

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3701

Appeal PA15-162-2

Ministry of Community and Social Services

February 27, 2017

Summary: The appellant made a request to the Family Responsibility Office (FRO) of the Ministry of Community and Social Services for access to her file. Access was granted, in part. In this order, the adjudicator upholds the application of the exemptions at section 49(a) (discretion to refuse to disclose requesters own information), in conjunction with section 19(a) (solicitor-client privilege), and section 49(b) (personal privacy) to the remaining withheld information and dismisses the appeal.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 19, 21(2)(a), 21(2)(e), 21(2)(f), 21(2)(h), 21(3)(e), 21(3)(f), 49(a) and 49(b).

Order Considered: P-1014.

OVERVIEW:

[1] The Ministry of Community and Social Services received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) from a support recipient for access to "[c]opies of [the requester's] complete Family Responsibility Office file from 1988 to present time, of February 23, 2015."

[2] The Ministry of Community and Social Services (the ministry) then sent a letter on behalf of its Family Responsibility Office (FRO) to the support recipient advising that because of the volume of responsive records it was extending the time to respond to

the request, as provided for under section 27(1)(a) of the *Act*.

[3] The support recipient alleged that she did not receive the decision letter and commenced a deemed refusal appeal, which was assigned appeal file number PA15-162. That file was closed when the ministry issued its decision letter.

[4] In its decision, the ministry granted partial access to the responsive records that were located, relying on sections 14(1) (law enforcement) and 19 (solicitor-client privilege), in conjunction with section 49(a) (discretion to refuse requester's own information), as well as 49(b) (personal privacy) of the *Act* to deny access to the portions it withheld. The decision letter also set out that there was a photocopying fee of \$89.80 for copies of the pages of records that FRO had decided to disclose.

[5] The support recipient then requested, and received, a fee waiver.

[6] The support recipient (now the appellant) appealed the decision denying access. As a result, this appeal file (PA15-162-2) was opened.

[7] In the course of mediation, the appellant obtained copies of the pages of records that the ministry had agreed to disclose. No other issues could be resolved at mediation so the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[8] I commenced my inquiry by sending the ministry a Notice of Inquiry setting out the facts and issues in the appeal. The ministry provided responding representations. In its representations, it advised that it would be disclosing additional information to the appellant and was withdrawing its claim that certain records were subject to section 14(1) of the *Act*. As a result, that information, and the application of section 14(1), is no longer at issue in the appeal. I then sent a Notice of Inquiry to the appellant along with a copy of the ministry's representations. The appellant provided responding representations.

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

RECORDS:

[10] At issue in the appeal are copies of the undisclosed contents of the appellant's FRO file which includes letters, court documents and a file activity print out.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

- B. Does the discretionary exemption at section 49(a) in conjunction with section 19 apply to the information for which it is claimed?
- C. Does the discretionary exemption at section 49(b) apply to the information remaining at issue in the appeal?

DISCUSSION:

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

[11] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) 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 if 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;

[12] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹

[13] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.²

[14] FRO submits that the records contain the personal information of the appellant that she provided to FRO for the purposes of enforcing a support order filed with FRO. FRO submits that the information provided by the support recipient is confidential and highly sensitive in nature and falls within the ambit of personal information as defined by paragraphs (a), (b), (c), (d) and (f) of section 2(1).

[15] In the circumstances of this appeal, because of the manner in which the request by the appellant is framed, and the fact that the information is found in a file that pertains to the appellant, I find that all the records contain the personal information of the appellant. I also find that all the records remaining at issue contain the support payor's personal information. This personal information includes his age, the location of his residence and work and other personal information about him. Some records also contain references to other identifiable individuals which qualifies as their personal information.

[16] I will first address whether section 49(a), in conjunction with section 19, applies to the information for which it is claimed. Then I will consider whether section 49(b) of the *Act* applies to the balance of the information at issue.

Issue B: Does the discretionary exemption at section 49(a), in conjunction with section 19, apply to the information for which it is claimed?

[17] Section 48(1) sets out the access procedure applicable to requests for an individual's own personal information. Section 49 provides a complete list of exemptions to be applied where an individual has requested access to his or her own personal information. All of the exemptions in section 49 are discretionary. Sections 49(a) and (b) state as follows:

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

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

(a) 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 [emphasis added]; or

(b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[18] Under section 49(a) of the *Act*, where a record contains the personal information of the appellant and section 19 would apply to the disclosure of that information, FRO may refuse to disclose that information to the appellant.

[19] The ministry submits that section 19 applies to information at pages 259, 441, 442, 511, 524 and 589 of the responsive records.

[20] The ministry submits that it is not claiming the application of common-law litigation privilege, but that the withheld information is subject to common law solicitor-client communication privilege and statutory solicitor-client communication and litigation privilege.

[21] Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[22] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

Branch 1: common law privilege

[23] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[24] Solicitor-client communication privilege protects direct communications of a

confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.³ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁵

[25] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁷

Branch 2: statutory privileges

[26] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation." The statutory exemption and common law privileges, although not identical, exist for similar reasons.

The ministry's representations

[27] The ministry submits that the lawyers at FRO are employees of the Ministry of the Attorney General and work in-house as counsel for the Director of FRO (the Director) and his staff. As well, it states that FRO also retains private sector lawyers as counsel.⁸

[28] The ministry submits that solicitor-client privilege is being claimed for records prepared by in-house counsel and panel lawyers including case log notes of conversations between FRO staff and counsel, court results/reports prepared by counsel attending at court for the Director as well as legal memorandum and opinions relating to the enforcement of support orders. The ministry further submits that the solicitor-client communications were made in confidence and privilege has not been waived.

[29] The ministry also takes the position that the records are subject to the statutory solicitor-client communication privilege because they were "prepared by Crown counsel in the Legal Services Branch for the purpose of giving legal advice."

³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁴ Orders MO-1925, MO-2166 and PO-2441.

⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

⁸ The ministry submits that the solicitor-client relationship in both scenarios was acknowledged by the Divisional Court in *Ministry of Community and Social Services v. Cropley et al.* (2004), 70 O.R. (3d) 680.

[30] Finally, the ministry takes the position that the records at issue are also subject to statutory litigation privilege as they were prepared by or for Crown counsel "in contemplation of or for use in litigation." It submits that the Director and the Legal Services Branch often prepare materials including case log notes, legal opinions and memoranda to aid in the conduct of litigation. The ministry submits that the statutory privilege has not been waived.

Representations of the appellant

[31] The appellant provided representations in the form of an affidavit (along with other documents) detailing, amongst other things, her health, her marriage to the support payor, her interaction with an Ontario government agency and her concerns regarding her family law proceedings and FRO as well as other individuals. She does not directly address the ministry's claim that the identified records qualify for exemption under solicitor-client privilege.

Analysis and findings

[32] I find that the withheld information in the records that is claimed to be subject to section 19, falls within the scope of section 19(a) of the *Act* because disclosure of this information would reveal the nature of the confidential communication or legal opinion sought and provided from legal counsel to its client (FRO's Director and/or staff) in the context of a confidential solicitor-client communication or would reveal the substance of the confidential communication or legal opinion provided. I am satisfied that no waiver of privilege has occurred with respect to this information. Accordingly, I find that this information qualifies for exemption under section 49(a) of the *Act* in conjunction with section 19(a).⁹

[33] I will now address the remaining information at issue in this appeal.

Issue C: Does the discretionary exemption at section 49(b) apply to the balance of the information remaining at issue in the appeal?

[34] 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.

[35] For records claimed to be exempt under section 49(b) (i.e., 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

⁹ In light of this finding it is not necessary for me to consider whether the withheld information also qualifies for exemption under section 49(a) in conjunction with section 19(b).

an unjustified invasion of personal privacy.¹⁰

[36] Sections 21(2) and (3) of the *Act*, read, in part:

(2) 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;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence;

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

(a) relates to employment or educational history;

(b) was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness.

[37] The ministry submits that the records contain information that falls under the presumptions at sections 21(3)(d), (e) and (f) of the *Act* because:

The records contain information concerning the support payor's employment history. For example, see page 331 of the records at issue in this appeal which indicates employment income information about the support payor. The records also contain tax information about the support payor. For example, see pages 292-293 of the records at issue in this appeal, which provide detailed tax information about the support payor. Finally, records contain financial information about the support payor. For example, see pages 332-342 which discloses income, assets, liabilities and information on the net worth of the support payor.

¹⁰ Order MO-2954.

[38] In addition, the ministry states that the factors at sections 21(2)(e), (f) and (h) apply.

[39] With respect to the application of section 21(2)(e), the ministry submits that:

... the relationship between support payors and support recipients is often acrimonious and adversarial. As a result, disclosing the personal information of one party to the other party could expose that party to potential harm ranging from unwanted verbal contact to domestic violence.

[40] Regarding 21(2)(f), the ministry submits that:

Given the relationship between support payors and support recipients, and given that FRO acts as a buffer between them, the support payor's personal information should be considered highly sensitive as the disclosure could reasonably be expected to cause significant personal distress to the support payor. In P-1056, P-1269 and P-1340, the IPC found that communication between a support recipient and FRO is highly sensitive and thus is personal information. In PO-2910 and PO-3051, the same protection of privacy was extended to support payors and their communications with FRO.

[41] With respect to section 21(2)(h), the ministry submits that:

Given the relationship between the support payor and support recipient, and given that FRO acts as a buffer between them, any communication between FRO and the support payor is supplied in confidence. In P-1056, P-1269 and P-1340, the IPC found that communication between a support recipient and FRO is supplied in confidence and thus is personal information. In PO-2910 and PO-3051, the same protection of privacy was extended to support payors and their communications with FRO.

[42] As set out above, the appellant provided representations in the form of an affidavit (along with other documents) detailing, amongst other things, her health, her marriage to the support payor, her interaction with an Ontario government agency and her concerns regarding her family law proceedings and FRO as well as other individual

Presumptions in section 21(3)

Sections 21(3)(d), (e) and (f)

[43] In my view the presumptions at sections 21(3)(e) and/or (f) apply to the personal information in a great number of records at issue in this appeal because they contain financial information and/or tax return information that pertains to the support payor. I find that this information satisfies the requirements of sections 21(3)(e) and/or

(f) and its disclosure is presumed to constitute an unjustified invasion of the support payor's personal privacy. Accordingly, it is not necessary for me to also consider whether this information also falls within the section 21(3)(d) presumption.

The factors and circumstances in section 21(2)

[44] The appellant does not specifically refer to the application of section 21(2)(a), however her representations discuss her concerns about FRO's conduct in administering the file. I interpret this as a submission that disclosure of the information would be desirable for the purpose of subjecting the activities of FRO to public scrutiny, a factor listed in section 21(2)(a). In addition to the factor listed in section 21(2)(a), the appellant's submissions also appear to raise another unlisted circumstance that is often considered in balancing access and privacy interests under section 21(2) in matters of this nature, i.e. that "the disclosure of the personal information could be desirable for ensuring public confidence in the integrity of the institution."

[45] In Order P-1014, Adjudicator John Higgins considered the possible application of section 21(2)(a) to a request for information by an individual who had been accused of workplace harassment. The requester in that case sought access to various records created or obtained in relation to the investigation of the harassment allegation. Adjudicator Higgins wrote:

The objective of section 21(2)(a) is to ensure an appropriate degree of scrutiny by the public. In my view, there is public policy support for proper disclosure in proceedings such as [Workplace Discrimination and Harassment Policy (WDHP)] investigations, as evidenced by the rules of natural justice. For this reason, I agree with the appellant that an appropriate degree of disclosure to the parties involved in WDHP investigations is a matter of considerable importance. I will return to this issue under the heading "Public Confidence in the Integrity of an Institution", below.

However, as regards section 21(2)(a), it is my view that the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one. The appellant is not arguing that the public should be able to scrutinize these records. Rather, he seeks to review them himself, in order to ensure that justice was done in this particular investigation, in which he was personally involved. For this reason, I find that section 21(2)(a) does not apply in the circumstances of this appeal.

[46] In my view, similar considerations arise here, and based on the reasoning in Order P-1014, which also applies in this case, I find that section 21(2)(a) does not apply.

[47] For similar reasons, I am also not satisfied that releasing the withheld personal information could be desirable for ensuring public confidence in the integrity of the institution. The interests at issue in this appeal are essentially private. Releasing the balance of the information will not assist in ensuring *public* confidence in the integrity of FRO. In all the circumstances of this case, I am not satisfied, on the evidence before me that this factor applies.

The factors and circumstances which favour privacy protection

[48] In order for section 21(2)(e) to apply, the evidence must demonstrate that the damage or harm envisioned is present or foreseeable, and that this damage or harm would be “unfair” to the individual involved.

[49] In my view, even if it could be established that release of the personal information would expose the individual to whom the information relates to pecuniary or other harm, I am not satisfied, in the circumstances of this case, that this harm would be *unfair*, as is required. Accordingly, I do not find the factor at section 21(2)(e) to be relevant in the circumstances of this appeal.

[50] To be considered highly sensitive under section 21(2)(f), there must be a reasonable expectation of significant personal distress if the information is disclosed.¹¹

[51] In enforcing support orders, the Director acts as a conduit through which monies flow in order to help minimize the contact between support payors and recipients in recognition of the often acrimonious and adversarial nature of relationships where FRO is involved as a payment facilitator. In my view, in this context, certain information about individuals that is held by the Director is inherently highly sensitive. Moreover, I accept that in order for the Director to effectively enforce support orders, the parties to the FRO process must be able to communicate without the fear that the other party will have access to the kind of highly sensitive information that may be reflected in those communications.

[52] In the circumstances of this appeal, I find that disclosure of some of the withheld personal information would result in a reasonable expectation of significant personal distress. In my view, this factor weighs in favour of protection of privacy for some of the records, and I assign it moderate weight.

[53] Section 21(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 21(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.¹²

¹¹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

¹² Order PO-1670.

[54] I am prepared to accept that, in light of the context and the circumstances surrounding the provision of certain personal information in the records, it would be subject to a degree of confidentiality under section 21(2)(h). In light of the circumstances surrounding the context and nature of the information provided, I find that section 21(2)(h) carries moderate weight in favour of privacy protection with respect to some of the personal information in the records.

Balancing of the factors and circumstances

[55] As set out above, for information claimed to be exempt 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 in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy. I have found that the presumptions in sections 21(3)(e) and/or (f) and the factors in sections 21(2)(f) and/or (h) apply. The appellant has failed to establish any factors or circumstances favouring disclosure. Accordingly, considering and weighing those factors and presumptions that I have found to apply, and balancing the interests of the parties, I find that the disclosure of the personal information in the records would be an unjustified invasion of personal privacy. I make this finding in part, because of the extent of the information the ministry decided to disclose to the appellant, and in part, because of information that is reflected in the records at issue in this appeal, which I cannot reveal without disclosing the contents of the records. I therefore find that disclosure of the remaining withheld personal information would be an unjustified invasion of personal privacy under section 49(b).

[56] In making my findings with respect to the application of sections 49(a) and 49(b) above, I am of the view that any information that I have found to be subject to the section 49(a) and/or 49(b) exemptions is so intermingled with other information that it cannot be disclosed without resulting in disclosure of "disconnected snippets," or "worthless," "meaningless" or "misleading" information or disclosing the information that I have found to qualify for exemption.¹³

[57] Finally, based on my review of the information that I have determined to qualify for exemption under sections 49(a) and (b), and the overall circumstances of the matter including the sensitivity of the context and the nature of the information gathered for FRO enforcement matters, I am satisfied that the ministry properly exercised its discretion with respect to the information that I have found to be exempt under sections 49(a) and (b) of the *Act*.

¹³ See, in this regard *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

ORDER:

I uphold the ministry's decision and dismiss the appeal.

Original Signed by: _____
Steven Faughnan
Adjudicator

February 27, 2017 _____