

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3760

Appeal PA16-309

Ministry of the Attorney General

August 1, 2017

Summary: Under the *Freedom of Information and Protection of Privacy Act*, the requester sought access to a letter sent to three named individuals. After notifying these three individuals (the affected parties), the ministry decided to disclose the letter in its entirety, except for the affected parties' mailing addresses. One of the affected parties (the appellant) appealed this decision on behalf of all three of them. The appellant, on behalf of himself and the other affected parties, has identified parts of the letter that they wanted withheld, and consented to disclosure of the remainder. In this order, the adjudicator determines that the letter is the affected parties' personal information, and finds it exempt under section 21(1) except the parts that the affected parties consent to disclose. The ministry is ordered to disclose the non-exempt parts of the record that remain at issue.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 2(1) (definition of "personal information"), 21(1), 21(1)(a) and 23.

OVERVIEW:

[1] This is a third party appeal. An individual (the requester) made an access request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a letter sent to three individuals on a specific date. These three individuals (the affected parties) are expressly named in the request, which also identified the ministry's file reference number.

[2] The ministry located the letter (referred to in this order as "the record").

Pursuant to section 28(1) of the *Act*, the ministry provided notice to the three affected parties to obtain their views regarding disclosure. One of the affected parties responded on behalf of all of them. With this response, the affected party (who is also the appellant in this appeal) enclosed a version of the record showing the information that he and the other affected parties wanted redacted and, in effect, consenting to the disclosure of the remainder.

[3] After considering the representations from the affected parties, the ministry issued a decision granting access in part. The ministry advised the affected parties and the requester that portions of the record would be withheld in accordance with section 21(1) (personal privacy) of the *Act*, and that the remainder of the record would be disclosed.

[4] Under section 28(8), the ministry advised the affected parties of their right to appeal the ministry's decision to disclose portions of the record. Other than the affected parties' mailing addresses, the ministry's decision would entail disclosure of all the other information the affected parties asked it to sever. Put more simply, the ministry's decision was to disclose the record in its entirety, except for the mailing addresses of the affected parties.

[5] The ministry's decision letter to the requester advised her that she could appeal its decision to deny access to portions of the record.

[6] One affected party (the appellant) appealed the ministry's decision. The appellant has provided documentary evidence that, in addition to representing his own interests, he acts as agent on behalf of the other two affected parties in this appeal.

[7] The requester did not appeal the ministry's decision to deny access to the portions of the record that the ministry decided to withhold (the mailing addresses of the affected parties), and those portions are therefore not at issue.

[8] The appeal was assigned to a mediator under section 51 of the *Act*. During mediation, the requester confirmed that she has seen the top part of the record, and knows the identity of the individuals involved. For that reason, she is only interested in receiving the body of the letter, which the ministry had decided to disclose in full. Accordingly, the body of the letter, which consists of the letter minus the names and addresses of the affected parties, is the information at issue in this appeal.

[9] Also during mediation, the appellant advised that no portion of the record should be disclosed to the requester. This is a change from the position taken by the appellant at the request stage. (As explained later in this order, during the inquiry stage of this appeal, the appellant returned to his original position consenting to the disclosure of parts of the record.)

[10] The appellant advised the mediator that he relies on the mandatory exemption in section 21(1) of the *Act* in conjunction with sections 21(3)(b) and (g) and 21(2)(e), (f),

(h) and (i). He also claims that sections 14(1)(a), (b), (c), (d), (g) and (l) (law enforcement) apply. As the section 14 exemptions are discretionary and were not claimed by the ministry, this raises the issue of whether the appellant is entitled to claim and rely on them.

[11] As no further issues could be resolved, the appeal moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[12] In view of the issues raised in this appeal, I added the possible application of the "public interest override" found in section 23 of the *Act* as an issue in the inquiry.

[13] I began the inquiry by sending a Notice of Inquiry to the appellant, inviting him to provide representations, which he did. I then sent a Notice of Inquiry to the requester and the ministry and invited them to provide representations. I did not share the appellant's representations with these parties for reasons of confidentiality. The requester provided representations in response to the Notice of Inquiry, and the ministry contacted this office to advise that it would not be providing representations.

[14] In this order, I find that the body of the letter discloses personal information about identifiable individuals, and except for the parts the appellant consents to disclose on his own behalf and that of the other two affected parties, it is exempt under section 21(1). The public interest override in section 23 does not apply. The ministry is ordered to disclose the body of the letter, but to withhold the portions that the appellant does not consent to disclose, which are exempt under section 21(1).

[15] Under these circumstances, it is not necessary to consider whether the appellant is entitled to raise the discretionary exemptions in sections 14(1)(a), (b), (c), (d), (g) and (l), and if so, whether they apply.

RECORD:

[16] The record at issue consists of the body of a two-page letter.

ISSUES:

- A. Does the record contain personal information within the meaning of section 2(1) of the *Act*, and if so, to whom does it pertain?
- B. Does the mandatory exemption in section 21(1) of the *Act* apply?
- C. Does the public interest override in section 23 of the *Act* apply?

DISCUSSION:

A. Does the record contain personal information within the meaning of section 2(1) of the *Act*, and if so, to whom does it pertain?

[17] The record consists of a letter addressed to the appellant and two other affected parties, whom he represents for the purposes of this appeal. The letter is in response to correspondence the ministry received from these individuals.

[18] The names and addresses of the affected parties are not at issue, as already noted. However, the request identifies the appellant and the other two affected parties by name, so their identities are known to the requester.

[19] The term, "personal information" is defined in section 2(1), in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

(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,

(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;

[20] 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

[21] Sections 2(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

¹ Order 11.

dwelling and the contact information for the individual relates to that dwelling.

[22] 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.²

[23] Based on my review of the record, it is evident that it is in response to correspondence from individuals, and would provide information about the contents of the letter to which it responds. As such, it reveals personal views and opinions of the appellant and the other individuals he represents. The severance of their names and addresses from the record will not prevent them from being identifiable as they are identified by name in the request. There is also no suggestion that this is business or professional information.

[24] Accordingly, I find that the letter consists of the personal information of the appellant and the other two affected parties he represents as agent.

B. Does the mandatory exemption in section 21(1) of the *Act* apply?

[25] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[26] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[27] If the information fits within any of paragraphs (a) to (e) of section 21(1), it is not exempt from disclosure under section 21. Under section 21(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[28] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. Section 21(4) does not apply in this case.

Section 21(1)(a)

[29] This section permits disclosure where an affected party or parties consent. It states:

² Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(a) upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access;

[30] In his representations, the appellant consents, in writing, on his behalf and that of the other two affected parties he represents as agent, to the disclosure of the body of the letter subject to a number of identified severances.

[31] The ministry provided copies of the record to all three affected parties when it did its section 28(1) notice, and accordingly, I conclude that it is a record to which they were entitled to have access. Based on the appellant's representations, I am satisfied that he and the other two affected parties consent to disclosure of the portions of the record that are at issue, other than the parts they asked the ministry to sever at the request stage.

[32] During the inquiry, the appellant provided me with a new copy of the record, showing the parts that the affected parties want severed. It is the same as the version that was given to the ministry at the request stage.

[33] I find that section 21(1)(a) applies to the portions of the body of the letter that the affected parties have consented to disclose.

[34] As it is apparent from his representations that the appellant does not seek to apply the section 14 exemptions he mentioned during mediation to the parts of the record that he and the affected parties consent to being disclosed, and no other exemptions are claimed, I will order these parts of the record disclosed.

Section 21(1)(f)

[35] Section 21(1)(f) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

(f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[36] As already noted, sections 21(2), (3) and (4) help in determining whether disclosure constitutes an unjust invasion of personal privacy.

[37] If no factor favouring disclosure applies, then the exception in section 21(1)(f) does not apply, and unless another of sections 21(1)(a)-(f) applies, the information is subject to the mandatory exemption in section 21(1).

[38] In this case, the requester's representations do not point to any factors favouring disclosure, and I find that none are established. Other than section 21(1)(a), no exception to the exemption applies.

[39] Accordingly, the remainder of the record at issue, other than the parts subject to the exception in section 21(1)(a) based on the affected parties' consent to disclosure, are exempt under section 21(1).

C. Does the public interest override in section 23 of the *Act* apply?

[40] Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[41] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[42] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.³

[43] Although the requester is not required to prove that section 23 applies, it would have been helpful to have her explanation of why disclosure in this case would be in the public interest. Instead, her representations focus on the activities of a group of local citizens, but do not set out any an explanation of how these activities raise a public interest in the disclosure of the record.

[44] She states that ". . . the only compelling public interest is in the minds of a very small group of people who can't accept the actions taken by their local council." From the context, it is clear, however, that she does not support or agree with that compelling public interest. She further states: ". . . I apologize for the time and efforts your office has expended in this matter. As this has gone on long enough, I have no further representations."

[45] While the record may relate to matters that have attracted publicity, neither its contents, which I have carefully reviewed, nor the requester's representations, contain

³ Order P-244.

anything that would persuade me of a "compelling" public interest in its disclosure.

[46] Accordingly, the first requirement for the application of section 23 has not been met. I find that section 23 does not apply.

ORDER:

I order the ministry to disclose the record to the requester, but to sever and not disclose the portions I have found to be exempt, which are highlighted on the copy of the record that I am sending to the ministry with this order. This disclosure is to be made on or before **September 11, 2017** but not before **September 5, 2017**.

Original Signed by: _____
John Higgins
Adjudicator

_____ August 1, 2017