

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-3975

Appeal PA18-00544

Ministry of Government and Consumer Services

July 30, 2019

**Summary:** The appellant made a request to the Ministry of Government and Consumer Services (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of any correspondence sent to the ministry by two specific individuals that referred to her. The ministry granted the appellant partial access to the records. It withheld some information pursuant to mandatory exemption at section 21(1) of the *Act* and the discretionary exemption at section 49(b) of the *Act*. The appellant appealed the ministry's decision. In this order, the adjudicator upholds the ministry's exercise of discretion to withhold the information at issue pursuant to section 49(b) and she dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy*, R.S.O. 1990, C. F.31, as amended, ss. 2(1) (definition of "personal information"), 21(1) and 49(b).

### OVERVIEW:

[1] The Ministry of Government and Consumer Services (the ministry) received the following request under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

I am requesting all correspondence that [named individual] or [named individual] sent to Service Ontario regarding myself as operator [number] from the time period of Nov 1/17 to June 30/18.

[2] The ministry identified five responsive records and granted the requester partial access to them, denying access to some information on the basis that disclosure of the withheld portions would constitute an unjustified invasion of personal privacy under the

mandatory exemption at section 21(1) of the *Act* and the discretionary exemption at section 49(b) of the *Act* in conjunction with section 21(1).

[3] The requester (now the appellant) appealed the ministry's decision and the file proceeded to mediation. At the start of that process, the appellant advised the mediator that she was only seeking access to the withheld information in two of the records (Record 1 and Record 5) and said that she wanted the appeal to move immediately to adjudication. The mediator subsequently advised the ministry that, at the appellant's request, the file was moving directly to adjudication and that only the redactions made to the two specified records remained at issue.

[4] The file was then transferred to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry under the *Act*. I commenced this inquiry by seeking representations from the ministry on the issues set out in a Notice of Inquiry. I also sought representations from another individual the ministry identified as someone who could potentially be affected by the disclosure of the information in dispute (the affected party).

[5] The affected party did not provide representations in response to the Notice of Inquiry. The ministry did provide representations. This office sent a copy of the ministry's representations to the appellant, along with a Notice of Inquiry, and she was invited to provide representations in response. Some portions of the ministry's representations were removed as they met the confidentiality criteria set out in this office's *Practice Direction Number 7*. The appellant provided representations in response and asked that they not be shared with the other parties to this appeal.

[6] In this order, I find that the discretionary personal privacy exemption at section 49(b) applies to the information at issue and I uphold the ministry's exercise of discretion to withhold that information.

## **RECORDS:**

[7] There are five pages of records in total. Some portions of those pages have been disclosed and only the remaining withheld information is at issue. The records can be described as follows:

Record Number	Description
1	A four-page fax comprised of a cover page, a two page letter and a one page attachment (the fax)
5	A one page letter (the letter)

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) of the *Act*?
- B. Does the discretionary exemption at section 49(b) apply to the information at issue?

## **DISCUSSION:**

[8] 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;

[9] 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>

[10] Sections 2(2), (3) and (4) also relate to the definition of personal information. These sections state:

2. Personal information does not include information about an individual who has been dead for more than thirty years.

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.

[11] 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.<sup>2</sup>

### **The parties' representations**

[12] The ministry submits that the information it has severed in the fax and letter qualifies as personal information as defined in section 2(1) of the *Act*.

[13] The ministry says the personal information at issue relates to both the appellant and an affected party. It says that it took into account the context surrounding the records and the relationship between the parties when considering whether the information at issue was personal information.

[14] The ministry submits that the fax and letter contain the personal information of the affected party because the records are correspondence of a confidential nature sent to the ministry by the affected party. It says that the records contain details about the affected party's interactions with the appellant as well as her viewpoints about those

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<sup>1</sup> Order 11.

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

interactions. The ministry submits that this office has recognized that the “impact of an incident on an affected party were the views and opinions of that affected party about themselves and therefore constitutes their own personal information” under paragraph (e) of section 2(1).<sup>3</sup>

[15] The ministry also says that the records contain the affected party’s contact information and her license plate number which qualify as personal information pursuant to paragraphs (d) and (c) of the definition of that term in section 2(1) of the *Act*.

[16] The ministry submits that the fax and letter also contain the appellant’s personal information because the affected party details her interactions with the appellant.

[17] The appellant did not make any representations specifically about whether the fax or letter contained personal information, though she says they are about her.

### **Findings and Analysis**

[18] Based on my review of the fax and letter and the parties’ representations, I find that both records contain the personal information of the appellant and the affected party.

[19] First, with regard to the affected party, the information that has been severed from the fax and letter include her address, phone number, email address, license plate number as well as her description of her understanding of events involving the appellant that she says took place and her viewpoints about matters related to those events. The fax and letter also contain information of a personal nature about the affected party that I cannot describe without revealing the content of the information at issue.

[20] I agree with the ministry that the information it has severed is the personal information of the affected party pursuant to the definition as set out in paragraphs (c), (d) and/or (g) of section 2(1) of the *Act*. Based on the content and context of the records, I also find that the severed information qualifies as the affected party’s personal information pursuant to paragraph (h) of section 2(1).

[21] As the content of the fax and letter refer and relate to the appellant, I also find that the records contain her personal information.

[22] Since the records contain both the appellant and the affected party’s personal information, the discretionary personal privacy exemption at section 49(b) is the

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<sup>3</sup> The ministry refers me to Orders PO-3740 and MO-1453 in support of this assertion.

appropriate personal privacy exemption to consider.<sup>4</sup>

**Does the discretionary exemption at section 49(b) apply to the information at issue?**

[23] 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.

[24] 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.<sup>5</sup>

[25] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy. If the information fits within any of paragraphs (a) to (e) of section 21(1) or (a) to (d) of 21(4), disclosure is not an unjustified invasion of personal privacy and the information is not exempt under 49(b).

[26] If the information does not fit within any of subsections (a) to (e) of section 21(1) or (a) to (d) of 21(4), sections 21(2) and (3) assist in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). In making this determination, this office will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.<sup>6</sup>

***Overview of the parties’ positions***

[27] The ministry says that none of paragraphs (a) to (e) of sections 21(1) apply to the information at issue. It also denies that any of the presumptions in section 21(3) apply. The ministry submits that it weighed the factors set out in subsection 21(2) and determined that subsections (d) (fair determination of rights), (f) (highly sensitive) and (h) (supplied in confidence) were relevant to its determination that disclosure of the information at issue would be an unjustified invasion of personal privacy under section 49(b).

[28] The appellant submitted five pages of representations with approximately 23

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<sup>4</sup> See, for example, Order MO-3408-I at paras. 14-18.

<sup>5</sup> See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 49(b).

<sup>6</sup> Order MO-2954.

exhibits. The majority of her submissions do not respond to the issues set out in the Notice of Inquiry and she has asked that they not be shared with any other parties to this inquiry. As a result, I will not reproduce her representations in detail and will provide only a general summary and as much detail as is necessary to address the issues she raises.

[29] The appellant's representations focus predominantly on her relationship with the affected party and provide her version of some of the matters that are the subject matter of the records at issue. In summary, she says that the fax and letter are directed at her and her reputation. She asserts that she should have the opportunity to see the withheld information because it is about her.

### ***Findings and analysis***

[30] Based on my review of the records and the parties' representations, I find that the information at issue is exempt under the discretionary personal privacy exemption at section 49(b) for the reasons that follow.

[31] First, I agree with the ministry that none of paragraphs (a) to (e) of section 21(1) apply to the information at issue. I also find that sections 21(3) and 21(4) are not applicable. I will now review the parties' representations and consider and weigh the factors that may be relevant in section 21(2).

#### *Section 21(2)(d): fair determination of rights*

[32] Section 21(2)(d) specifies that an institution must consider whether the personal information is relevant to a fair determination of rights affecting the person who made the request. If it applies, section 21(2)(d) weighs in favour of disclosure.

[33] In order for section 21(2)(d) to apply, the appellant must establish that:

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; and
2. the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
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>7</sup>

[34] The ministry says that it took into account whether the information at issue is relevant to a fair determination of the parties' rights because one of the parties indicated that they were involved in a lawsuit with the other party. However, the ministry submits that it did not receive evidence to show that the requested information is relevant to a fair determination of the appellant's rights regarding any particular proceeding and it therefore submits that this factor does not weigh in favour of disclosure.

[35] Although the appellant does not directly assert that section 21(2)(d) applies, she provided a copy of the first page of a Statement of Claim as an exhibit to her representations and she refers to another court proceeding that appears to have concluded.

[36] The appellant does not explain how the information at issue would relate to a fair determination of her rights in either of those proceedings (or any others). Because the appellant has asked that her representations not be shared with the other parties to this inquiry, I will not refer to them further or provide additional details about her submission. In summary, I understand her to be asserting that something happened after the letter was sent. However, even if the event she mentions did occur, it is not clear what right is being determined or how the information at issue would be relevant to a fair determination of that right.

[37] I am similarly unable to see how any of the other points she raises or the exhibits she provides would support a finding that the information at issue is relevant to a fair determination of her rights. As such, I find that the appellant has not met any part of the four-part test set out above and I agree with the ministry that section 21(2)(d) does not apply to the information at issue.

*Section 21(2)(f): highly sensitive*

[38] Section 21(2)(f) specifies that an institution must consider whether the personal information at issue is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.<sup>8</sup> If section 21(2)(f) applies, it weighs in favour of not disclosing the information.

[39] The ministry says that section 2(2)(f) is a relevant factor because the disclosure

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<sup>7</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.).

<sup>8</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.



of the information at issue could reasonably be expected to cause the affected party significant personal distress due to the relationship between the parties.

[40] It submits that this office has previously found that information is “highly sensitive” where the appellant and the affected party’s “contentious,” “volatile,” “adversarial” or “emotionally intense” relationship gives rise to the reasonable expectation that the affected party would suffer embarrassment or significant personal distress if the information at issue was disclosed to the appellant.<sup>9</sup>

[41] Prior to issuing a decision regarding the records, the ministry says it contacted the affected party to seek her views on the disclosure of the information at issue. The ministry says the affected party told it that she did not want the records to be disclosed to the appellant. The ministry provided additional information about its communications with the affected party in its representations, but I cannot specify further without revealing the content of the information at issue.

[42] The ministry submits that, based on the information the affected party provided, it concluded that the disclosure of the information at issue could reasonably cause the affected party significant personal distress. It says that given the current relationship between the appellant and the affected party, it believes the information at issue is highly sensitive and it says it gave this factor significant weight when determining whether disclosure would result in an unjustified invasion of the affected party’s personal privacy.

[43] In general, the appellant disputes that the information at issue is highly sensitive. She provided a number of exhibits, which I understand to be aimed at demonstrating that releasing the information could not reasonably be expected to cause significant personal distress to the affected party. I have considered the appellant’s evidence, but find that it is not relevant to the determination of whether the affected party would experience significant personal distress if the information was disclosed.

[44] I find that it is reasonable to expect that the affected party would experience significant personal distress if the information at issue was disclosed. In my view, this finding is supported by the evidence provided by the ministry about the nature of the relationship between the appellant and the affected party and the records themselves. This factor weighs in favour of withholding the information at issue.

*Section 21(2)(h): supplied in confidence*

[45] Section 21(2)(h) of the *Act* specifies that an institution must consider whether the personal information was supplied by the individual to whom the information relates

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<sup>9</sup> The ministry relies on Orders P-1535, PO-3740 and PO-2510.

in confidence. If applicable, this factor weighs in favour of non-disclosure.

[46] This factor 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.<sup>10</sup>

[47] The ministry says that the information at issue was supplied in confidence. It says that the fax and letter arose from an incident in which the appellant allegedly improperly accessed the affected party's personal information on a computer system and that in both records the affected party was communicating information to the ministry that she intended to be kept confidential.

[48] The ministry submits that it was reasonable for the affected party to expect that the information she provided would not be disclosed and that (given the relationship between the two parties in this appeal) the ministry would treat the information she provided as confidential.

[49] The ministry submits that this office has previously accepted that information provided by an affected party outlining a complaint was expected to be kept confidential between the institution and the affected party. It asserts that this case is similar to the circumstances in Order PO-3740, where an appellant made a request to a university for all of the information in a report that related to them. The report included an affected party's summary of events, including a description of the appellant's inappropriate behaviour leading up to the report. The adjudicator in that appeal determined that "given the nature of the appellant's past behaviour towards the affected party it was reasonable for the affected party to expect that the details of his request for assistance would be kept confidential and not disclosed to the appellant."

[50] In my view, similar reasoning applies here. The appellant and the affected party were involved in a conflict and the fax and the letter at issue in this appeal provides detail about the affected party's account of that conflict, including the affected party's views and opinions about that conflict.

[51] Given the context within which the affected party supplied the personal information, I find that it was reasonable for her to expect it would be kept confidential. I also accept the ministry's assertion that it understood the information was provided on that basis. Therefore, I find that this factor weighs in favour of withholding the information at issue.

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<sup>10</sup> Order PO-1670.

*Other factors*

[52] As noted above, the list of factors under section 21(2) is not exhaustive. As a result, the ministry must also consider any circumstances that are relevant, even if they are not listed under section 21(2).<sup>11</sup>

[53] The ministry says that it took into consideration the fact that it consulted with the affected party about whether she consented to the disclosure of the information at issue and that she refused her consent. I agree that given the circumstances and context of events underlying the information in dispute in this appeal, the fact that the affected party did not consent to disclosure is a relevant factor that weighs in favour of withholding the information at issue.

[54] Finally, I considered the appellant's claim that the comments in the fax and letter are about her, and therefore she should have the opportunity to see them. I agree that there could be a scenario where it might be appropriate for an institution to provide a requester with information that is about them so that they may have a chance to see it and respond, even if the information also includes an affected party's personal information.

[55] However, in this case, the information that has been withheld relates primarily to the affected party and only peripherally to the appellant. In fact, while the letter and fax generally relate to the appellant and the underlying events, most of the content is not about the appellant. While I cannot say more without revealing the information at issue, I am satisfied that this is not a circumstance where the appellant should be able to see and respond to the information at issue. As such, this factor should not be given any weight in my consideration.

*Absurd result*

[56] The appellant asserts that it is unnecessary to withhold some of the information at issue (including, for example, the affected party's address, phone number and license plate number) because she is already aware of this information or could obtain it through other means.

[57] This office has found in some previous cases that where a requester originally supplied the information at issue, or if they are otherwise aware of it, the information may not be exempt under section 49(b) of the *Act* because withholding information in those circumstances would be absurd and inconsistent with the purpose of the exemptions in the *Act*.<sup>12</sup>

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<sup>11</sup> Order P-99.

<sup>12</sup> Orders M-444 and MO-1323.

[58] The absurd result principle has been applied where, for example,

- The requester sought access to his or her own witness statement;<sup>13</sup>
- The requester was present when the information was provided to the institution;<sup>14</sup> and/or
- The information was clearly within the requester's knowledge.<sup>15</sup>

[59] In my view, the absurd result principle does not apply in this instance. While the appellant asserts that she knows the information at issue, the information is not her own personal information. It is possible that appellant believes she knows (or believes she could locate) the affected party's personal information, but in actuality she may not have the accurate information or may not be able to obtain it. As such, I find that the absurd result principle does not apply.

### ***Conclusion***

[60] In summary, I find that two factors favour non-disclosure of the information at issue (sections 21(2)(f) and 21(2)(h) of the *Act*), while no factors favour disclosure. Therefore, subject to my findings on the ministry's exercise of discretion below, I find that the information at issue is exempt under section 49(b).

[61] I also find that the portions of the records containing the appellant's personal information contain personal information of the affected party which is inextricably intertwined. I accept the ministry's submission that it has disclosed as much of the fax and letter as can reasonably be severed without disclosing any information which is exempt under section 49(b).

### ***Exercise of Discretion***

[62] The section 49(b) exemption is discretionary and permits 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.

[63] 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

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<sup>13</sup> Orders M-444 and M-451.

<sup>14</sup> Orders M-444 and P-1414.

<sup>15</sup> Orders MO-1196, PO-1679 and MO-1755.

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[64] The ministry submits that it has exercised its statutory discretion in good faith and for purposes that are consistent with the intention of the *Act*. In addition, it says that it took into account all relevant considerations and did not base its decision on irrelevant considerations.

[65] The ministry also says that it took care to balance the appellant's right of access to the information at issue while preserving the confidentiality of the information relating to the affected party. Specifically, it says that the information it severed from the fax and letter primarily relates to the affected party and only peripherally relates to the appellant. It says that the information at issue would offer the appellant little insight into the incident underlying the records.

[66] Having reviewed the fax and the letter, I accept the ministry's submissions that it considered whether additional information could be provided to the appellant. I agree that the information it severed relates primarily to the affected party. I find that the reasons provided by the ministry for exercising its discretion to withhold the information at issue are appropriate. I see no evidence that the ministry took into account irrelevant considerations, or that it failed to take into account relevant considerations.

[67] As a result, I uphold the ministry's exercise of discretion and find that the information is exempt from disclosure pursuant to the discretionary exemption at section 49(b) of the *Act* and I will dismiss this appeal.

**ORDER:**

The appeal is dismissed.

Original signed by \_\_\_\_\_  
Meganne Cameron  
Adjudicator

July 30, 2019 \_\_\_\_\_