Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3702

Appeal PA15-519

Ministry of Labour

February 28, 2017

Summary: The appellant made a request to the Ministry of Labour (the ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about a particular arbitration, with the exception of any privileged information. The ministry granted access to the responsive records, but withheld some information in the records, relying on the personal privacy exemption at section 21(1) of the *Act* and the advice and recommendations exemption at section 13(1). The ministry also withheld information that was, in its view, privileged, on the basis that such information was not within the scope of the appellant's request. The appellant appealed. The adjudicator finds that the appellant's request did not include information subject to solicitor-client privilege and upholds the withholding of privileged information on that basis. However, she finds that some information that the ministry claimed to be privileged is not, in fact, privileged. Since the ministry did not claim an exemption (other than solicitor-client privilege) for that information, she orders that it be disclosed. Finally, the adjudicator upholds the ministry's finding that the remainder of the withheld information is exempt from disclosure pursuant to the discretionary personal privacy exemption at section 49(b), and the discretionary exemption at section 49(a) in conjunction with section 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of "personal information"), 13(1), 49(a), and 49(b).

Orders and Investigation Reports Considered: Order M-352.

BACKGROUND:

[1] The appellant was dissatisfied with the length of time that passed between the hearing of an arbitration in which he was the grievor and the release of the arbitration award. He submitted a request to the Ministry of Labour (the ministry) pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to "information on a [named arbitrator's] recent matter with [an identified union and an identified employer] in relation to grievances of [the appellant]".

[2] The appellant elaborated on his request as follows:

> According to the Freedom of Information and Privacy act, please send me copies of all non-privileged communication that can be disclosed in the above matter. I need copies of any and all information that can be made public sent to me without exception. I would request you to include rather than exclude any information that can be construed to be non-relevant to the matter. Include any notes, conversation records, checklists, working papers etc.

[3] In its decision, the ministry granted partial access to the requested records. Some of the information was withheld as the ministry considered it to be non-responsive to the request. The ministry explained as follows:

> Based on your written request, I understand that you do not need access to any privileged ministry communications. Therefore, a number of internal email exchanges and draft correspondence are considered to be non-responsive to your request. Those records would otherwise be protected in their entirety under the advice to government and solicitor-client privilege exemptions in sections 13 and 19 of *FIPPA*.

[4] Access to portions of the remaining records was denied pursuant to the discretionary exemption for advice and recommendations at section 13(1) of the *Act*, the mandatory exemption for third party information at section 17, the discretionary exemption for solicitor-client privilege at section 19 and the mandatory personal privacy exemption at section 21(1).

[5] The appellant appealed the ministry's decision to this office.

[6] During the course of mediation, the mediator sought clarification regarding the information requested, noting that whereas the original request was for copies of "all non-privileged communication that can be disclosed", the appeal letter asked for disclosure of "all information". The appellant confirmed that he is seeking access to all information and the mediator conveyed this clarification to the ministry. The ministry, however, did not change its position regarding the records that it deemed non-responsive as a result of the wording of the request. Accordingly, the scope of the appellant's request and the responsiveness of certain records to his request are at issue in this appeal.

[7] Also during mediation, the ministry confirmed that in addition to the exemptions listed in its decision letter, it is also claiming the application of section 49(a) (discretion to refuse requester's own information) in conjunction with the exemptions at sections 13(1), 17 and 19. Further, it is claiming the discretionary personal privacy exemption at section 49(b).

[8] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I invited and received representations from the ministry and an affected party. In accordance with *Practice Direction 7: Sharing of Representations*, the ministry's representations were shared with the appellant, with portions withheld pursuant to the confidentiality criteria found in the practice direction. The affected party prepared a summary of its representations which was shared with the appellant. The appellant then filed representations. It was not necessary for me to seek reply representations from the ministry or the affected party.

[9] With its representations, the ministry advised that it had decided to release additional information to the appellant and provided copies of the information to the appellant. The ministry also provided a revised index of records and consented to a redacted version of the index being shared with the appellant.

[10] In this order, I uphold the ministry's decision to withhold information that is subject to solicitor-client communication privilege, on the basis that that information is not responsive to the appellant's request.[1] I uphold the ministry's decision to withhold the personal information of individuals other than the appellant pursuant to the discretionary personal privacy exemption at section 49(b), and to withhold information pursuant to section 13(1) in conjunction with section 49(a).

RECORDS:

[11] The records at issue are listed as records 1 through 101 in the Revised Index of Records prepared by the ministry. The records consist mainly of emails, correspondence and draft correspondence relating to the release of an arbitration award in respect of a particular grievance. The ministry released record 6 in its entirety to the appellant during adjudication, so that record is no longer at issue.

ISSUES:

A. What is the scope of the request? What records are responsive to the request?

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[1] I find, however, that the information in record 43 that the ministry seeks to withhold as privileged is not, in fact, privileged. As a result, all of the information in record 43 is within the scope of the appellant's request.

B. Does the record 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. Does the discretionary exemption at section 49(a) in conjunction with the exemption at section 13(1) apply to the records?

E. Did the ministry exercise its discretion under section 49(b), and section 49(a) in conjunction with section 13(1)? If so, should I uphold the ministry's exercise of discretion?

DISCUSSION:

A. What is the scope of the request? What records are responsive to the request?

[12] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; …
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[13] To be considered responsive to the request, records must "reasonably relate" to the request.[2] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[3]

[14] The ministry submits that the request provided sufficient detail in order for it to identify the records that were responsive to the request. The ministry states:

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[2] Orders P-880 and PO-2661.
[3] Orders P-134 and P-880.

> The Ministry understood from the request that the Appellant wanted all records that met the following criteria: (a) related to [the arbitrator's] matter with [a specified grievance] and (b) not privileged.

[15] The ministry's representations on what constitutes privileged information differ somewhat from the position it took in its decision letter. The ministry's decision letter states that information that would be subject to the exemptions at sections 13 or 19 would be privileged, and therefore outside the scope of the appellant's request. However, in its representations, the ministry states that records that would be subject to section 13 but not section 19 would be within the scope of the request (although exempt from disclosure under section 13). The ministry submits that where the solicitor-client privilege exemption at section 19 applies, the records are privileged, and therefore outside of the scope of the appellant's request.

[16] The appellant's representations do not address this issue. The affected party was not asked to provide representations on this issue.

[17] I find that the appellant's request provided sufficient detail to identify the records responsive to the request. The request clearly excluded privileged records. In my view, the request was not ambiguous in this regard. The only potential ambiguity arises from the scope of the term "privileged", since there exist privileges other than solicitor-client privilege. However, in my view, a liberal reading of this request would restrict the meaning of "privileged" to solicitor-client privilege. As a result, only records that are subject to solicitor-client privilege are excluded from the scope of the request.

[18] I conclude that the records responsive to the request exclude records that are subject to solicitor-client privilege.

Which records are subject to solicitor-client privilege and therefore outside the scope of the request?

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

Representations

[20] The ministry submits that many of the records reflect privileged and confidential communications between ministry counsel and clients relating to the seeking and giving of legal advice. The ministry submits that the records all fall within a continuum of communications between solicitor and client relating to the seeking and giving of legal advice. The ministry also submits that some of the records were prepared in contemplation of litigation.

[21] The ministry submits that the counsel who prepared or received the records at issue is a Crown counsel, employed by the Ministry of the Attorney General and seconded to the Ministry of Labour, for the purpose of providing legal services to Ministry of Labour clients.

It submits that these clients request legal advice from counsel on a regular basis, and that these requests for legal advice can involve a wide range of issues. In response to requests for legal advice, ministry counsel communicate their legal advice through both formal and informal legal opinions with the understanding that the advice contained within is privileged and maintained in confidence by clients.

[22] The ministry submits that privilege covers both the legal advice provided by counsel and the information exchanged between counsel and the client to keep both informed on the issues with respect to which advice was being sought and provided. The ministry submits that legal counsel was being kept informed and legal assistance was sought with respect to many, if not all, matters dealing with the appellant given the anticipation that litigation could develop on the issues.[4]

[23] The ministry acknowledges that confidentiality is a key component of the privilege and submits that the communications were made in confidence between legal counsel and ministry clients.

[24] The ministry submits that in addition to communication privilege, litigation privilege also applies to certain records, as they relate to advice sought and provided concerning a legal proceeding commenced by the appellant.

[25] The appellant submits that the records are not privileged because there was no agreement prior to the communications that the communications would be privileged. He also submits that he has waived all solicitor client privilege in all his dealings with the Minister of Labour and others.

Analysis and findings

[26] 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.[5] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[6] 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.[7]

[27] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[8]

[28] Confidentiality is an essential component of the privilege. Therefore, the institution

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[4] The ministry cites Order P0-3078 in support of this submission.
[5] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[6] Orders PO-2441, MO-2166 and MO-1925.
[7] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[8] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

must demonstrate that the communication was made in confidence, either expressly or by implication.[9] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[10]

[29] A list of individuals identified in the records, and their roles, was appended to the ministry's representations at my request. From my review of the records and with reference to this list, I find that the following records are privileged in their entirety: records 1, 5, 7-13, 21-37, 41, 44-46, 49, 50, 52-54, 56, 57, 61, 63-68, 73, 74, 76-78, 80-84, and 86-100.[11]

[30] The vast majority of these records contain direct communications between solicitor and client, the client being the ministry as represented by its staff. From my review of these records, it is clear that the purpose of the communications was the giving and receiving of legal advice. In coming to my conclusions, I have considered the principle that the solicitor-client communication privilege covers not only the document containing the legal advice, or the request for advice, but also information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given. While some portions of these records, taken on their own, might not have been subject to privilege, they are covered by the privilege in this case because they form part of the continuum of communications between the solicitor and client aimed and keeping both informed so that advice can be sought and given.

[31] With respect to the appellant's argument that there was no agreement ahead of time that the communications would be privileged, I note that the law of solicitor-client privilege does not include such a requirement. It is, however, required that the communications be made in confidence. From my review of the records, I am satisfied that all of the communications were made in confidence, either explicitly or implicitly.

[32] Some of the information withheld on the basis of privilege does not consist of direct communications between solicitor and client, but I find that disclosure of those records would reveal solicitor-client privileged communications. This is the case, for example, for some information in records 12, 34, and 35.[12]

[33] A few of the records (for example, records 74, 76, 78, 80, 81, 90 and 91) contain communications between ministry counsel for the purpose of providing legal advice. These are communications passing between counsel for the same client, for the purpose of providing legal advice to that client. I find, therefore, that these communications form part of the continuum of communications for the purpose of providing legal advice, and are

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[9] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[10] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[11] I note that the pages marked as record 5 actually comprise several email strings, i.e. several records. This is also the case for other records, for example records 23, 44, and 45. I have examined each record in such groups of records separately. It is preferable for institutions to list each record separately in an index.
[12] See, for example, Order PO-2087-I.

protected by solicitor-client communication privilege.

[34] The ministry also withheld portions of the following records on the basis of privilege: records 48, 51, 55, 62, 69, 71 and 85. I have reviewed these withheld portions and find that they contain direct communications between solicitor and client, or that their disclosure would reveal solicitor-client privileged communications. For the reasons stated above, I find, therefore, that this information is subject to solicitor-client communication privilege.

[35] From my review of the records, I also find that there has been no express or implied waiver of the privilege. The solicitor-client communications between the ministry and its counsel were not shared with any third parties. The privilege belongs to the client, in this case the ministry, and only the ministry can waive that privilege. Therefore, the appellant's argument that he has waived privilege cannot succeed.

[36] Finally, I find that non-privileged information cannot be reasonably severed and released without disclosing privileged information. To attempt to do so would, in my view, result in the disclosure of meaningless snippets of information.[13]

[37] As a result of my findings, I do not need to consider whether any of the information in the above-noted records is also subject to common law litigation privilege.

[38] I conclude that the records and portions of records listed above are not within the scope of the appellant's access request. Therefore, I will not address those records/portions of records further in this order.

[39] I find, however, that record 43 does not contain privileged information. Record 43 is a briefing note sent by a senior employee of Dispute Resolution Services (DRS). The ministry submits that a portion of the briefing note is subject to solicitor-client communication privilege. The ministry relies on Order PO-3078, where briefing notes were found to be privileged.

[40] Based on my review of the briefing note at issue in this appeal, however, I find that it does not represent a solicitor-client communication, nor does it form part of the continuum of communications between solicitor and client aimed at keeping both informed. Further, disclosure of the briefing note would not reveal solicitor-client privileged information, because it is not evident whether any legal advice was involved in its preparation and if so, what that advice was. I distinguish the record before me from the briefing notes at issue in Order PO-3078, which appear to have been prepared by counsel and to contain legal advice.

[41] I find, therefore, that record 43 does not contain privileged information. As a result, the entire record is within the scope of the appellant's request. Furthermore, since the

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[13] See *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23.

ministry has not claimed any exemption for the portion of the record that it claims is subject to privilege,[14] I will order that it be disclosed to the appellant.

Other non-responsive information

[42] I find that portions of record 4 are not responsive to the appellant's request, not because the information is privileged, but because it relates to labour relations matters other than the grievance involving the appellant and the named arbitrator. As this information is not responsive to the request, I will not address it further, and do not need to consider the ministry's argument that it is exempt from disclosure pursuant to section 49(a) in conjunction with section 17(1) of the *Act*.

Records that are within the scope of the request

[43] In light of my findings above, the records that are within the scope of the request and remain at issue are records 2, 3, 14-20, 38-40, 42, 43, 47, 55, 58-60, 70, 72, 75, 79 and 101. I will now consider whether the information at issue in these records is exempt from disclosure under any of the exemptions claimed by the ministry.

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

[44] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,

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[14] Other than solicitor-client communication privilege under section 19, which I find does not apply, for the reasons outlined above.

> (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;

[45] 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.[15]

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

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[47] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[16]

[48] Also, to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[17] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[18]

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[15] Order 11.
[16] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).
[17] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[18] Orders P-1409, R-980015, PO-2225 and MO-2344.

Representations

[49] The ministry submits that many of the records at issue contain the personal information of individuals other than the appellant under paragraphs (b) and (d) of the definition of personal information, including an individual's home telephone number and personal email address. The ministry submits that this information is personal and not business information. The ministry also submits that certain comments in record 55 are the personal information about the individual under paragraph (d), as the information consists of the views of others about the individual's work performance.

[50] The ministry acknowledges that information associated with an individual in their professional capacity is not their "personal information" unless the information reveals personal information about the individual. The ministry submits that the information that it redacted from the records is not professional information, but information personal to the individual in question.

[51] The affected party submits that the records contain personal information under paragraphs (b), (c), (e) and/or (f) of the definition. The appellant did not make representations on this issue.

Analysis and findings

Do the records contain the appellant's personal information?

[52] For reasons that I will elaborate on below under Issues C and D, it is necessary not only to determine whether the records contain the personal information of individuals other than the appellant, but also whether the records contain the appellant's own personal information.

[53] From my review of the records at issue, I find that all of them contain the appellant's personal information. Most of the records contain the appellant's name, along with other personal information about him within the introductory wording of the definition, such as the fact that he was the grievor in an arbitration matter. A small number of the records do not contain the appellant's name, but I find that he is readily identifiable from the information in the records, and that they contain his personal information under the introductory wording of the definition.

Do the records contain the personal information of other individuals?

[54] The ministry claims that records 2, 3, 14-20, 38-40, 42, 47, 55, 70, 75 and 79 contain the personal information of two named individuals other than the appellant.

[55] From my review of the records, I find that the portions withheld by the ministry contain the personal information of individuals other than the appellant. That information includes personal cell and home telephone numbers, which are personal information under paragraph (d), personal email addresses, which are personal information under the

introductory wording of the definition, information that qualifies as personal information under paragraph (d), and views and opinions that qualify as personal information under paragraph (e). I agree with the ministry that this information reveals something of a personal nature about these individuals and therefore qualifies as personal information.

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

[56] 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. Section 49(b) states:

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

[57] 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.[19] This is in contrast to the mandatory personal privacy exemption at section 21(1), which is the appropriate exemption to consider where the record does not contain the requester's personal information.

[58] Both the ministry and the affected party submit that the mandatory personal privacy exemption at section 21(1) of the *Act* applies to the personal information withheld by the ministry. They submit that, since the withheld information does not contain the appellant's own personal information, the discretionary personal privacy exemption at section 49(b) is inapplicable.

[59] I disagree. In Order M-352, Adjudicator John Higgins stated:

> In order to give effect to the legislature's intention to distinguish between requests for an individual's own personal information and other types of requests, the Commissioner's office has developed an approach for determining whether Part I or Part II of the *Act* applies. In that approach, the unit of analysis is the record, rather than individual paragraphs, sentences or words contained in a record.

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[19] See below in the "Exercise of Discretion" section for a more detailed discussion of the institution's discretion under section 49(b).

> This approach has been applied in many past orders, and it is set out in detail in the October 1993 edition of IPC Practices entitled "Responding to Requests for Personal Information". That publication states, in part, as follows:
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> > Generally, an individual seeking access to a record that contains his or her personal information has a greater right of access than if the record does not contain any such information. ... Part II of the municipal *Act* oblige[s] institutions to consider whether records should be released to an individual, regardless of the fact that they may otherwise qualify for exemption under the legislation.
>
> In my view, the record-by-record analysis best reflects the special character of requests for records containing one's own personal information, and it provides a practical, uniform procedure which all institutions can apply in a consistent manner.
>
> It requires institutions to analyze records which are identified as responsive to a request in order to determine whether any of them contain personal information pertaining to the requester. For records which are found to contain the requester's own personal information, the institution's access decision is to be made under Part II of the *Act*. For records which do not contain the requester's own personal information, the decision would be under Part I.

[60] I agree with this approach, which is the approach that this office generally follows in determining whether a request for access should be addressed under Part II of the *Act,* where section 21(1) is found, or Part III of the *Act*, which addresses requests for one's own personal information and where section 49(b) is found.[20]

[61] Following the above approach, I find that, since the records contain the appellant's own personal information, the discretionary personal privacy exemption at section 49(b) is the appropriate personal privacy exemption to consider.

Would disclosure be "an unjustified invasion of personal privacy" under section 49(b)?

[62] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b).

[63] If the information fits within any of paragraphs (a) to (e) of section 21(1), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under

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[20] The corresponding parts of the municipal version of the *Act,* under which Order M-352 was decided, are Parts I and II.

section 49(b). None of the parties raised the application of any of these paragraphs and I find that none apply. In particular, none of the individuals to whom the personal information relates has consented to the disclosure of their personal information (paragraph 21(1)(a)).

[64] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. None of the circumstances set out in section 21(4) applies here.

[65] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 49(b), this office considers, and weighs, the factors and presumptions in sections 21(2) and (3) and balances the interests of the parties.[21]

Do any of the section 21(3) presumptions apply?

[66] Section 21(3) states:

> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
> >
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
> >
> > (c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;
> >
> > (d) relates to employment or educational history;
> >
> > (e) 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;
> >
> > (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or

[21] Order MO-2954.

> (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

[67] Having reviewed the information at issue, I find that the presumptions listed at one or more of the paragraphs in section 21(3) applies to some of it. I cannot be more specific, as to do so would reveal the nature of the information.

Do any of the section 21(2) factors apply?

[68] Section 21(2) of the *Act* states:

> (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;
>
> (b) access to the personal information may promote public health and safety;
>
> (c) access to the personal information will promote informed choice in the purchase of goods and services;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[69] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[22] Four of the listed factors, if present, generally weigh in favour of disclosure,

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[22] Order P-239.

while five of the factors, if present, generally weigh in favour of non-disclosure. However, the list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2).[23]

Section 21(2) factors weighing in favour of non-disclosure

[70] I find that some of the information at issue is highly sensitive within the meaning of section 21(2)(f). Previous orders of this office have found that, in order for information to be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[24] I find there to be such an expectation in this case, given the nature of the information at issue. Again, I cannot be specific without disclosing the nature of the information. I find that this factor weighs strongly in favour of non-disclosure.

[71] Further, I find that in the particular circumstances of this appeal, the personal email and home addresses of the affected party are highly sensitive. The factor at section 21(2)(f) therefore applies to this information and weighs in favour of non-disclosure of this information.

Section 21(2) factors weighing in favour of disclosure

[72] The appellant has not raised the potential application of any listed factors which would weigh in favour of disclosure of the information at issue. He argues, however, that he seeks access to the withheld information in order to understand the reasons for the delay in writing the appellant's arbitration award.

[73] From my independent review of the records, I find that the disclosure of most of the personal information in the records would not add to an understanding of the reasons for any delay in releasing the award. A small amount of the information may shed some light on the issue. I therefore accept that this is an unlisted factor favouring disclosure of certain information. However, given the limited extent to which the information may add to an understanding of the delay, I place little weight on this factor.

Balancing the presumption and factors for and against disclosure

[74] I have found above that a section 21(3) presumption weighs against disclosure of some of the information, and that the factor at section 21(2)(f) weighs against the disclosure of some of the information. The unlisted section 21(2) factor weighing in favour of disclosure applies to a small amount of this information. I find, however, that the sensitivity of the information outweighs this factor. I find, therefore, that disclosure of the information that is subject to a presumption and/or a factor weighing against disclosure would be an unjustified invasion of personal privacy under section 49(b).

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[23] Order P-99.
[24] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[75] The remainder of the personal information, however, is not subject to any presumption or factor weighing against disclosure. On the other hand, there are also no factors weighing in favour of disclosure of this information. Taking into account the nature of the information and balancing the interests of the parties,[25] I find that the disclosure of this information would be an unjustified invasion of the personal privacy of the individuals to whom the information relates. As a result, the section 49(b) exemption applies to the information.

Does the absurd result principle apply?

[76] The appellant argues that he already knows some of the personal cell phone and email information in the records from previous production by the ministry. Previous orders of this office have found that where the requester originally supplied the information, or the requester is otherwise aware of it, the information may not be exempt under section 49(b), because to withhold the information would be absurd and inconsistent with the purpose of the exemption.[26]

[77] The absurd result principle has been applied where, for example, the requester sought access to his or her own witness statement,[27] the requester was present when the information was provided to the institution,[28] or the information is clearly within the requester's knowledge.[29]

[78] However, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge.[30] In the circumstances of this appeal, I find that disclosure of the information would be inconsistent with the purpose of the section 49(b) exemption, which is to protect the personal information of third parties. As the appellant has not been specific about the information he already has, I find that it is not clear that any information at issue is clearly within his knowledge. Even if it were, I have found above that certain personal cell and email information is highly sensitive in the context of this appeal. For that reason, I decline to apply the absurd result principle.

[79] Subject to my findings below on the ministry's exercise of discretion, I conclude that the personal information at issue is exempt from disclosure pursuant to the discretionary exemption at section 49(b) of the *Act.* As noted above, this personal information is found in records 2, 3, 14-20, 38-40, 42, 47, 55, 70, 75 and 79.

[80] In light of my conclusion, I do not need to consider the affected party's argument

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[25] Order MO-2954.
[26] Orders M-444 and MO-1323.
[27] Orders M-444 and M-451.
[28] Orders M-444 and P-1414.
[29] Orders MO-1196, PO-1679 and MO-1755.
[30] Orders M-757, MO-1323 and MO-1378.

that this information is also exempt pursuant to the exemption at section 49(a) in conjunction with section 17(1).

D. Does the discretionary exemption at section 49(a) in conjunction with the exemption at section 13(1) apply to the records?

[81] As noted above, section 49 sets out a number of exemptions to an individual's general right of access to their own personal information under section 47(1). Section 49(a) reads:

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

[82] 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 grant requesters access to their personal information.[31] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[83] In this case, the institution relies on section 49(a) in conjunction with section 13(1), which states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[84] The purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[32]

[85] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[86] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and

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[31] Order M-352.
[32] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [33]

[87] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[88] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[34]

[89] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[35]

[90] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[36]

[91] Examples of the types of information that have been found *not* to qualify as advice or recommendations include factual or background information,[37] a supervisor's direction to staff on how to conduct an investigation,[38] and information prepared for public dissemination.[39]

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[33] See above at paras. 26 and 47.
[34] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[35] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[36] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[37] Order PO-3315.
[38] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[39] Order PO-2677.

Representations

[92] The ministry submits that the withheld information in records 43, 58-60, 72, and 101 is exempt from disclosure pursuant to section 13(1). It submits that these records convey advice and recommendations regarding the ministry's response to certain inquiries it had received.

[93] The ministry submits that the role of Dispute Resolution Services (DRS) (the program area from which the majority of the records at issue in the appeal were held) is relevant to the section 13 analysis. The ministry submits that DRS provides neutral third-party assistance to Ontario's labour-management community in the negotiation and administration of collective agreements, provides best practices advice on labour-management relationships, and provides collective bargaining information. The program is provided through the Office of the Director of DRS, Mediation Services, Arbitration Services and Collective Bargaining Information Services.

[94] The ministry submits that the nature of the work performed by Arbitration Services is relevant for the purposes of this appeal. Specifically, the division of Arbitration Services assists the Minister of Labour in carrying out statutory responsibilities for constituting boards of arbitration and appointing single arbitrators under the *Labour Relations Act, 1995* and various other statutes. The service is responsible for receiving and processing requests from employers and trade unions for the appointment of arbitrators and nominees to boards of arbitration. The service monitors the progress of arbitration proceedings and catalogues awards and maintains the Minister's list of qualified grievance arbitrators.

[95] Given the nature of the work, the ministry submits that this division must be free to engage in a free flow of communications in order to be able to carry out its functions. The ministry submits that its senior management rely on confidential advice and recommendations from the Director of DRS regarding specific arbitration matters.

[96] The ministry submits that the records to which section 13(1) applies contain advice and recommendations for responses to the questions around the issuance of a grievance arbitration award. In this case, the decision making process relates to advice on draft responses to those questions. The ministry submits that the preferred courses of action are outlined in the drafts and these went to the decision maker to make a final determination on how to respond.

[97] The ministry submits, further, that it has already provided the objective and factual material to the appellant, and that the information over which section 13(1) has been claimed consists of records or portions of records that contain actual advice or recommendations. The disclosure of the contents of the drafts and the comments contained within the drafts, as well as the emails discussing the drafts, would necessarily reveal the advice that was provided to the senior officials and the recommendations for response.

[98] The affected party was not asked to provide representations on this issue. The appellant's representations do not address this issue.

Analysis and findings

[99] Record 43 is a briefing note prepared by a senior employee of DRS. The ministry submits that it has withheld portions containing advice to the government which are exempt under section 13(1). Based on my review of the withheld information in the context of the records as a whole, I find that it qualifies as "advice" or "recommendations" for the purposes of section 13(1), as it sets out a policy option that the ultimate decision maker was free to accept or reject.

[100] The information at issue in records 58, 59 and 60 consists of a recommended response to a media inquiry. The recommendation was made by a communications officer to a senior staff member at DRS. From my review of this record in the context of the other records, I find that the withheld information constitutes a recommendation within the meaning of section 13(1), as the senior staff member at DRS was free to accept, reject or modify the recommendation.

[101] Records 72 and 101 consist of draft correspondence and an email. The ministry submits that the drafts reveal advice on a recommended response to the inquiries in question. From my review of these records, I agree that they represent a suggested course of action that could be accepted or rejected by the ultimate decision maker. Therefore, section 13(1) applies to them.

[102] I conclude that the exemption at section 49(a), in conjunction with the section 13(1) exemption applies to the information that the ministry withheld under section 13(1). As noted above, this information is found in records 43, 58-60, 72 and 101.

E. Did the ministry exercise its discretion under sections 49(b), and 49(a) in conjunction with section 13(1)? If so, should I uphold the ministry's exercise of discretion?

[103] The section 49(a) and 49(b) exemptions are discretionary, and permit 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.

[104] 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, or it fails to take into account relevant considerations.

[105] In either case this office may send the matter back to the institution for an exercise

of discretion based on proper considerations.[40] This office may not, however, substitute its own discretion for that of the institution.[41]

[106] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[42]

- 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
- 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

[107] Although the ministry took the position that the appropriate personal privacy exemption is the mandatory exemption at section 21 and not the discretionary section 49(b) exemption, it made submissions on section 49(b) in the alternative. It also provided representations on the exercise of its discretion under section 49(b) as well as section 49(a) in conjunction with section 13(1).

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[40] Order MO-1573.
[41] See section 54(2).
[42] Orders P-344 and MO-1573.

[108] The ministry submits that it disclosed as much information as was possible (approximately 657 pages were disclosed either in full or in part) to the appellant. It submits that in exercising its discretion to withhold the exempt information, it took into account the following relevant factors:

- That the appellant received both his personal information and information that was responsive to his request to the fullest extent possible. The ministry made all efforts to balance the appellant's right to his own personal information against the privacy rights of the affected individuals. The personal information withheld was limited and specific. Further, the appellant was provided with a substantial amount of information (approximately 657 pages) in response to his request;

- The sensitivity of some of the withheld personal information;

- The lack of any compelling need for the appellant to receive the personal information of the other individuals identified in the records;

- The nature of the relationship between the appellant and the affected persons;

- In respect of the information subject to the section 13(1) exemption, the concern that disclosure of the information would undermine the frankness and openness of communications that necessarily take place between staff in connection with responses on behalf of government to inquiries.

[109] The appellant did not make representations on the ministry's exercise of discretion. Having reviewed the ministry's representations in this regard, I am satisfied that it exercised its discretion under sections 49(b) and 49(a) in conjunction with 13(1). The ministry explicitly acknowledged that the records contain the appellant's personal information, but balanced this fact against other legitimate considerations such as the sensitivity of the personal information and the need to protect the free flow of advice. There is also no evidence that the ministry exercised its discretion in bad faith or that it took into account irrelevant considerations.

[110] I uphold the ministry's exercise of discretion.

ORDER:

1. I uphold the ministry's decision, in part. I order the ministry to disclose the withheld information in record 43 to the appellant, with the exception of the information that the ministry marked as exempt under section 13.

2. The disclosure noted in paragraph 1 is to take place by **April 4, 2017 but not before March 30, 2017**.

3. In order to ensure compliance with paragraphs 1 and 2 of this Order, I reserve the right to require the ministry to provide me with a copy of the information disclosed to the appellant.

Original Signed by: February 28, 2017

Gillian Shaw
Adjudicator