

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER PO-3454-F

Appeal PA14-281

Ministry of Community and Social Services

January 27, 2015

**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 that were compiled while he was a resident at Southwestern Regional Centre. The ministry granted access to the responsive records, withholding some portions pursuant to the mandatory personal privacy exemption at section 21(1) 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 some of the records. In Interim Order PO-3432-I, the adjudicator upheld the ministry's search as reasonable, and upheld the ministry's decision to withhold two of the records at issue under the mandatory personal privacy exemption at section 21(1). The adjudicator found that the remaining records contain the appellant's personal information in addition to that of his mother, and are exempt under the discretionary personal privacy exemption at section 49(b), rather than the mandatory personal privacy exemption at section 21(1). The adjudicator ordered the ministry to exercise its discretion with respect to those records. The ministry subsequently exercised its discretion in favour of the disclosure of some of the records, and in favour of non-disclosure of the remainder. In this order, the adjudicator upholds the ministry's exercise of discretion.

### OVERVIEW:

[1] This appeal arises from the appellant's request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all records pertaining to him that were compiled while he was a resident of Southwestern Regional Centre

(the centre). A class action lawsuit had been brought against the province for deficiencies in the care provided to residents at the centre. The action settled, and the appellant sought the records to support his claim for payment from the settlement fund. The ministry identified responsive records and granted partial access to them, withholding some information pursuant to the personal privacy exemption at section 21(1) of the *Act*. The appellant appealed the ministry's decision to this office, objecting to the exemption applied by the ministry and, further, raising the issue of the reasonableness of the ministry's search.

[2] In Interim Order PO-3432-I, I upheld the ministry's search as reasonable. I also upheld its decision to withhold two records under the mandatory personal privacy exemption at section 21(1). However, I found that the remaining records are exempt under the discretionary exemption at section 49(b), rather than the mandatory exemption at section 21(1), because they contain the appellant's personal information in addition to that of his mother. I ordered the ministry to exercise its discretion with respect to those records, and to provide this office with written notification of its decision regarding the exercise of discretion. I ordered that, should the ministry decide to exercise its discretion in favour of non-disclosure, it provide its reasons for so doing.

[3] The ministry subsequently issued a new decision to the appellant dated November 26, 2014, in which it provided partial access to the records at issue and maintained its decision to withhold the remainder. The ministry provided representations on the factors it had considered in its exercise of discretion, and consented to the sharing of its representations with the appellant. A copy was provided to the appellant, who was invited to make representations, but did not do so.

[4] In this order, I uphold the ministry's exercise of discretion pursuant to section 49(b) of the *Act*.

## **RECORDS:**

[5] The records remaining at issue consist of pages 565, 566, 568, 569, 570, 571, 572, 574, 575, 577, 578, 579, 580 and 581 of the package of records provided to this office. The records are medical records relating to the appellant and his mother around the time of the appellant's birth.

## **ISSUE:**

[6] The sole issue to be decided in this order is whether the ministry exercised its discretion under section 49(b) of the *Act* with respect to the above-mentioned records, and if so, whether this office should uphold the exercise of discretion.

## **DISCUSSION:**

[7] 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.

[8] 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.

[9] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>1</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>2</sup>

### **Relevant considerations**

[10] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>3</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

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<sup>1</sup> Order MO-1573.

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

<sup>3</sup> Orders P-344 and MO-1573.

- 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.

## **Representations**

[11] In its representations, the ministry states:

The ministry has reviewed the relevant records and exercised its discretion to disclose portions of the records that speak to the health of the appellant as a newborn. The ministry has not exercised its discretion to release the remaining information, as this information more readily speaks to the appellant's mother's health at the time of birth. It is the Ministry's position that this balances both the rights of the appellant to access [his] personal information as well as the rights of the appellant's mother to privacy.

The ministry submits that its approach to the exercise of discretion under section 49(b) to the remaining records at issue balances the Act's dual objectives under section 1. The appellant has been provided with the portions of the records that relate to the appellant's health at birth, while information that speaks more readily to the health of the appellant's mother has not been disclosed in order to maintain her privacy interests under the Act.

The ministry submits that this exercise of discretion has been undertaken in good faith, taking into account relevant considerations. In particular, the ministry relies on the following considerations:

- The ministry recognized that the appellant should have a right of access to [his] own personal information. Accordingly, information that speaks to the health of the appellant upon his birth has been released, whereas information that speaks more readily to the mother's health has not been disclosed, thereby reasonably balancing the respective right to access and the countervailing right to privacy. The ministry submits that the exercise of discretion in this manner realizes the underlying purpose of the Act.
- ... in this instance, the release of the information being sought would be considered an unjustified invasion of personal privacy (Paragraph 52 of the interim order) as the records contain the medical information of the appellant's mother. The ministry is therefore mindful of the sensitivity of this information as recognized by the Act, even in light of the age of the records and the familial relationship at the heart of the records. In this instance, the ministry has exercised its discretion in favour of protecting the appellant's mother's right to privacy over sensitive information held by the ministry.
- In the interim order, Adjudicator Shaw recognized that the records at issue "...pre-date the time of the appellant's residence at [the centre]... their disclosure would not subject the Government of Ontario or its agencies to public scrutiny" Further, they "...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..."...No other sympathetic or compelling need to receive the information has been brought to the attention of the ministry.

[12] As noted previously, the appellant did not file representations.

### **Analysis/Findings**

[13] Having reviewed the records at issue and the ministry's representations, I am satisfied that I should uphold the ministry's exercise of discretion. I find that the ministry took into account relevant factors and that there is no evidence that it exercised its discretion in bad faith or for an improper purpose. In making the decision to exercise its discretion in favour of partial disclosure, it was appropriate for the ministry to consider the purposes of the *Act*, the nature of the information, the interests

protected by section 49(b) and whether there was any sympathetic or compelling need for the appellant to have the information. The ministry also took into account the relationship between the appellant and his mother, and the age of the information, but found that, for some of the records at issue, the mother's right to privacy prevailed.

**ORDER:**

I uphold the ministry's exercise of discretion with respect to its decision to provide partial access to the records at issue pursuant to section 49(b) of the *Act*.

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Adjudicator

\_\_\_\_\_ January 27, 2015