

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3288

Appeal PA13-239

Legal Aid Ontario

December 20, 2013

**Summary:** The appellant sought access to a letter from his former lawyer sent to Legal Aid Ontario. LAO relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with the discretionary exemption in section 20 (threat to safety or health), to deny access to the letter. The decision of LAO 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, sections 2(1), 20 and 49(a).

**Cases Considered:** *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

### OVERVIEW:

[1] The appellant, through his lawyer, submitted a request to Legal Aid Ontario (LAO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all letters addressed to LAO between January 1, 2010, and July 30, 2011, from his previous lawyer that concern him.

[2] LAO located one responsive record. It then notified an individual whose interests could be affected by disclosure of the record (the affected party) as required under section 28 of the *Act*. The affected party objected to disclosure of the record.

[3] LAO issued a decision and relied on the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with the discretionary exemption in section 20 (threat to safety or health), to deny access to the record in its entirety.

[4] The appellant's current lawyer appealed LAO's decision to this office. In the appeal correspondence he provided to this office, the appellant's current lawyer stated that if he were granted access to the letter at issue, he undertook not to share the letter or its contents with the appellant. The lawyer also provided a letter from the appellant which confirmed the appellant understood that the letter and its contents would not be divulged to him by his lawyer. Both the lawyer's and the appellant's correspondence indicated that the basis of the request was to ensure that the lawyer was aware of the appellant's entire case in order to be able to represent the appellant fully going forward.

[5] During mediation of the appeal, the affected party confirmed she objected to disclosure of the record.

[6] As a mediated resolution of the appeal was not possible, the appeal was transferred to the adjudication stage of the appeal process, for an inquiry under the *Act*.

[7] I began my inquiry by sending a Notice of Inquiry inviting the representations of LAO and the affected party on the issues set out below. The affected party provided representations and asked that they be kept confidential. After reviewing the affected party's representations, I concluded that they satisfied the confidentiality criteria set out in *Practice Direction Number 7* and accordingly, I decided not to share them with the appellant and his lawyer in accordance with section 7 of this office's *Code of Procedure*.

[8] LAO also provided representations in response to the Notice of Inquiry and asked that portions of them be kept confidential. I determined that these portions also satisfied the confidentiality criteria in *Practice Direction 7* and withheld them from the appellant and his lawyer. I shared the non-confidential portions of LAO's representations with the appellant's lawyer and invited him to submit representations in response; however, he did not.

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

## **RECORDS:**

[10] The sole record at issue is a letter from the affected party to LAO.

**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(a), in conjunction with the section 20 exemption, apply to the information at issue?
- C. Did LAO exercise its discretion under section 49(a)? 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?**

[11] 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), in part, as follows:

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

. . .

- (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,

. . .

- (e) the personal opinions or views of the individual except if they relate to another individual,

. . .

- (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;

[12] 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.<sup>1</sup>

[13] 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.

[14] 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.<sup>2</sup>

[15] 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.<sup>3</sup>

[16] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[17] As noted above, only LAO and the affected party provided representations in response to the Notice of Inquiry. In its representations, LAO acknowledges that the record contains the appellant's personal information. It adds that the record forms part of the appellant's legal aid file and that normally, the appellant is entitled to access the contents of his file under LAO policies. However, LAO objects to providing the disclosure the appellant would normally be entitled to, on the grounds that disclosure could reasonably be expected to result in a threat to the safety or health of the affected party.

[18] The appellant and his lawyer provided no representations during the inquiry into this appeal. However, the request indicates the appellant's belief that the record

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<sup>1</sup> Order 11.

<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

concerns him, and thus it can be taken as an implicit assertion that the record contains his personal information.

[19] Based on my review of the sole record at issue, I find that it contains the personal information of the appellant as that term is defined in paragraphs (b), (e), (g) and (h) of section 2(1) of the *Act*. I also find that it contains the personal information of other individuals, including the affected party, as that term is defined in paragraph (h).

[20] Because the record contains the personal information of the appellant in addition to that of other individuals, I will determine whether the appellant is entitled to obtain access to the responsive record, or whether the record is exempt under section 49(a), in conjunction with section 20.

**B. Does the discretionary exemption at section 49(a), in conjunction with the section 20 exemption, apply to the information at issue?**

[21] Section 49 provides a number of exemptions from an individual's general right of access under section 47(1) to their own personal information held by an institution. Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

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.

[22] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.<sup>5</sup> In this case, the institution relies on section 49(a) in conjunction with section 20, which states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[23] For this exemption to apply, LAO must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, LAO must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, LAO must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.<sup>6</sup>

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<sup>5</sup> Order M-352.

<sup>6</sup> *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).

[24] Although I am not able to refer to the affected party's confidential representations in this order, I am satisfied that the affected party has provided sufficient evidence to demonstrate that there is a reasonable basis for believing that endangerment to her health or safety could result from disclosure of the record. While I am able to make a finding on the basis of the affected party's representations alone, I will address LAO's representations on this issue, as they too provide sufficient evidence to establish the application of the section 20 exemption.

[25] LAO submits that there is an objectively reasonable basis for concluding that endangerment to the health or safety of the affected party could reasonably be expected to result from disclosure of the record. Specifically, it has tendered information about the appellant from numerous decisions of the Ontario Review Board (ORB) concerning him. LAO encloses with its representations, an affidavit from its President and CEO that sets out the factors he considered in deciding to deny access to the record in question. Exhibit A to the affidavit contains 18 decisions of the ORB relating to the appellant, including the most recent from August 2013. To support its submission, LAO highlights in its representations, the following excerpt from the August 2013 ORB decision:

The Board considered all of the evidence and the submissions of the parties acknowledging that [the appellant] continues to represent a significant threat to the safety of the public, and we agree that he continues to meet that threshold. [The appellant] continues to be very ill, as he was when first coming under the jurisdiction of this Board, and sadly there has been very little appreciable improvement in his condition. The hospital report is replete with incidents of serious aggressive and self-injurious behaviours that continue to this day. [The appellant] suffers from a serious psychotic disorder, as well as a personality disorder NOS, which cause him to behave in a continuously and unprovoked aggressive manner. Despite ongoing treatment with antipsychotic medication, [the appellant] remains highly symptomatic with delusions and paranoid beliefs. He requires significant resources to manage his behaviour including the repeated use of restraints and seclusions.

[26] LAO submits that the comments from the ORB provide insight into the appellant's potential to behave in an unpredictable and unsafe manner. It further submits that because the appellant has previously demonstrated a tendency towards violent and impulsive behavior, and because he is considered to present an ongoing threat to the public despite ongoing psychiatric treatment, there is a serious possibility of harm in this matter which is neither frivolous nor exaggerated. It adds its concern about the appellant specifically singling out in his request the affected party, who was acting in a professional capacity.

[27] In making its decision, LAO states that it considered the relevant and reliable information contained in the ORB decisions relating to the appellant, as well as the ongoing potential for harm in the future. It notes that although the appellant is presently in custody, there are ongoing safety concerns as he may be transferred to a lower security facility at some point, or may have the opportunity to enter the community on day passes. It further notes the potential that the appellant could independently choose to leave the facility without appropriate authorization and without notifying the facility of his whereabouts.

[28] LAO concludes by stating that it takes the rights of its clients as seriously as it takes the safety and well-being of the lawyers representing them; and when clients have a history of dangerous behaviours that could, when viewed in the broader context, be indicative of a health and safety risk to the involved lawyer or other individuals, its conclusion that the disclosure of information should be denied is reasonable where the risk is increased by disclosure.

[29] As set out above, the Court of Appeal for Ontario has held that evidence establishing a reasonable basis for believing that endangerment will result from disclosure is sufficient to meet the section 20 test.<sup>7</sup> LAO has tendered current evidence that the appellant behaves in a “continuously and unprovoked aggressive manner” and that he is a danger to the public. This uncontroverted evidence of the appellant’s documented serious aggression and his unpredictability is adequate for me to conclude that disclosure of the letter at issue could reasonably be expected to seriously threaten the affected party’s health or safety.

[30] Accordingly, I find that the record at issue qualifies for exemption under section 20 and is exempt on the basis of section 49(a), subject to my review of LAO’s exercise of discretion below.

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

[31] The section 49(a) 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.

[32] 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

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<sup>7</sup> *Supra*, footnote 6.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[33] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>8</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>9</sup>

[34] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>10</sup>

- 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
- the relationship between the requester and any affected persons
- 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 historic practice of the institution with respect to similar information.

[35] LAO submits that in denying access to the record, it exercised its discretion under section 49(a). It further submits that it took a number of relevant factors into consideration in exercising its discretion, including confidential factors that I am not able to include in this order. LAO lists the following factors in its non-confidential representations:

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<sup>8</sup> Order MO-1573.

<sup>9</sup> Section 54(2).

<sup>10</sup> Orders P-344 and MO-1573.



- the general purposes of the *Act* and in particular the right of access of the public to information
- the fact that the appellant is a legal aid client
- the fact that the information requested is part of the appellant's legal aid file and contains his personal information
- the fact that disclosure of the information may have an adverse effect on lawyers' willingness to be candid in their communications with LAO about clients and cases, and
- its obligation to protect persons in its employ or in a contract for service, pursuant to the *Occupational Health and Safety Act, 1990*.

[36] Having reviewed LAO's complete representations, including the confidential representations on this issue, I am satisfied that it exercised its discretion under section 49(a) appropriately and took into account only relevant factors. The discretionary exemption in 49(a) recognizes that it is appropriate to curtail an individual's right to access his personal information in certain situations; one such situation being where the disclosure may threaten the safety of an individual. The discretionary exemption in section 20 is a significant one as it relates to safeguarding an individual's safety and health. I find that LAO considered only relevant considerations, and in doing so, exercised its discretion properly in the circumstances. Accordingly, I uphold LAO's exercise of discretion.

**ORDER:**

I uphold LAO's decision and dismiss this appeal.

Original Signed By: \_\_\_\_\_  
Stella Ball  
Adjudicator

December 20, 2013 \_\_\_\_\_