

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **INTERIM ORDER PO-3432-I**

Appeal PA14-281

Ministry of Community and Social Services

November 28, 2014

**Summary:** The appellant submitted a request to the ministry pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of records relating to him compiled during the time period when he was a resident at the Southwestern Regional Centre. The ministry located records responsive to the request and provided access to them, with portions of the records withheld pursuant to the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*. The appellant appealed the ministry's decision, claiming that the ministry had not conducted a reasonable search and also objecting to the withholding of one of the records. The adjudicator upholds the ministry's search for responsive records as reasonable and further upholds the ministry's decision to withhold two pages of the records at issue under the mandatory personal privacy exemption at section 21(1). The adjudicator finds that the remaining pages are exempt under the discretionary exemption at section 49(b), rather than the mandatory exemption under section 21(1), and orders the ministry to exercise its discretion with respect to those pages.

### **OVERVIEW**

[1] The appellant was a resident at Southwestern Regional Centre (the centre), a residential facility for individuals with intellectual disabilities. When the centre closed in 2008, its records were sent to the Government of Ontario's off-site storage facilities.

[2] The appellant submitted the following request to the ministry, pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*):

All records on file for [the appellant] while a resident of Southwestern Regional Centre (Cedar Springs)

[3] The ministry issued a decision advising that it had located records and was providing partial access to them, with some information being withheld on the basis of the personal privacy exemptions at sections 21(1) and 49(b) of the *Act*. Approximately 1100 pages of records were provided to the appellant. The file is extensive and includes medical records, Individual Development Plans, Resident Treatment Plans, student achievement forms, admission records, discharge records, and correspondence.

[4] The appellant appealed the ministry's decision to this office on the basis that additional records should exist, thereby raising the issue of the reasonableness of the ministry's search for records. The appellant also objected to the exemptions applied by the ministry to the records that were disclosed in part, and objected to the withholding of one record in its entirety.

[5] During mediation, the mediator was advised that in 2011, after the centre closed, a class action lawsuit was brought against the province for deficiencies in the care provided to residents at the centre. The class action lawsuit was settled in December 2013. The settlement applies to individuals who resided at the centre between 1963 and 2008 who were alive as of December 29, 2008. Individuals may submit claims for payment from the settlement fund until November 30, 2014. The appellant's representative (his sister) advised that she is seeking the records so that she may submit them in support of a claim on the appellant's behalf for payment from the settlement fund.

[6] The appellant's representative advised the mediator that she believes that additional records exist and that the 1100 pages of records released to her do not constitute her brother's complete residential file. In particular, she believes that information about discipline administered to her brother should exist.

[7] The appellant's representative also advised that she no longer objects to the severances applied to the records disclosed to her, with the exception of Record 148, which is described on the ministry's Index of Records as "Blurry and Illegible". She objects to the ministry having withheld this record (consisting of pages 565-598 of the records package provided by the ministry) in its entirety.

[8] The ministry advised the mediator that it has conducted a full and thorough search and disclosed all records within its custody, except for those subject to exemption under the *Act*. The ministry also advised that the retention and disposal of government documents is governed by records schedules, which are developed by

ministries and approved by the Archivist of Ontario in accordance with the *Archives and Recordkeeping Act, 2006*. The ministry noted that a records schedule specifies how long specific records should be kept, where they should be retained and by whom, and whether a record should ultimately be destroyed or preserved in the Archives of Ontario. The ministry referred to Records Schedule No. 270 and stated that this schedule stipulates that a Resident's/Client's Medical, Individual Assessment and Program files are to remain in the ministry's custody for 20 years, at which point select records are transferred to the Archives of Ontario and the remainder are disposed of. The ministry further stated that if any documents are missing from the records, they were shredded by the centre prior to the centre's files being transferred to the ministry.

[9] As mediation efforts did not resolve this appeal, the appeal was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the ministry and shared them with the appellant in accordance with section 7 of the Information and Privacy Commissioner's *Code of Procedure and Practice Direction 7*. The appellant was provided the opportunity to make representations, but did not do so.

[10] In its representations, the ministry advised that it would be releasing several pages of Record 148 and that a new decision letter would be issued shortly. The ministry advised that some of the pages, being illegible, do not contain any personal information and were therefore being released. It further advised that some pages contain the appellant's personal information in addition to the personal information of others, and that it is exercising its discretion to release those pages.

[11] With the decision later that was subsequently issued, the ministry has released several pages in full and several pages in part, citing the mandatory personal privacy exemption at section 21(1) of the *Act* as the basis for withholding certain pages and parts of pages. The pages and partial pages remaining at issue contain information of the appellant's mother. As will be explained below, I find that "Record 148" in fact consists of multiple medical records, and I consider each record separately later in this order.

[12] In this order, I find that the ministry's search for records was reasonable. I uphold the ministry's decision to withhold the records at pages 586 and 590 pursuant to the mandatory personal privacy exemption at section 21(1), but find that the remaining records at issue – those at pages 565, 566, 568, 569, 570, 571, 572, 574, 575, 577, 578, 579, 580 and 581-- fall within the discretionary personal privacy exemption at section 49(b). I order the ministry to exercise its discretion with respect those pages.

## **RECORDS**

[13] The records remaining at issue are those found at pages 566, 568, 571, 575, 577, 580, 581, 586, and 590 of the package of records provided to this office. The

following pages, which the ministry withheld in part, are also at issue: pages 565, 569, 570, 572, 574, 578, and 579.

## **ISSUES**

- A: Did the institution conduct a reasonable search for records?
- B: Does the information at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- C: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?
- D: Did the institution exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

## **DISCUSSION**

### **Issue A: Did the institution conduct a reasonable search for records?**

[14] In the Notice of Inquiry, I asked the ministry to provide a written summary of all steps taken in response to the appellant's request for records. I also asked the ministry to provide a copy of "Records Schedule 270", the retention schedule to which it had referred during mediation, and to explain whether and how Schedule 270 (or any other applicable retention schedule) was applied to records relating to the appellant.

[15] I also asked the ministry to explain whether it has any knowledge of the Archives of Ontario having any client records from the centre, and, in particular, any records about the appellant. The ministry was asked to explain any arrangement that may be in place for records held at the Archives of Ontario to be included within the scope of requests for information made to the ministry regarding the centre's former residents, and whether the ministry asked the Archives of Ontario to search for records relating to the appellant's request.

[16] The ministry was also asked to address the appellant's representative's concern that information pertaining to any disciplinary measures taken with respect to her brother is absent from the records disclosed to her.

### ***Ministry's representations***

[17] The ministry has provided detailed representations on the extent of its search for records. In this case, quoting the ministry's submissions verbatim best captures the nature and extent of its search. The ministry submits:

### **An experienced employee knowledgeable in the subject matter**

In order to respond to FIPPA requests related to former residents of the Huronia, Rideau and Southwestern Regional Centres (the "facilities"), the [Ministry of Community and Social Services] established a dedicated team of FOI Analysts whose sole responsibility is to process FOI requests and review responsive records for possible redactions under the Act. This team worked collaboratively with Records Clerks at the Record Information and Security Management Unit ("RISM"), who are responsible for identifying responsive records and working with the Ministry of Consumer and Government Services' off-site storage facilities and the Archives of Ontario to retrieve those records.

Rather than 'an experienced employee knowledgeable in the subject matter' the Ministry employed a dedicated interdepartmental team of individuals with specific knowledge in both the processing of FIPPA requests (the staff at the Special Cases Unit) and file storage and retrieval (RISM). RISM's particular mandate is to maintain transfer documentation for all records that are currently maintained in the Government of Ontario's off-site storage facility. The Ministry submits that this is a team of staff with the particular expertise necessary to respond to the FIPPA request under appeal, being a team entirely dedicated to the task of processing and responding to FIPPA requests related to former residents of the facilities.

### **Reasonable efforts to locate records reasonably related to the request**

In navigating the repositories of records related to the operation of the former Southwestern Regional Centre, the Ministry has made use of the transfer lists and box content lists created when the files were moved out of Southwestern to identify and recall records that may be responsive to the FIPPA requests received. It should be noted that the Ministry expended considerable effort in the context of this initiative to identify and inventory over 3400 boxes of records, containing both resident files and other records related to former residents of the facilities. The 3400 boxes were identified using records schedules to determine boxes that would contain resident files as well as files related to the care and treatment of former residents of the facilities.

This was a manual search undertaken by Ministry staff, and Ministry staff dedicated many hours to this exercise. The product of this undertaking was updated box content lists to allow the Ministry to locate

responsive records with both greater facility and afford the Ministry greater confidence in the comprehensive nature of individual searches. These updated lists were cross referenced against [the appellant's] name and casebook number. Using this extensive search methodology, the Ministry was able to locate [the appellant's] resident file and provide it to the requester. It should also be noted that the Ministry worked collaboratively with the Archives of Ontario and searched extensively through the Archives' holdings to ensure that all responsive records could be located.

The Ministry submits that its search was reasonable within the meaning of section 24 of the Act. Staff that was responsible for carrying out the search were entirely dedicated to the task of processing FIPPA requests and locating responsive records. Staff responsible for file retrieval worked within the RISM, a Ministry department whose specific mandate relates directly to records management and storage. Not only did staff work with the existing file transfer and retention documentation (the transfer lists and box content lists), they also spent considerable time and effort to update that documentation through a comprehensive file inventory. The file inventory was a proactive initiative of the Ministry to give it the utmost confidence in its FOI search process...

### **The specific concerns raised by the requester and the IPC**

The Ministry submits that "Schedule 913-270 (Revised) - 91" is applicable to Southwestern client files and its application to resident files is set out at paragraphs 12-14 of the Ministry's affidavit. The Ministry cannot say definitively whether any files in the record have been destroyed pursuant to the schedule. However, the Ministry has located and provided a lengthy file of nearly 1100 pages, and the Ministry's search has not given it any reason to believe that further records may exist. The Ministry has done a thorough review of file transfer lists and box content lists for records relating to [the appellant]. Subsequent file inventories have not returned further responsive records.

Further, a resident file is unique to the individual. Therefore the contents of the individual resident file will of course vary from resident to resident. Respectfully, the appellant appears to have certain expectations as to the content of the resident file. The fact that the records produced may not reflect the appellant's assumptions about [the appellant's] time at Southwestern does not mean that the records are somehow incomplete or that further responsive records exist.

[18] The ministry also filed an affidavit in support of its representations. That affidavit, sworn by the ministry's Manager, Record Information and Security Management ("RISM") Unit, states in part:

### **Background of the Affiant**

I am the Manager of the Recorded Information and Security Management unit ("RISM") within the Information Management and Architecture Branch of the Ministry of Community and Social Services ("Ministry"). RISM is responsible for developing, in consultation with the applicable Ministry department, records schedules in accordance with the *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Schedule A, and maintaining those schedules. It is also responsible for maintaining the authoritative copy of location metadata, that is data about the location of records, and transfer documentation for all records that are currently maintained in the Government of Ontario's off-site storage facilities.

As Manager of RISM, I oversee a team of staff that have been working in conjunction with other Ministry and government branches to respond to requests under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("FIPPA" or the "Act") for records related to former residents of the Huronia, Rideau and Southwestern Regional Centres (the "facilities"). In particular, my staff is responsible for working with the staff of the Government of Ontario's off-site records storage facilities and the Archives of Ontario to provide responsive records to FOI Analysts within the Ministry's Special Cases Unit...

### **The Ministry's Retrieval of the Resident File**

On March 13, 2014, the Ministry received a request under the Act, for a copy of the resident file of [the appellant] from the time he spent as a resident of Southwestern Regional Centre... Subsequently, the Ministry received a request... for any records related to [the appellant] on May 26, 2014... It is the second request that is under appeal...

[An FOI Policy Analyst in the Special Cases Unit of the Ministry] received [the May 26, 2014 request]. The Special Cases Unit and its staff are responsible for processing FIPPA requests relating to records of former residents of the Huronia, Southwestern and Rideau Regional Centres and are responsible for processing requests and reviewing responsive records to determine the application of possible exemptions in accordance with the Act. The Unit was created to respond to the large

volume of FIPPA requests received for files relating to former residents of the above noted facilities...

[An FOI Policy Analyst] ... was responsible for processing [the May 26, 2014 request], and ... she, given the similar scope of the request, relied on the search results from [the March 13, 2014 request].

Based on a review of the RSIM search notes, in response to [the March 23, 2014 request], on March 14, 2014, [a FOI Policy Analyst] made a request to RISM using the individual's full name, date of birth, and casebook number (a unique identifier used for administrative purposes in the former facilities). These requests are made using an electronic tracking system...

[The FOI Policy Analyst's] request was processed by [a Records Clerk] at the RISM on March 14, 2014.

When a request for records relating to a former resident is received by RISM from an analyst at the Special Cases Unit, staff checks relevant records transfer lists and box content lists to determine the location of responsive records. These lists can be described as follows: records transfer lists that detail what records were transferred from the relevant facility upon its closing, in this case the Southwestern Regional Centre, to the Ministry of Government and Consumer Services' Information Storage and Retrieval (IS&R) offsite storage facility used by the Government of Ontario; box content lists that outline what records are contained in each box stored in the facilities; a list of Ministry holdings that document all the boxes in storage at the off-site storage facility and their contents; and, where applicable, archived resident lists covering client files for former facility residents that were transferred from interim storage warehouses to the Archives of Ontario. RISM has also been provided by the Archives of Ontario with verified lists of Archives' holdings as they relate to the Huronia and Southwestern Regional Centres which are also reviewed by RISM staff during the search process. The records transfer lists are arranged both by resident name and by casebook number, and can be used to identify the range of boxes in which responsive records are located. The detailed box content lists can then be used to further determine and verify the box in which a responsive record is located. Box content lists detail the contents of individual boxes.

Where a review of the transfer list and Archives' holdings lists indicates that a file has been sent to the Archives of Ontario, staff at RISM or the



Special Cases Unit request a copy of the file from the Archives of Ontario, and provides individual's full name, date of birth, date of discharge and casebook number, as well as any other relevant information to assist staff at the Archives in locating the file.

I have reviewed the files notes... and can advise as follows: On March 14, 2014, [the Records Clerk] reviewed the records transfer lists and relevant detailed box content lists, using [the appellant's] name and his casebook number, to determine the location of possible responsive records. A review of the lists and Archives' holdings lists indicated that records related to [the appellant] were located at IS&R. The lists are reviewed electronically and then manually (i.e. by reviewing each page). [The appellant's] name and casebook number were found on transfer list 2007-00379, A review of this list and the relevant box content list indicated that the resident file is located in warehouse 7, aisle 128, bay 90, shelf 7, carton 29, temporary box H49. A review of the lists did not indicate that any responsive records had been transferred to the Archives of Ontario, nor did a review of the Archives' holdings lists return any matches. Copies of the relevant portions of the records transfer lists and box content lists are attached as Exhibit "C".

Upon a review of the notes regarding this search, I can advise that the file located at warehouse 7, aisle 128, bay 90, shelf 7, carton 29, temporary box H49 was received from IS&R on March 20, 2014. I am advised by [the FOI Analyst] that she relied on the records located and provided to respond to [the March 13, 2014 request] to respond to [the May 26, 2014 request]...[O]n June 3, 2014, a copy of these records were sent to the requester.

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### **Detailed File Inventories Undertaken by the Ministry**

In order to ensure the thoroughness of its searches, Ministry staff undertook an inventory of files from the former facilities of both resident files and other records related to treatment and care of residents that were generally kept independently of the resident file, to assist the Ministry in locating responsive records to FIPPA requests received by the Ministry. This involved an inventory of more than 3400 boxes of former facility files for the three facilities. Ministry staff manually reviewed the files to ensure that the box content lists were accurate (and that no files were misfiled) and to update them as necessary to allow them to be more easily cross-referenced with FIPPA requests. This inventory also included a review of records held at the Archives of Ontario related to the three facilities by staff at the Archives.

For records generally kept independent of the resident file, Ministry staff reviewed the records schedules to identify those schedules that would contain information relating to former residents of the three former facilities. The records schedules represent classes of files that were generated by the facilities. Upon reviewing the records schedules relating to the three former facilities, the Ministry determined that the following records schedules could contain records about former residents and relied upon them to identify boxes of files that may contain responsive records:

- 003 - Investigation Records
- 278R - Training, Behaviour & Nursing Care Worksheets
- 334 - Confidential & Sensitive Issues
- 335 - Accident & Injury Report
- 336 - Movement of Population & Statistical Reports (Closed Facilities)
- 747 - Confidential/Sensitive Issues
- 270 - Resident's Medical, Individual Assessment and Program Files - Huronia Regional Centre
- 270 - Resident's Medical, Individual Assessment and Program Files – Rideau Regional Centre
- 270 - Resident's Medical, Individual Assessment and Program Files - Southwestern Regional Centre
- 333 - Master Resident/client Index Cards-Southwestern Regional Centre
- 2736A - Discontinued - Control Records, Registers, Log Books, and Lists -Rideau Regional Centre
- 2736A - Discontinued - Control Records, Registers, Log Books, and Lists – Southwestern Regional Centre

The inventory took place in two stages. The inventory of resident files began on January 27, 2014. The inventory was completed on July 8, 2014. This inventory did not generate further records relating to [the appellant] other than those that were already provided to the appellant.

The inventory for records relating to former residents but stored separate from the resident file began on July 9, 2014 and concluded on August 29, 2014. The inventory did not produce any records relating to [the appellant].

[19] The ministry appended a retention schedule as an exhibit to its affidavit. This schedule, Schedule 913-270 (revised) – 91 applies to the centre's resident medical, individual assessment and program files that were generated by staff at the centre. Under "Record Series Description", the schedule states:

Data on clients'/residents' identification, present location, \*medical and social history, legal status, \*admission and discharge summaries by various disciplines, medical treatment and education and programming information. May include some or all of the following data relevant to client/resident care and treatment:

[20] The schedule goes on to list several types and subtypes of records, under the headings Demographic, Medical, Nursing, Psychological, Educational, Social, Allied Health Services, Legal documents, and Correspondence. Some of the subtypes of records are marked with an asterisk, while others are not.

[21] Under "Retention Requirements", the schedule states 20 years after the date of last activity (or in the case of a person under the age of 18 years, 20 years after the date of last activity commencing on the 18<sup>th</sup> birthday). Under "Qualifying Factors/Archives Limitations", the schedule states:

Segregate asterisked documents from each file at end of retention period and transfer to Archives. Destroy remainder of files.

[22] The ministry's affidavit makes reference to this schedule as follows:

**The Application of the Relevant Records Schedule to the Resident File**

Schedule 913-270 (Revised) - 91 outlines the records retention schedules for Resident's/Client's medical, individual assessment and program files that were generated by staff at the Southwestern Regional Centre. The Schedule is applicable to resident files kept at the facility. The section on the schedule titled "Existing authority to

dispose" outlines various record series revisions that are obsolete versions of our current record series or obsolete versions of records series that closely relate to our current record series.

Staff at RISM consulted with staff at the Archives of Ontario, who interpret the schedule to mean that all records noted with an asterisk are required to be kept in the file that is ultimately sent to the Archives of Ontario. In contrast, records without an asterisk are to be destroyed 20 years after the date of last activity. My understanding of the accepted interpretation of "last date of activity" is that it refers to the last date the record was used for any operational purpose. Therefore, in the context of resident files, it would be 20 years after the file ceases to serve an operational purpose, such as the closure of the file where a resident is discharged from the facility or passes away.

I am not able to comment on the particular practices at the Southwestern Regional Centre in terms of noting when records were destroyed in accordance with records retention schedules, however, it is my understanding that such practices may not always have been consistent. Therefore, it is not possible for me to conclude whether records in the file have or have not been destroyed in accordance with records retention schedules.

### ***Analysis and findings***

[23] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>1</sup> For the following reasons, I find that the ministry has conducted a reasonable search for records responsive to the appellant's request.

[24] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>2</sup> From my review of the ministry's representations, including its affidavit, I find that the search was conducted by employees experienced in the subject matter of the request and that these individuals expended reasonable efforts to locate responsive records. I rely in particular on the following:

- a. The ministry employed a dedicated interdepartmental team of individuals with specific knowledge in both the processing of FIPPA requests (the staff at the Special Cases Unit) and file storage and

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<sup>1</sup> Orders P-624 and PO-2559.

<sup>2</sup> Orders M-909, PO-2469 and PO-2592.

retrieval (RISM). In my view, this demonstrates the ministry's commitment to using its best efforts to respond to freedom of information requests made by the appellant and other former residents.

- b. I note that the search for records was undertaken in a systematic manner, using the appellant's name, assigned "casebook number", transfer lists and box content lists to locate the box containing his resident file. This systematic approach would be likely to locate any records relating to a particular requester.
- c. The ministry also consulted with the Archives of Ontario to ascertain whether it was in possession of any records relating to the appellant. In my view, this was a reasonable and necessary step in light of the possibility that records could have been sent to Archives pursuant to the applicable retention schedule.
- d. In addition to searching for and locating the appellant's resident file, the ministry also reviewed other files that might contain records relating to the appellant, as detailed in its affidavit.

[25] In my view, these factors demonstrate that the ministry took a systematic, reasonable approach to searching for records relating to the appellant and expended reasonable efforts to locate responsive records.

[26] I now turn to the appellant's specific concerns with respect to the adequacy of the searches performed by the ministry. Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>3</sup> In this case, the appellant's representative is concerned that the records disclosed do not contain any information pertaining to disciplinary measures taken with respect to the appellant. However, the appellant's representative has not referred to any specific instances that lead her to believe that such records exist. I agree with the ministry's submission that the appellant appears to have made assumptions about what records the file should contain.

[27] I understand that the appellant feels that there ought to be more records than what he has received. As it appears from my review of the records disclosed to the appellant that he left the centre around 1999, it would seem that no records should have been destroyed in accordance with the 20-year rule set out in the applicable retention schedule. It is always possible that some records that ought to have been

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<sup>3</sup> Order MO-2246.

retained were in fact destroyed, but I hasten to add that the material before me does not give me any reason to conclude that this occurred.

[28] However, while it may or may not be the case that additional records *ought* to exist, the appropriateness of the record-keeping practices of the centre and the ministry is not an issue before me, and further, does not have a bearing on whether the ministry's search was reasonable. My jurisdiction in this appeal is limited to deciding whether the ministry has conducted a reasonable search for records.

[29] It is also possible that further records exist, but were not located by the ministry. In my view, however, given the ministry's evidence about the steps undertaken to locate records, this is unlikely to be the case. For the reasons stated above, I find that the ministry's search was reasonable.

[30] I recognize that my finding may be disappointing to the appellant, who feels that there are, or should be, more records pertaining to him. However, I am unable to find that the ministry's search was unreasonable in the circumstances.

**Issue B: Does the information at issue contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[31] 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,

- (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,
- ...
- (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;

[32] 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>4</sup>

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

### ***Representations***

[34] The ministry submits that the withheld and partially withheld pages are medical records that contain the personal information of a named individual, other than the appellant.

### ***Analysis and conclusion***

[35] In giving effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the established approach of this office is to review the application of the personal privacy exemptions on a record-by-record basis.<sup>6</sup> Having reviewed "Record 148", I find that it consists of a medical file containing multiple records relating to the appellant and/or his mother, many or all of which appear to have been generated around the time of the appellant's birth. Each page represents a separate record. As such, reviewing the application of the personal privacy exemptions on a record-by-record basis means, in this case, reviewing such on a page-by-page basis.

[36] I find that all of the records at issue -- pages 565, 566, 568, 569, 570, 571, 572, 574, 575, 577, 578, 579, 580, 581, 586 and 590 -- contain the personal information of the appellant's mother. To the extent they are legible, they contain the medical history of his mother and thus contain her personal information under subsection (b) of the definition of personal information. She is identifiable either because her name is legible on the records, or in the case of pages 565, 568, 569, 570, 572, 574, 577, 576 and 581, because notwithstanding that her name does not appear legibly anywhere on those records, her identity is readily ascertainable from the nature of the records combined with the fact that the records formed part of the appellant's file at the centre.

[37] I find that, with two exceptions noted below, all of the above pages also contain the personal information of the appellant. These pages contain information about the appellant's mother's pregnancy and delivery of the appellant, and as such, I find that they contain recorded information about the appellant and constitute his personal information as defined in the *Act*. Some of the records also contain information about

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<sup>4</sup> Order 11.

<sup>5</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>6</sup> See Order M-352.

the appellant's medical history when he was a newborn, and thus contain his personal information under subsection (b) of the definition of personal information.

[38] The records at pages 586 and 590 are illegible with the exception of the appellant's mother's name and the name of the hospital. These records disclose the fact that the appellant's mother was a patient at a particular hospital, but nothing more. Therefore, while this medical history constitutes her personal information under subsection (b) of the definition of personal information, these records do not disclose any personal information about the appellant.

[39] In summary, the following pages contain the personal information of both the appellant and his mother: pages 565, 566, 568, 569, 570, 571, 572, 574, 575, 577, 578, 579, 580, and 581. Pages 586 and 590 contain only the personal information of the appellant's mother.

**Issue C: Does the mandatory exemption at section 21(1) or the discretionary exemption at section 49(b) apply to the information at issue?**

[40] Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[41] 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.<sup>7</sup> Although the ministry relied on the mandatory personal privacy exemption in section 21(1), I have found that many of the records contain the personal information of the requester, such that access to those records must be assessed under the discretionary exemption in section 49(b).

[42] In contrast, under the mandatory exemption at section 21(1), where a record contains personal information of another individual but *not* the requester, the institution is prohibited from disclosing that information unless one of the exceptions in sections 21(1)(a) to (e) applies, or unless disclosure would not be an unjustified invasion of personal privacy under section 21(1)(f). Sections 21(1)(a) to (e) have no relevance to this appeal and it is unnecessary to consider them further.

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<sup>7</sup> See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).



[43] In applying either of the section 49(b) or 21(1) exemptions, sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[44] 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. For records claimed to be exempt under section 21(1) (ie., records that do not contain the requester's personal information), a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if a section 21(4) exception or the "public interest override" at section 23 applies.<sup>8</sup> If the records are not covered by a presumption in section 21(3), section 21(2) lists various factors that may be relevant in determining whether disclosure of the personal information would be an unjustified invasion of personal privacy, and the information will be exempt unless the circumstances favour disclosure.<sup>9</sup>

[45] On the other hand, for records claimed to be exempt under section 49(b) (ie., records that contain the requester's personal information), this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.<sup>10</sup>

### ***Representations***

[46] The ministry relies on the presumption in paragraph 21(3)(a), which reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

Relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

### ***Analysis and findings***

*Pages 586 and 590*

[47] Since these records contain only the personal information of the appellant's mother, the appropriate personal privacy exemption to consider is the mandatory exemption at section 21(1) of the *Act*. On my review of these pages, I find that the presumption in section 21(3)(a) "medical history" applies. None of paragraphs (a) to (d) of section 21(4) apply so as to overcome this presumption, and the public interest

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<sup>8</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

<sup>9</sup> Order P-239.

<sup>10</sup> Order MO-2954.

override has not been claimed. Accordingly, I find that these pages are exempt from disclosure under the mandatory exemption at section 21(1) of the *Act*.

*Pages 565, 566, 568, 569, 570, 571, 572, 574, 575, 577, 578, 579, 580, and 581*

[48] As these records contain the personal information of both the appellant and his mother, the appropriate personal privacy exemption to consider is the discretionary exemption at section 49(b) of the *Act*.

[49] I have considered the factors and presumptions in sections 21(2) and (3). As is the case with the record discussed above, the presumption in section 21(3) "medical history" applies to the records that were withheld in full, as well as to the withheld portions of the records that were withheld in part. This presumption applies with respect to the personal medical information of the appellant's mother. This is a factor weighing strongly against the disclosure of the records.

[50] Although the appellant did not provide representations and therefore has not argued any factors weighing in favour of disclosure, I have considered whether section 21(2) (a) "public scrutiny" or section 21(2)(d), "fair determination of rights", apply. These paragraphs, which would weigh in favour of disclosure if applicable, read:

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

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[51] I find that neither of these subsections applies in the circumstances of this appeal. The information at issue is medical information about the appellant's mother's pregnancy and delivery. The records pre-date the time of the appellant's residence at the centre. Accordingly, I find that their disclosure would not subject the Government of Ontario or its agencies to public scrutiny. I also find that they are not relevant to a fair determination of the appellant's rights. As noted above, the appellant has sought his file from the centre to support his claim for compensation from the class action settlement. That action was in respect of deficiencies in care of residents at the centre. I find that the records of the appellant's mother's pregnancy and delivery are not relevant to the centre's care of the appellant, and, therefore, are not relevant to a fair determination of the appellant's claim for funds from the class action settlement.

[52] Since the section 21(3) presumption applies, and weighs strongly in favour of privacy protection, and there are no factors rebutting this presumption, I find that disclosure of the withheld information on these pages would constitute an unjustified invasion of personal privacy pursuant to the discretionary exemption at section 49(b) of the *Act*.

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

### **General principles**

[53] The section 49(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[55] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

### **Relevant considerations**

[56] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>12</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

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<sup>11</sup> Order MO-1573.

<sup>12</sup> Orders P-344 and MO-1573.

- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[57] The ministry did not exercise its discretion with respect to the information it withheld at pages 565, 566, 568, 569, 570, 571, 572, 574, 575, 577, 578, 579, 580, and 581, because it was of the view that the mandatory personal privacy exemption at section 21(1) of the *Act* applies to this information.

[58] As it is this responsibility of this office to ensure that the ministry has properly exercised its discretion under the *Act*, my final determination of whether the withheld information on these pages is exempt from disclosure under section 49(b) will be deferred until representations have been received from the ministry regarding the exercise of its discretion. Therefore, I order the ministry to exercise its discretion under section 49(b) of the *Act* with respect to the withheld information in the records at these pages.

## ORDER

1. I uphold the ministry's search as reasonable.
2. I uphold the ministry's decision to withhold the records at pages 586 and 590.
3. I order the ministry to exercise its discretion under section 49(b) of the *Act* with respect to the withheld information in the records at pages 565, 566, 568, 569, 570, 571, 572, 574, 575, 577, 578, 579, 580, and 581, within twenty (20) days of the date of this Interim Order, and to provide this office with written notification of its decision regarding the exercise of discretion. If the ministry should decide to exercise its discretion in favour of non-disclosure, I order the ministry to provide its reasons for so doing.
4. I remain seized of this appeal.

Order Signed By: \_\_\_\_\_  
Gillian Shaw  
Adjudicator

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November 28, 2014