Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3636

Appeal PA15-587

Ministry of Transportation

July 22, 2016

Summary: The appellant sought access to a report a physician had written to the Ministry of Transportation, under section 203(1) of the *Highway Traffic Act*, which resulted in the suspension of the appellant's driving privileges. The ministry granted access, in part. It withheld one sentence in the report, claiming the application of the discretionary exemptions in sections 49(a), in conjunction with section 20 (danger to health or safety) and 49(b) (personal privacy). In this order, the adjudicator finds that the withheld information qualifies as the personal information of only the appellant, and that the exemptions in sections 20 and 49(b) do not apply. The ministry is ordered to disclose the withheld information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2 (definition of personal information), 20 and 49(a).

Orders and Investigation Reports Considered: PO-1940.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Ministry of Transportation (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester's access request was for a medical condition report.

[2] The ministry subsequently located a responsive record and disclosed it to the requester, withholding one sentence in the record. The ministry claimed the application of the discretionary exemption in section 49(a) (discretion to refuse requester's own information), in conjunction with section 20 (danger to health or safety) of the *Act*.

[3] The requester, now the appellant, appealed the ministry's decision to this office. The appeal was not resolved during mediation and subsequently moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I sought and received representations from the ministry and the appellant, which were shared in accordance with this office's *Practice Direction 7*. In its representations, the ministry raised, for the first time, the application of the discretionary exemption in section 49(b) (personal privacy). The ministry was also given the opportunity to reply to the appellant's representations, but did not do so.

[4] For the reasons that follow, I find that the withheld sentence contains only the appellant's personal information and that the exemption in section 49(a) in conjunction with section 20 does not apply. I order the ministry to disclose the record in its entirety to the appellant.

RECORDS:

[5] The withheld information is one sentence contained in a medical condition report.

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 in section 49(a) in conjunction with the section 20 exemption apply to the information at issue?

DISCUSSION:

Issue A: Does the record contain personal information as defined in section 2(1) and, if so, to whom does it relate?

[6] 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,
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> (e) the personal opinions or views of the individual except if they relate to another individual,
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> . . .
>
> (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;

[7] To qualify as personal information, the information must be about the individual in a personal capacity. In addition, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[1]

[8] The ministry submits that the record contains the personal information of the appellant and other individual(s), and that this information falls within paragraphs (e) and (h) of the definition of personal information. The appellant submits that the ministry has provided no evidence that the withheld information may be the personal information of another individual.

[9] On my review of the information at issue which, as previously stated, is one sentence in the medical condition report, I find that it qualifies as the personal information of the appellant and not of any other individuals. I make this finding because, in the circumstances, the information consists of the views or opinions of individual(s) about the appellant, which falls within paragraph (g) of the definition of personal information. Consequently, since the information at issue is the appellant's personal information and no one else's, the personal privacy exemption in section 49(b) is not applicable, as the disclosure of this information to the appellant would not constitute an unjustified invasion of anyone else's personal privacy. Having made this finding, it is not necessary for me to determine whether the ministry should be allowed to claim the discretionary exemption in section 49(b) late.

[10] I will now go on to determine whether the exemption in section 49(a) in conjunction with section 20 applies to the information at issue.

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

[11] Section 47(1) gives individuals a right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right, which states:

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

[12] 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

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

grant requesters access to their personal information.[2] In this case, the ministry 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.

[13] For this exemption to apply, the ministry must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[3]

[14] An individual's subjective fear, while relevant, may not be enough to justify the exemption.[4] The term *individual* is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[5]

[15] The ministry submits that it applied this exemption based on information provided to it by the physician who was present at the appellant's examination. The physician, the ministry advises, requested that the information at issue be withheld due to concerns of a risk of safety. The ministry submits that the physician's views should be accorded significant weight, given that it *saw no reason* to doubt the physician's concern. Further information contained in the ministry's representations will not be set out in this order, as it meets this office's confidentiality criteria as set out in *Practice Direction 7*. However, I have taken it into consideration.

[16] By way of background, the appellant advises that he was recovering from surgery in a hospital when the report was created. The appellant had been a patient of this physician for one day. As a result of the report, the ministry suspended the appellant's driver's license. The appellant challenged the ministry's decision and submitted a report written by his long-standing family physician to support his position. In his report, which the appellant provided to this office, the family physician indicated that the appellant was healthy and fit to drive. Subsequently, the ministry re-instated the appellant's driver's license.

[17] Turning to the exemption in section 20, the appellant submits that the ministry has submitted no evidence to support its claim that this exemption applies. He states that examples of the kind of evidence required to establish a section 20 claim include: evidence of a pattern of abusive and intimidating correspondence; affidavit evidence detailing a history of complaints; accusations and irrational reactions; and a history of persistent and harassing behaviour.[6] The present case does not involve any of the

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[2] Order M-352.
[3] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[4] Order PO-2003.
[5] Order PO-1817-R.
[6] See Orders PO-1940, PO-3056 and PO-3297.

behaviours described above.

[18] The appellant also submits that section 20 claims have been rejected in prior orders of this office dealing with the disclosure of medical condition reports, based on findings that the exemption is not established where the evidence is limited to physicians' and affected persons' expressed concerns about safety.[7] The appellant argues that the ministry's assertion that it simply relied on an unidentified physician's *concern* and saw no reason to doubt it is not the test for section 20. He goes on to state that the ministry does not identify any threat to the health or safety of any individual, and provided no evidence of any alleged threat. Simply put, the appellant submits that the ministry does not offer any argument or evidence regarding how or why the exemption applies.

[19] As previously stated, the ministry's argument is that the physician expressed concern that there was a safety risk should the appellant's personal information be disclosed to him, and that the ministry accepted the physician's concern.

[20] The party with the burden of proof under section 20, that is, the party resisting disclosure, must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.

[21] Having reviewed the representations of the ministry and the appellant and the personal information at issue, in my view, the disclosure of this information could not reasonably be expected to seriously threaten the safety or health of an individual or result in a reasonable expectation of harm to any individual.

[22] I agree with the appellant that the ministry has not met the threshold for making out a section 20 claim. For example, in Order PO-1940, former Adjudicator Laurel Cropley found that the requirements of section 20 were satisfied where the appellant was deemed to be angry and potentially dangerous after having engaged in a pattern of abusive and intimidating correspondence with the institution. In other words, she found that where the individual's behaviour is such that the recipient of that behaviour perceives it as a threat to his or her safety, the section 20 claim is made out.

[23] In the circumstances of this appeal, I do not accept that the evidence tendered by the ministry meets the required threshold for exemption under section 20. In the absence of further evidence, I find the argument that the disclosure of the withheld information in the report could threaten the safety of others to be speculative at best. Adopting the approach taken by Adjudicator Cropley, there is no evidence before me that the appellant poses a threat to anyone, either with or without the information at issue. Further, based on the evidence before me, there is no evidence of the kinds of behaviour that past orders of this office have required to find that section 20 is applicable.

[24] Consequently, I find that the disclosure of the information at issue could not

[7] See Orders PO-1792 and PO-3024.

reasonably be expected to seriously threaten the safety and/or health of any person. Accordingly, I find that the information at issue in the record cannot be withheld under section 49(a) in conjunction with section 20. Having found that these exemptions do not apply, it is not necessary for me to determine whether the ministry properly exercised its discretion.

ORDER:

1. I order the ministry to disclose the record in its entirety to the appellant by August 29, 2016 but not before August 23, 2016.

2. I reserve the right to require the ministry to provide this office with a copy of the record it discloses to the appellant.

Original Signe By: July 22, 2016
Cathy Hamilton
Adjudicator