Information and Privacy Commissioner,
Ontario, Canada

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

FINAL RECONSIDERATION ORDER PO-3410-R

Appeal PA11-541

Order PO-3225

Ministry of Community Safety and Correctional Services

October 15, 2014

Summary: This is a reconsideration of Order PO-3225. In his request, the appellant sought access to information relating to the apprehension of his mother under the *Mental Health Act*. The appeal form was accompanied by a power of attorney for personal care given to the appellant and his brother by their mother. The ministry identified responsive records and withheld some information as exempt under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). The ministry also took the position that the appellant could not rely on the power of attorney for personal care to obtain access to his mother's personal information under section 66(b) of *FIPPA*. A number of issues were raised in the ministry's decision and appeal, but were resolved as the appeal proceeded through the mediation and adjudication process. In Order PO-3225 the adjudicator determined that the records contained the personal information of a health care provider, the appellant and his mother and that appellant can rely on section 66(b). He also found that only the personal information of the health care provider qualified for exemption under *FIPPA*. The adjudicator was subsequently advised that the appellant's mother had died before Order PO-3225 was issued. As a result, in a preliminary reconsideration decision, the adjudicator determined that the appellant could not rely upon the power of attorney to obtain access to his mother's personal information, and Order PO-3225 should be reconsidered, but only with respect to his determinations under section 49(b) of *FIPPA*. In this final reconsideration order the adjudicator confirms his finding that the records at issue contain the personal information of a health care provider, the appellant and his late mother. The adjudicator revisits his finding in Order PO-3225 with respect to section 49(b) and concludes that, because of the change in circumstances, certain additional information is subject to exemption under section 49(b).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 10(2), 21(2)(f), 21(3)(a), 49(b) and 66(b); *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, section 12(1)(f).

Orders Considered: Order PO-3225.

OVERVIEW:

[1] This is an IPC-initiated reconsideration of Order PO-3225.

[2] Order PO-3225 was based, in part, on the application of section 66(b) of the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). In Order PO-3225, I set out my finding with respect to the application of section 66(b) of the *Act* in the following way:

> Section 66(b) provides that "any right or power conferred on an individual by this *Act*" may be exercised by the individual's attorney under a power of attorney for personal care. The requester provided a copy of a power of attorney for personal care given to him by his mother. While the circumstances surrounding the apprehension are concerning, I am satisfied that the requester is requesting the information to determine why it occurred. As a result, I find that it is related to the objects of the power of attorney for personal care.
>
> Accordingly, I find that the requester is entitled to rely on section 66(b) of the *Act* and exercise his mother's right of access to the records at issue in this appeal.
>
> Because of the application of section 66(b) the appellant stands in the shoes of his mother and is entitled to receive any information to which she would have a right of access under the *Act*. I am also treating the request, where applicable, as encompassing a request for access to any of the appellant's own personal information that may also be contained in the records at issue.

[3] In that order, my determination was premised on the determination that the appellant was entitled to all the information I ordered disclosed because of the existence of a valid power of attorney for personal care of his mother. In the result, only the decision of the ministry to withhold the personal information of a health care provider under section 49(b) of the *Act* was upheld.[1] The remaining personal information relating to the appellant and/or his mother was ordered disclosed to him.

[1] The police codes and any non-responsive information in the records were also not to be disclosed to the appellant.

[4] My decision to consider initiating a reconsideration of my Order was triggered by the receipt of correspondence from counsel for the Ministry of the Attorney General (the ministry). In the correspondence, ministry counsel set out certain matters and suggested that "it would be prudent to ensure that the Power of Attorney, which was executed in [specified date], remains valid and that there are no recent factual developments, which might inform the implementation of the Order".[2]

[5] I then ordered an interim stay of Order PO-3225, and sent a letter to the appellant advising him that I was considering initiating a reconsideration of my decision. I also requested the following information:

> …, I require confirmation from you that the Power of Attorney given by your mother to you and your brother, jointly and severally on [specified date], remains in full force and effect, and that no intervening factual developments have affected its validity. Also, we would ask you for your position on notifying your brother of my Order in the appeal.

[6] In response, the appellant provided correspondence to me setting out his position regarding notifying his brother and indicating that the Power of Attorney was valid. That said, the appellant also advised that his mother was deceased. In a telephone conversation with an Adjudication Review Officer, which predated the appellant's correspondence, the appellant had advised her that his mother had passed away before Order PO-3225 was issued.

Reconsidering an order

[7] The IPC's *Code of Procedure* (the *Code*) applies to appeals under the *Act*. Section 18.01 of the *Code* states:

> The IPC may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.

[2] After I had sent this letter to the appellant, counsel for the ministry furnished additional factual information to supplement the information he provided in his initial letter. A copy of the letter and the supplementary information was provided to the appellant in the course of the reconsideration process.

[8] In addition, section 18.02 of the *Code* states:

> The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

The preliminary reconsideration process

[9] In correspondence that I sent to the appellant and to the ministry in the course of the reconsideration process, I set out how my order was predicated on the existence of a valid power of attorney for personal care. I also set out section 12(1)(f) of the *Substitute Decisions Act*[3], which provides that a continuing power of attorney for personal care is terminated when the grantor dies.

[10] I then posed two questions:

1. Whether the information received from the ministry after the issuance of my order is a ground to reconsider my order and, if so, what is the remedy?

2. Whether the termination of the power of attorney for personal care prior to the issuance of my order is a ground to reconsider my order and, if so, what is the remedy?

[11] In response, amongst other things, the appellant maintained his entitlement to the information and queried why I am now inquiring with respect to the validity of the power of attorney for personal care.

[12] The ministry submitted that there were grounds to proceed with the reconsideration of my order. The ministry submitted that:

> … between the time the ministry first made its submissions and the time the order was issued, new facts of critical importance emerged, which had they been considered, could be expected to have significantly affected the reasoning applied in, as well as the conclusions reached in the Order.

The preliminary reconsideration decision

[13] In light of the death of the appellant's mother before Order PO-3225 was issued, in my preliminary reconsideration decision, I determined that there were sufficient grounds to reconsider certain elements of the order. I set out my analysis and finding in a letter to the appellant and the ministry, as follows:

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[3] S.O. 1992, c. 30.

I have considered the facts, circumstances and the submissions set out in the communications and correspondence received from the appellant and the ministry after the issuance of Order PO-3225. In my view, there are sufficient grounds to reconsider my order, but only with respect to my determination that section 66(b) could be relied upon by the appellant and my determinations pursuant to section 49(b) of the *Act* in regards to the personal information of the appellant and his mother. In particular, with respect to section 49(b), those determinations set out at paragraph 59 of my order, which was based on my analysis of whose personal information appeared in the records. In paragraph 59, I wrote:

> I have found above that certain withheld information pertains only to the appellant and/or his mother and qualifies as their personal information only. As a result, disclosing this information to the appellant would not constitute an "unjustified invasion" of another individual's personal privacy. Accordingly, I will order that this information be disclosed to the appellant.

My finding in paragraph 59 was predicated on the existence of a valid power of attorney for personal care given to the appellant by his mother. If there was no valid power of attorney for personal care at the time the order for disclosure was made, section 66(b) could not be relied upon by the appellant and the determination in paragraph 59 cannot be sustained.

This is because section 12(1)(f) of the *Substitute Decisions Act* provides that a continuing power of attorney is terminated when the grantor dies. In this case, the grantor of the power of attorney for personal care was the appellant's mother. The power of attorney for personal care that the appellant jointly held with his brother was therefore terminated when their mother died. My finding in paragraph 59 of the order was in error because no such power of attorney existed at the time the order was made, and the appellant could not rely on section 66(b) of the *Act*. Accordingly, there was a fundamental defect in the adjudication process. In all the circumstances, I am satisfied that there should be a reconsideration of my findings with respect to sections 49(b) and 66(b) of the *Act*.

[14] I advised the appellant and the ministry that before I made a final reconsideration order, I would invite their submissions with respect to the definition of personal information and the potential application of the section 49(b) exemption with respect to the personal information of the appellant's mother that may appear in the records at issue. I set out these issues in a Notice of Inquiry that I sent to both the appellant and the ministry.

[15] Only the ministry provided written representations in response to this second Notice of Inquiry. In making my determinations in this final reconsideration order, I have considered all the materials provided by the appellant and the ministry, through the course of the appeal and reconsideration, including all confidential and non-confidential submissions.

RECORDS:

[16] At issue in this appeal are the withheld portions of an Occurrence Summary, General Occurrence Report and a Police Officer's notes.

DISCUSSION:

Issue A: Do the records contain personal information?

[17] The discretionary personal privacy exemption in section 49(b) of *FIPPA* applies to "personal information". Consequently, it is necessary to determine whether the records contain "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 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 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.

[18] 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.[4]

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

> 2(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.
>
> 2(4) For greater certainty, subsection 2(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.

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[5]

[21] In addition, previous IPC orders have found that 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]

[22] At paragraphs 24 to 27 of Order PO-3225, I made the following determinations with respect to the information in the records, which included information pertaining to a health care provider, whom I referred to as an affected party in the order:

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[4] Order 11.
[5] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[6] Orders P-257, P-427, P-1412, P-1621, R-980015 and PO-2225.

> In my view, at all material times the affected party was acting as a health care provider in a professional, not personal capacity. Although it is possible for information provided by individuals in the role of the affected party to cross the threshold from professional to personal information, this, in my view, is not one of those occasions.
>
> Furthermore, paragraphs (e) and (g) of the definition of personal information provide that the personal opinions or views of an individual are that individual's personal information, except where they relate to another individual and that the view and opinions of another individual about an individual are the second individual's personal information. In light of my conclusion above, the net effect of these paragraphs, in the circumstances of this appeal, is that any view or opinions held by the affected party about the appellant or his mother are the personal information of the appellant or his mother, as the case may be, and not the affected party.
>
> Therefore, with certain limited exceptions, the information provided by the affected party is not her personal information. The information that I find to be her personal information is information related to her home address and home phone number, along with other similar information that I have highlighted on a copy of the records provided to the ministry along with a copy of this order. In my view, that highlighted information qualifies as the affected party's personal information, only.
>
> In conclusion, I find that the records at issue contain the personal information of the affected party but only to the extent that I have set out above. I also find that the records contain the personal information of the appellant and his mother.

[23] In Order PO-3225, I determined that the personal information of the health care provider was exempt from disclosure under section 49(b) of the *Act*. The health care provider did not take issue with these findings through filing their own reconsideration request or commencing an application for judicial review. Nothing that was provided to me has convinced me I should reconsider the findings pertaining to the personal information of the health care provider.

[24] Turning now to the balance of the withheld information, I find that except for the personal information of the health care provider, the remaining personal information in the records is that of the appellant's late mother or consists of the personal information of the appellant inextricably intertwined with the personal information of his late mother.

[25] I now turn to consider whether section 49(b) applies to the balance of the withheld personal information of the appellant's late mother contained in the records.

Issue B: Does the discretionary exemption at section 49(b) apply to the withheld personal information of the appellant's late mother in the records?

[26] Section 49(b) states:

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

[27] Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. Since the section 49(b) exemption is discretionary, the institution may also decide to disclose the information to the requester.[7]

[28] Sections 21(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy.

[29] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[8]

[30] The ministry initially provided representations on the presumptions in sections 21(3)(a) and 21(3)(b) and the factor at section 21(2)(f) in support of its decision to withhold the information at issue. The ministry did not further elaborate on the application of these sections in response to the Notice of Inquiry sent at the reconsideration stage.

[31] Section 21(2)(f) reads:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

[7] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).
[8] Order MO-2954.

the personal information is highly sensitive.

[32] Sections 21(3)(a) and (b) read:

> 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.

[33] The ministry submitted in its initial representations that the appellant received the portions of the records that contained his own personal information. The ministry submits that the withheld portion of the records contain highly sensitive information that falls within the scope of section 21(2)(f) of the *Act* and states:

> The ministry is concerned that if these records were ordered disclosed, individuals would no longer want to share their personal information with the police for fear that it would be subsequently ordered disclosed. The police rely upon the public freely providing sensitive and confidential information with the expectation it will remain confidential. The police require this information to investigate crime, to protect public safety and to otherwise discharge their duties. In sum, the disclosure of the records is contrary to the public interest and the ministry therefore strenuously opposes it.

[34] The ministry explains that the records at issue in this appeal were prepared by the Ontario Provincial Police (OPP) and relate to an incident in which a member of the OPP apprehended and transported a patient to a hospital for an assessment. The ministry submits that the apprehension was authorised by the *Mental Health Act*[9]. The ministry submits that the records contain personal information pertaining to the appellant's late mother that falls within the scope of the presumption in section 21(3)(a) of the *Act*.

[35] The ministry also submits that the records are of the kind created in the course of a law enforcement investigation. Accordingly, the ministry submits that the presumption at section 21(3)(b) also applies. The ministry also provides confidential submissions to explain why, in the circumstances of this appeal, the records were

[9] R.S.O. 1990, c. M.7.

created for two possible purposes, both of which would fall within the scope of the section 21(3)(b) presumption.

[36] The appellant does not specifically address the possible application of sections 21(3)(a), 21(3)(b) or 21(2)(f); nor does the appellant specifically discuss any factors or circumstances in section 21(2) that may favour disclosure. That said, the appellant submitted that he is requesting the information to help him understand what happened on the day in question and why his late mother was apprehended under the *Mental Health Act*.

Analysis and Finding

[37] I found above that except for the personal information of the health care provider, the remaining personal information in the records is that of the appellant's late mother or consists of the personal information of the appellant inextricably intertwined with the personal information of his late mother.

[38] I have reviewed the records and I am satisfied that certain withheld portions contain personal information pertaining to the appellant's late mother that falls within the scope of section 21(3)(a) as it relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation.

[39] I am also satisfied that the withheld personal information of the appellant's late mother also falls within the factor at section 21(2)(f). To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[10] Based on the circumstances of this appeal, and the nature of the information at issue, I am satisfied that there is a reasonable expectation of significant personal distress if the balance of the withheld information is disclosed. Accordingly, the factor at section 21(2)(f) applies to this information.

[40] The appellant did not raise any factors or circumstances in section 21(2) that favour disclosure, and in my view none would apply. I find that the presumption in section 21(3)(a) and/or the factor in section 21(2)(f) outweigh the appellant's right of access in the circumstances and disclosure of the withheld personal information of the appellant's late mother would constitute an unjustified invasion of privacy under section 49(b). In light of this conclusion, it is not necessary to consider whether the presumption at section 21(3)(b) might also apply. Consequently, the exemption at section 49(b) applies to the personal information of the appellant's late mother, some of which is inextricably intertwined with that of the appellant.

[41] I will consider below whether the absurd result principle applies in the circumstances of this appeal, whether the records can be reasonably severed without

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

revealing exempt information and whether the ministry exercised its discretion in a proper manner.

Issue C: Would it be absurd to withhold certain information from the appellant?

[42] Where the requester originally supplied the information, or the requester 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 exemption.[11]

[43] The absurd result principle has been applied where, for example:

- the requester sought access to his or her own written witness statement[12]
- the requester was present when the information was provided to the institution[13]
- the information is clearly within the requester's knowledge.[14]

[44] If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[15]

[45] I have carefully reviewed all of the records at issue and find that because the withheld information that I have highlighted in green on the first page of the Occurrence Summary was either provided by the appellant or is clearly within his knowledge, it would be absurd to withhold that information from him under section 49(b). As a result, I will order the ministry to disclose only that information to the appellant.

Issue D: Can the records be reasonably severed without revealing exempt information?

[46] Where a record contains exempt information, section 10(2) requires the ministry to disclose as much of the record as can reasonably be severed without disclosing the exempt information. This office has held, however, that a record should not be severed where to do so would reveal only "disconnected snippets", or "worthless",

[11] Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622.
[12] Order M-444.
[13] Orders M-444, MO-2266 and P-1414.
[14] Orders MO-1196, MO-1755, MO-2257-I and PO-1679.
[15] Orders MO-1323, PO-2622 and PO-2642.

"meaningless" or "misleading" information. Further, severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.[16]

[47] Based upon my review of the remaining information in the records and in light of the information that has already been disclosed, or ordered disclosed, to the appellant, in the circumstances of this case, any possible severance of those records would either reveal exempt information or result in disconnected snippets of information being revealed.

Issue E: Did the ministry appropriately exercise its discretion?

[48] The section 49(b) exemption is discretionary and permits the ministry to disclose information, despite the fact that it could be withheld. On appeal, this office may review the ministry's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so.[17]

[49] In addition, the Commissioner may find that the ministry erred in exercising its discretion where, for example,

- they do so in bad faith or for an improper purpose
- they take into account irrelevant considerations
- they fail to take into account relevant considerations.

[50] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[18] This office may not, however, substitute its own discretion for that of the institution.[19]

Analysis and Finding

[51] I have reviewed the circumstances surrounding this appeal and the ministry's representations on the manner in which it exercised its discretion. I am satisfied that the ministry has not erred in the exercise of its discretion not to disclose to the appellant the remaining withheld personal information contained in the records that I have found to qualify for exemption under section 49(b) of the *Act*.

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[16] Order PO-1663 and *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).
[17] Orders MO-1629 and PO-2129-F.
[18] Order MO-1573.
[19] Section 54(2).

[52] In light of my determinations above, I will lift the interim stay of Order PO-3225, and replace the order provisions in Order PO-3225, with the ones that follow.

ORDER:

1. The interim stay of Order PO-3225 issued on July 18, 2013 is hereby lifted.

2. I order the ministry to disclose to the appellant the withheld portions of the Occurrence Report that I have highlighted in green on a copy of the page of that record that I have enclosed with this order by sending it to him by November 20, 2014 but not before November 17, 2014.

3. In all other respects, I uphold the decision of the ministry not to disclose the balance of the withheld responsive information in the records.

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 page of the Occurrence Report as disclosed to the appellant.

Original Signed By: October 15 2014
Steven Faughnan
Adjudicator