

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3882

Appeal PA17-504

Ministry of Community Safety and Correctional Services

September 28, 2018

**Summary:** The Ministry of Community Safety and Correctional Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for an unredacted Fire Marshal's Report relating to a fire at a specified address on a specified date. The ministry located a fire investigation report in response to the request, and granted partial access to the responsive record. The ministry withheld portions of the record on the basis of the mandatory personal privacy exemption at section 21(1) of the *Act*. At mediation, the request was narrowed to certain pages of the report, and to exclude the name, address, and contact information of an identifiable individual. However, disclosure of the remaining information was still in dispute. This order upholds the ministry's access decision.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(2), 21(1) and 64.

### OVERVIEW:

[1] The Ministry of Community Safety and Correctional Services (the ministry) received a request made under *Freedom of Information and Protection of Privacy Act* (the *Act*) for an unredacted Fire Marshal's Report pertaining to the fire that occurred at a specified address on a specified date. The requester provided the ministry with an executed authorization signed by the owners of the specified property.

[2] The ministry located a fire investigation report in response to the request.

[3] The ministry then issued a decision granting partial access to the responsive

record. It withheld small portions of the responsive record under the mandatory personal privacy exemption at section 21(1) of the *Act*, and identified some information within the record as not responsive to the request.

[4] The requester (now the appellant) appealed the ministry's decision to this office.

[5] During mediation, the issues were narrowed. The appellant advised that only the responsive information withheld on pages 23 and 45 of the record was being sought. The appellant also removed an affected party's name, address, or phone number from the scope of the request. The mediator attempted to obtain consent for disclosure of the remaining withheld information from the affected party, but the affected party did not provide consent.

[6] Since mediation could not resolve the dispute, the appeal moved to the adjudication stage. I sought and received written representations from the ministry and the appellant. Representations were shared amongst those parties, in accordance with Practice Direction 7 of the *IPC Code of Procedure*. I also asked for written representations from the affected party, but the affected party indicated to this office that they did not wish to participate in the adjudication of this case and re-iterated that they did not consent to disclosure of their personal information.

[7] In this order, I uphold the ministry's access decision.

## **RECORDS:**

[8] The record at issue is a fire investigation report. The information at issue is the withheld portions on pages 23 and 45, except for the portions severed as non-responsive as well as the name, address and phone number of the affected party.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?

## **DISCUSSION:**

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

[9] The records in this case contain personal information belonging to the affected party, as explained below.

[10] 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. “Personal information” is defined, in part, in section 2(1) 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,

...

[11] 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.<sup>1</sup>

[12] If it would be reasonable to expect that an individual in a personal capacity may be identified by the disclosure of information, that information qualifies as personal information.<sup>2</sup>

[13] As mentioned, the appellant is no longer pursuing the affected party’s name, address or telephone number. However, the appellant submits that the remaining redacted information does not contain personal information of an identifiable individual.

[14] Having reviewed the record and the ministry’s confidential representations, I can confirm that the information withheld on both pages 23 and 45 does constitute an affected party’s personal information. The personal information at issue includes information that falls within paragraph (e) of the definition above, and the introductory wording of the definition of “personal information” at section 2(1) of the Act. I cannot elaborate further without revealing the contents of the information at issue. I find that the affected party is identifiable from the nature of the information, even with the name, address, and telephone number redacted.

[15] In addition, the appellant’s representations with respect to the redactions on page 45 rely on an assumption that the information redacted pertains to a fire department employee. However, having reviewed the records myself, I agree with the ministry’s position that the information withheld on page 45 has not been provided by an individual acting in a professional, business, or official capacity.

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<sup>1</sup> Order 11.

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

**Issue B: Does the mandatory personal privacy exemption at section 21(1) apply to the information at issue?**

[16] Where a requester seeks personal information of another individual, as it is the case here, 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.

[17] The parties agree that none of the exceptions at section 21(1)(a) to (e) apply.

[18] Under section 21(1)(f), the record must be disclosed if disclosure would not be an unjustified invasion of personal privacy.

[19] To determine whether disclosure would or would not be an unjustified invasion of privacy, this office examines the factors at section 21(2), the presumptions at section 21(3), and the situations listed at section 21(4).

[20] It is agreed that only section 21(2) is relevant in this appeal.

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

[21] On the basis of the following, I find that at least one section 21(2) factor applies.

[22] Section 21(2) is a non-exhaustive list of factors that may be relevant in determining whether disclosure would be an unjustified invasion of personal privacy under section 21(1)(f).<sup>3</sup> Any circumstances that are relevant, even if they are not listed under section 21(2), must be considered.<sup>4</sup>

[23] One or more factors and/or circumstances favouring disclosure in section 21(2) must be present to find that disclosure does not constitute an unjustified invasion of personal privacy. If not, the exception in section 21(1)(f) is not established and the mandatory section 21(1) exemption applies.<sup>5</sup>

[24] Section 21(2) states, 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,

...

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

...

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<sup>3</sup> Order P-239.

<sup>4</sup> Order P-99.

<sup>5</sup> Orders PO-2267 and PO-2733.

(f) the personal information is highly sensitive;

...

*Factor weighing in favour of disclosure: section 21(2)(d) – fair determination of rights*

[25] The only factor favouring disclosure raised by the appellant, though not by specifically citing the listed factor, is the one at section 21(2)(d), so I will consider whether it applies.

[26] The appellant implicitly raised its application in representations about the civil lawsuit launched against the appellant and others, in relation to the fire that is the subject matter of the record in this appeal.

[27] For section 21(2)(d) to apply, the appellant, as the requester, must have established each of the following points:

1. the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
3. the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.<sup>6</sup>

[28] The fact that the appellant may obtain the personal information through the civil litigation system undermines the notion that the personal information is “required” to prepare for the lawsuit or to “ensure” an impartial hearing, so Part 4 of the test is not met. Since all four parts must be met for the factor at section 21(2)(d) to apply, I find that this factor does not apply. Nevertheless, I will discuss the implications in this case if section 21(2)(d) does apply when I weigh the 21(2) factors overall, after discussing the factor raised by the ministry.

*Factor weighing against disclosure: section 21(2)(f) – highly sensitive*

[29] The ministry has withheld the records on the basis the factor listed at section 21(2)(f), and I agree with the ministry’s position.

[30] Section 21(2)(f) allows the ministry to consider whether personal information is “highly sensitive” in determining whether its disclosure would constitute an unjustified

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<sup>6</sup> Order PO-1764; see also Order P-312, upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.).

invasion of personal privacy.

[31] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>7</sup>

[32] I agree with the ministry that the context of the creation of the records containing the personal information is also significant to an assessment of high sensitivity of the personal information at issue. The parties agree that the fire caused significant property damage. The fire is the reason that the disputed redactions in the record exist. In my view, this is an inherently highly sensitive context, despite the lack of injuries or fatalities. Therefore, the factor at section 21(2)(f) applies.

*Balancing of factors for and against disclosure*

[33] The balance of factors in this case weighs heavily towards non-disclosure. I have found that section 21(2)(f) (highly sensitive) applies, and I find that it weighs heavily against disclosure. The appellant did not identify any factors favouring disclosure other than, implicitly, the one at section 21(2)(d) (fair determination of rights).

[34] If section 21(2)(d) applies, it is far outweighed by the factor at section 21(2)(f). The appellant submits that the "absence of disclosure of the requested information may impact upon the ability of the [c]ourt to adjudicate this matter on its merits". I do not accept this argument because the Act that governs this appeal does not replace any other legal avenue the appellant may have to obtaining the same information under the *Rules of Civil Procedure* that govern the lawsuit over which the court presides. This is clear from the wording of the *Act* at section 64:

(1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

(2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

[35] The appellant speculates that the ministry's response to a request for the information at issue during civil litigation would be the same as its response under the *Act*, but the ministry's response for information outside the *Act* is not a matter within my legal authority and does not outweigh the reasons I believe the exemption applies.

[36] Because the Act does not limit the appellant's ability to seek other legal avenues to obtain the information, the weight that I place on section 21(2)(d), assuming it applies, is diminished. Balancing the factors at sections 21(2)(d) and 21(2)(f), and taking into account the interests of the parties, I find that this case strongly favours non-disclosure of the personal information at issue. As a result, I find that disclosure of the information at issue would be an unjustified invasion of the personal privacy of the affected party and the exemption at section 21(1), therefore, applies.

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<sup>7</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

[37] Having reviewed the record, I also agree that the ministry has disclosed as much of the responsive record as can reasonably be severed without disclosing material which is exempt, as required by section 10(2) of the *Act*. The ministry confidentially elaborated on this position during the adjudication process, but those details cannot be shared without revealing the information at issue.

**ORDER:**

I uphold the ministry's access decision, and dismiss this appeal.

Original Signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

\_\_\_\_\_ September 28, 2018