partially, pages 1-3, 5-10, 12-23, 25-33, 35, 37-45, 47-66, 70, 72-75, 78, 79, 82, 83, 150, 151, 157, 158, 161-169, 200, 208-284, 289, 292, 295, 298, 300-303, 306, 307, 310, 345, 414, 417, 420-422, and 424.

[33] Sections 21(1) to (4) provide guidance in determining whether the disclosure of personal information *would* constitute an unjustified invasion of personal privacy. 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). However, in *Grant v. Cropley*, [2001] O.J. 749, the Divisional Court commented on the discretionary nature of a section 21(3) presumption when reviewed under section 49(b). The Court stated that the Commissioner could:

> . . . consider the criteria mentioned in s. 21(3)(b) in determining, under s.49(b), whether disclosure . . . would constitute an unjustified invasion of [a third party's] personal privacy.

[34] Additionally, a presumption in section 21(3) can also be overcome where the personal information falls under section 21(4) or the "public interest override" at section 23 applies.[10] The "public interest override" in section 23 has not been raised in this appeal and, in my view, it would not apply. Moreover, as suggested by the FRO, I agree that none of the exceptions in section 21(4) are applicable in the circumstances.

[35] 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, must also be considered.

[36] In this appeal, the ministry provided submissions on sections 21(3)(c) and (f) and 21(2)(d)-(f) and (h), which state:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels; ..
> > (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
>
> (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,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[10] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

> (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; …

Representations

[37] Regarding communications between the support recipient and its staff, the FRO submits that it:

> … takes the privacy of support payors and support recipients very seriously, and will not disclose any support recipient communication (i.e., communication between the FRO and the support recipient) to the support payor, or vice versa.

[38] According to the FRO, disclosure of the support recipient's personal information to the appellant would result in an unjustified invasion of personal privacy. With specific reference to the presumptions in section 21(3), the FRO submits that pages 208-283[11] and 295 contain "financial information provided by the support recipient [which] may reveal eligibility for social services or welfare benefits [and] which shows whether the support recipient or the assignee (social services) received support payments" as contemplated by section 21(3)(c). Further, the FRO submits that correspondence provided by the support recipient may reveal information about her finances, income and financial history or activities for the purpose of paragraph (f) of section 21(3).

[39] Regarding the factors favouring protection of the support recipient's privacy, the FRO submits that section 21(2)(e) is relevant because, while the Director (of FRO) is not aware of the nature of the relationship between this support payor and recipient, the FRO's general approach to these sensitive situations is to exercise caution since disclosure "may indeed expose the support recipient to pecuniary or other harm."

[40] Again acknowledging that the circumstances of the relationship in this case are unknown, the FRO states that section 21(2)(f) is relevant:

> Given the overall sensitivity of the issues the Director is involved with, the personal information of the support recipient should be treated as highly sensitive and disclosure of same could reasonably be expected to cause significant personal distress to the support recipient and/or the children. (See FRO cases directly on point: P-1-56; P-1198; P-1269 and P-1340.)

[11] Pages 208-283 consist of Account Inquiry printouts.

[41] Relying on the same orders, the FRO also submits that the factor in section 21(2)(h) weighs against disclosure because the information was supplied by the support recipient in confidence for the purpose of enforcing the support order.

[42] The FRO also addresses the factor favouring disclosure in section 21(2)(d) by asserting that disclosure of this particular information is not relevant to a fair determination of the appellant's rights because issues of entitlement between the parties may be resolved without reference to that information.

[43] Finally, respecting the possible application of the absurd result principle, the FRO submits that every effort was made to disclose information in a manner consistent with the spirit of the *Act* and to avoid "an absurd result."

Analysis and findings

[44] I concluded, above, that the records contain the personal information of the appellant and of another identifiable individual – the support recipient. My review of section 49(b), together with the presumptions and factors in sections 21(3) and 21(2), is conducted only in relation to the personal information of that other individual since the disclosure of the appellant's own personal information to him cannot result in an unjustified invasion of another individual's personal privacy. Further, as also stated, section 49(b) does not apply to "professional" information.

[45] The representations provided by the FRO in this appeal are similar to those provided to this office in past appeals. Consequently, the guidance provided by past orders is useful in reviewing the specific circumstances before me here.

[46] The FRO claims that the presumption against disclosure in section 21(3)(c) applies because disclosure of the support recipient's "financial information … may reveal eligibility for social services or welfare benefits," seemingly by virtue of the receipt of support payments. I do not accept this position. I am not persuaded that the mere fact that the support recipient received payments from the payor (appellant), as collected by and channeled through FRO, demonstrates anything about her eligibility for social services or welfare benefits or the determination of benefit levels. Not having been provided with sufficient evidence by the FRO to establish this presumption, I find that section 21(3)(c) is not applicable in the circumstances of this appeal.

[47] 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." Based on my review of the records, I accept the FRO's submission that the presumption against disclosure in section 21(3)(f) applies to the support recipient's personal information in some of the records, including correspondence from her about certain financial matters and banking information contained in the general ledger account inquiry printouts on pages 308-383. 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 support recipient's personal privacy.

[48] The FRO argues that the factors in paragraphs (e), (f) and (h) of section 21(2) apply and that they weigh in favour of protecting the privacy of the support recipient. I will review these factors in relation to the personal information that is not subject to the presumption against disclosure in section 21(3)(f).

[49] To find that the factor in section 21(2)(e) applies to weigh against disclosure, the evidence must demonstrate that the harm envisioned is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. The FRO relies on the "overall sensitivity of the issues" in the support matters over which has oversight in claiming that 21(2)(e) applies because it does not have direct knowledge of the nature of the relationship between this particular payor (the appellant) and recipient. The FRO made an identical submission in the appeals leading to Orders PO-2910 and PO-2917, and in both cases, the adjudicator found the factor did not apply. In this appeal, I am also not persuaded that the factor is relevant. The fact that disclosure of the personal information might be uncomfortable for the individual concerned, if there is an acrimonious relationship present does not, by itself, mean that the individual will be exposed to any pecuniary or other harm. More notably, especially in the absence of evidence, it does not mean any such harm would be *unfair*, as the factor requires.[12] In the circumstances of this appeal, I find that the factor in section 21(2)(e) does not weigh against disclosure of the personal information at issue.

[50] The FRO's brief representations regarding the relevance of the factor in section 21(2)(f) are based on the same premise about the "overall sensitivity" of the relationships between support payors and recipients. For information to be considered highly sensitive as contemplated by section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.[13] Past orders of this office that have considered the FRO's role as a payment facilitator and buffer between individuals – in what are typically adversarial relationships – have acknowledged that the context in which the information at issue was gathered is inherently sensitive.[14] With this in mind, I find that there is a reasonable expectation of significant personal distress to the support recipient if certain personal information about her were to be disclosed. I find that some of the other personal information at issue does not attract the weight of this factor because its sensitivity is lower. Overall, however, this factor weighs in favour of privacy protection, and I find that it should be given moderate weight.

[12] Orders PO-2230, PO-2910 and PO-2917.
[13] Orders PO-2518, PO-2617, MO-2262 and MO-2344.
[14] Order PO-2910.

[51] The factor in section 21(2)(h) 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. This determination requires an objective assessment of the reasonableness of the expectation of confidentiality.[15] In my view, the context and the surrounding circumstances of this matter are such that a reasonable person would expect that information supplied by her to the FRO would be subject to a degree of confidentiality. Accordingly, in this appeal, I find that the factor in section 21(2)(h) weighs in favour of protecting the privacy of the support recipient with respect to access to her personal information.

[52] As previously indicated, I received no submissions from the appellant to support the application of any of the factors favouring disclosure, as outlined in sections 21(2)(a) to (d). Perhaps anticipating an argument from the appellant that the factor in section 21(2)(d) may apply, the FRO provided representations refuting its application. I agree with the FRO's position. There is no evidence before me that the disclosure of the withheld personal information of the support recipient is required to prepare for any existing or contemplated proceeding under the *Family Responsibility and Support Arrears Enforcement Act, 1996,* or to ensure an impartial hearing. Given my conclusion on the evidence presented to me that the withheld information is not relevant to a fair determination of rights affecting the appellant, I find that this factor does not apply.[16]

[53] Without evidence establishing that any of the factors favouring disclosure apply, and there being some weight to be given to the factors weighing against disclosure in sections 21(2)(f) and (h), I find that disclosure of certain withheld personal information of the support recipient which is "highly sensitive" or "supplied in confidence" would constitute an unjustified invasion of her personal privacy under section 49(b).

[54] Following the absurd result principle, however, 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.[17]

[55] The absurd result principle has been applied in appeals where, for example, the appellant was present when the information was provided to the institution;[18] or the information was clearly within the appellant's knowledge.[19] However, the absurd result principle may not apply even if the information was supplied by the appellant or is

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[15] Orders P-1670 and PO-1910.
[16] Orders PO-2715, PO-2778, PO-2910 and MO-2448 contain discussion regarding the existence of disclosure or production processes concurrently available to an appellant in court matters reducing any weight accorded to the section 21(2)(d) factor in certain circumstances.
[17] Orders M-444, MO-1323 and PO-2679.
[18] Orders M-444 and P-1414.
[19] Orders MO-1196, PO-1679 and MO-1755.

clearly within the appellant's knowledge if disclosure would be inconsistent with the purpose of the section 49(b) exemption. In Order PO-2910, I reviewed the principle and referred to a description of it by Adjudicator Laurel Cropley in Order MO-2114:

> 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.

[56] I agreed with this general approach to the absurd result principle in Order PO-2910 and, in fact, applied the principle to order disclosure of certain information. However, I am mindful of the need to be "consistent with the purpose of the exemption" and in the circumstances of the present appeal, I will not apply the absurd result principle. I note that the support recipient's home address appears on several of the records at issue, which are court orders from some time ago. However, the fact that personal information may have been disclosed at one time as part of a public process does not necessarily mean that it ought to be considered "public" for all time under the *Act.* Disclosure under the *Act* may constitute an unjustified invasion of personal privacy even though the information was earlier disclosed in a court process.[20] Based on the specific personal information to which the absurd result principle might apply in this appeal, therefore, I decline to apply it.

[57] Accordingly, subject to 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 personal information remaining at issue.

C. Does the solicitor-client privilege exemption in section 19 apply to the panel lawyer report?

[58] The ministry relies on section 49(a), in conjunction with section 19, to deny access to a single record: the panel lawyer report at page 184.[21] According to the FRO's representations, both section 19(a) and section 19(b) apply to this record. These provisions state:

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[20] Order PO-1986.

[21] As identified earlier in this order, the duplicate copies of the panel lawyer report at page 184 (pages 185 and 387) are removed from the scope of the appeal.

> 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; …

[59] Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b). The FRO must establish that at least one branch applies.

[60] 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.

[61] 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.[22] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[23]

[62] 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.[24]

[63] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[25] 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.[26]

[64] Litigation privilege protects records created for the dominant purpose of litigation, actual or reasonably contemplated.[27]

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[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[23] Orders PO-2441, MO-2166 and MO-1925.
[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[25] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[26] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.) [*Chrusz*].
[27] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* [2006] S.C.J. No. 39.

[65] 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." Termination of litigation does not affect the application of statutory litigation privilege under branch 2.

[66] 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.[28] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[29] The grounds for waiving privilege under Branch 2 are more limited.[30]

Representations

[67] The FRO states that it claimed section 19 to withhold the panel lawyer report because "revealing the support payor's personal information would also reveal solicitor-client privileged information." The FRO submits that the lawyers from the Ministry of the Attorney General who work as in-house counsel for the FRO, as well as outside private sector lawyers retained on a case-by-case basis, have been recognized as being in a solicitor-client relationship with the Director of the FRO by the Divisional Court.[31] According to the FRO, therefore,

> … the records produced by FRO lawyers at the request of the Director and his staff, including reports to the Director and his staff, are subject to common law solicitor-client privilege.

[68] The ministry relies on *Descoteaux v. Mierzwinski, supra,* in submitting that the record at issue is protected by solicitor-client privilege because it constitutes a communication of a confidential nature between solicitor and client, made for the purpose of obtaining or giving professional advice and also to report to FRO about the status of litigation. The FRO submits that such panel reports are subject to both an express and implied understanding of confidentiality and that the privilege has not been waived.

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[28] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[29] 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.).
[30] Waiver of privilege by the *head* of an institution (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)); and the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, 2006, *supra*).
[31] The FRO relies on *Ministry of Community and Social Services v. Cropley et al.* (2004), 70 O.R. (3d) 680.

[69] With further reference to the position that the record is also subject to litigation privilege, the FRO states that it was "produced as a result of a court attendance (i.e. a motion brought by the support payor…)" and submits that it:

> … meet[s] the requirements of the "dominant purpose test" as enunciated in *Waugh v. British Railways Board;* in particular that the documents were "produced or brought into existence … with the dominant purpose … of using it or its content in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect.

[70] The FRO refers to the continuing possibility of further litigation on this matter in support of the exemption of the panel lawyer report under litigation privilege.

[71] The FRO provides similar submissions under Branch 2 of the section 19 exemption to those provided under the first branch, arguing that statutory solicitor-client privilege also applies due to the fact that the FRO counsel who serve the Director are Crown counsel. One difference is that the FRO submits that the "Report also provides direction to the Director and his staff on how the case should be enforced."

Analysis and findings

[72] To establish that solicitor-client communication privilege applies, the FRO was 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."[32] For the FRO's alternate position that litigation privilege applies to be made out, the FRO 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."

[73] To begin, I find that FRO lawyers (in-house or by contract) 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). This finding is consistent with past orders.[33]

[74] However, based on my review of the representations and the actual panel lawyer report at issue, I conclude that the information the record contains does not support exemption under either section 19(a) or 19(b). Several submissions made by the FRO are worth noting. First, the FRO contends that "revealing the support payor's personal information would also reveal solicitor-client privileged information." Second, the FRO submits that the "report also provides direction to the Director and his staff on how the case should be enforced." I reject both submissions. The panel lawyer report is an

[32] *Descôteaux, supra.*
[33] Orders PO-2910 and PO-2917.

administrative form, with a section at the bottom for the FRO lawyer to report on the "Court Result." In Order PO-2910, I found that this section of the panel lawyer report at issue contained information that, if disclosed, would reveal confidential solicitor-client privileged information. I upheld the exemption of the report in that appeal. In this case, however, the information contained in the record merely reflects the fact that the appellant himself took a particular step to conclude that proceeding. There is no advice or communication regarding enforcement by the Director. I also note that the application documents that accompany the panel lawyer report[34] were disclosed to the appellant by the FRO and many of them contain the very information being withheld here, with the exception of the bottom-line "Court Result."

[75] Panel lawyer reports are not exempt merely as a consequence of the title of the record. A substantive element to the content is required. In my view, the record in this appeal conveys merely an administrative matter and not solicitor-client communication with respect to any legal opinion. In this case. I am also not satisfied that it forms part of the continuum of communications that might exist between a client and his or her legal advisor. Finally, I am not satisfied 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."

[76] Accordingly, given these conclusions, I find that the solicitor-client privilege exemption does not apply and that the panel lawyer report is not exempt under section 49(a) of the *Act*, in conjunction with either section 19(a) or section 19(b). As no other exemptions are claimed to withhold this record, I will order that it be disclosed to the appellant.

D. Should the ministry's exercise of discretion be upheld?

[77] 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 FRO erred in exercising its discretion, and whether it considered irrelevant factors or failed to consider relevant ones. An adjudicator, in reviewing the exercise of discretion by an institution may not, however, substitute her own discretion for that of the institution.

[78] As previously noted, section 49(b) is a discretionary exemption, and I have upheld the FRO's decision to apply it to deny access to certain portions of the records. I must review the FRO's exercise of discretion in doing so. To be clear, my review of the FRO's exercise of discretion is limited to the information that I have not otherwise ordered disclosed pursuant to this order.

[34] Rather, the copy of page 184 that appears at page 387.

[79] In reaching the decision to withhold information under section 49(b), the FRO claims that it considered "all of the relevant factors" and that it did not act in bad faith or for an improper purpose. The FRO states that it is committed to fulfilling its statutory mandate to enforce support orders, while safeguarding the information of support payors and recipients and being open and transparent. According to the FRO, it considered the following factors: the purposes of the *Act*; the appellant's right to access his own personal information; the limited and specific application of exemptions to the record; the unknown nature of the relationship between the appellant and support recipient in this matter; and the sensitive nature of personal information in FRO files, generally.

[80] As noted, the appellant did not provide representations for my consideration in this appeal.

[81] I have considered the FRO's representations and the personal information for which I have upheld the ministry's access decision under section 49(b). I have also considered the disclosure the appellant will receive pursuant to this order. In this context, I am satisfied that the FRO has properly exercised its discretion in withholding the personal information of the support recipient that I have found exempt under section 49(b). Accordingly, I uphold the ministry's exercise of discretion on appeal.

ORDER:

1. I uphold the ministry's claim for exemption under section 49(b), in part.

2. I do not uphold the ministry's exemption claim under section 49(a), together with section 19.

3. I order the ministry to disclose pages 2, 3, 5, 6, 8, 12, 21, 22, 25, 27, 28, 29, 37, 38, 41, 42, 65, 74, 79, 184, 295, 301, 307 and 310 to the appellant by **September 18, 2013,** but not before **September 13, 2013**. The portions to be disclosed are marked with green highlighter on the copy of the records sent to the ministry with this order. On pages where the record was withheld in its entirety by the ministry and partial disclosure is ordered, I have highlighted exempt information in orange.

4. 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 3.

Original signed by: August 13, 2013
Daphne Loukidelis
Adjudicator