Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4062

Appeal PA18-00718

Ministry of the Solicitor General

August 28, 2020

Summary: The appellant, whose father is a resident at a long-term care facility, made an access request to the ministry under the *Act* for reports relating to the OPP's two attendances at the facility and their related interactions with the appellant. The ministry granted access in part, withholding some information under the exemptions at sections 49(b) (personal privacy) and section 49(a) (discretion to refuse requester's own personal information) in conjunction with section 20 (threat to safety or health). The appellant appealed. In this order, the adjudicator upholds the section 49(b) claim, in part, does not uphold the section 49(a)/20 exemption, and orders disclosure of the non-exempt information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F31, as amended, sections 2(1) (definition of "personal information"), 20, 49(a) and 49(b).

Orders and Investigation Reports Considered: Orders PO-2225, PO-3742, and MO-3310.

OVERVIEW:

[1] The appellant's father is a resident at a long-term care facility. On two occasions in 2018, officers of the Ontario Provincial Police (the police) attended and interacted with the appellant and other involved individuals. The appellant subsequently made a request to the Ministry of the Solicitor General (the ministry)[1] under the *Freedom of*

[1] Then named the Ministry of Community Safety & Correctional Services. The OPP is a division of the ministry.

Information and Protection of Privacy Act (the *Act*) for complete reports relating to the incident numbers assigned to the two occurrences.

[2] The ministry granted partial access to the records and advised that portions were withheld pursuant to sections 49(a) (discretion to refuse requester's own personal information), in conjunction with sections 14(1)(a) and (l) (law enforcement), as well as the personal privacy exemptions in sections 21(1) and 49(b) of the *Act*. The ministry also advised that it was withholding some information on the basis that it was not responsive to the request.

[3] The appellant appealed the ministry's decision to the Information and Privacy Commissioner (the IPC or this office). During mediation, the appellant advised that she was not seeking access to police codes severed pursuant to the section 14(1)(l) exemption, and the ministry advised the mediator that it is no longer relying upon section 14(1)(a) of the *Act*. As a result, the application of sections 14(1)(a) and (l) of the *Act* is no longer at issue in this appeal. The appellant also confirmed that she is not seeking information withheld on the basis that it is not responsive to the request, so that information is no longer at issue.

[4] Also during mediation, the ministry issued a supplementary decision relying on section 20 of the Act (danger to health and safety) to deny access to the withheld information, in addition to the exemptions previously claimed.

[5] As mediation did not settle the issues, the file was transferred to the adjudication stage of the appeal process. I began my inquiry into the issues on appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the ministry. The ministry provided representations. I then sent a Notice of Inquiry to and invited representations from two affected parties, one of whom provided representations.

[6] I then sent a Notice of Inquiry to the appellant and invited her representations on the issues in this appeal. I shared the ministry's representations with her, with portions withheld because they meet the confidentiality criteria in *Practice Direction 7: Sharing of Representations*. The affected party's representations were entirely withheld from the appellant for the same reason.

[7] The appellant did not file representations specific to this appeal but told this office that she relies on the representations she filed in a related appeal with a different institution. I have considered the appellant's representations on the related appeal in coming to my conclusions in this appeal.

[8] In this order, I uphold the ministry's decision, in part. I find that the section 49(b) personal privacy exemption applies to some of the information at issue and uphold the ministry's decision to withhold it. I find that the exemption at section 49(a) in conjunction with section 20 (health and safety) does not apply to the remaining information. I order the ministry to disclose the non-exempt information to the appellant.

RECORDS:

[9] The records at issue are two occurrence reports relating to two occurrences. Both records were partially disclosed to the appellant.

ISSUES:

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

B. Does the discretionary personal privacy exemption at section 49(b) apply to the personal information at issue?

C. Should the ministry be permitted to raise the section 49(a) exemption, in conjunction with section 20 (threat to safety or health), after the time period for raising discretionary exemptions has passed? If so, does the exemption apply to the information remaining at issue?

D. Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

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

[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.

[11] Specifically, in this case, I need to determine whether the records contain the appellant's personal information, and whether they contain the personal information of other individuals.

[12] Personal information is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> > (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,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
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> (e) the personal opinions or views of the individual except if they relate to another individual,
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> (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,
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> (g) the views or opinions of another individual about the individual, and
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> (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;

[13] 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.[2]

[14] 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.
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> (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.

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[2] Order 11.

[15] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed. The information must also be about the individual in a personal capacity. Information associated with an individual in a professional, official or business capacity is not generally considered to be "about" the individual.[3] 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.[4]

Representations

[16] While the appellant's representations do not speak directly to this issue, it is clear from my reading of her representations that she believes the information in the records relates to her.

[17] The ministry submits that the withheld information relates to five individuals other than the appellant and that these individuals would be identifiable to the appellant even if their names are redacted. It submits that all the information relating to these individuals should be withheld.

[18] I have also considered the representations of the affected party, which were not shared with the appellant for confidentiality reasons.

Analysis and findings

[19] Having reviewed the records and the parties' representations, I conclude that the records contain the personal information of both the appellant and other individuals.

[20] First, with respect to the appellant, I have no trouble concluding that the records contain her personal information. The records relate to two occurrences where the police interacted with the appellant. The records contain the appellant's name along with some statements attributed to her, information about the appellant in relation to her father, and information about the particular events of the days in question that involved the appellant. This is the appellant's personal information under paragraphs (a), (e), and (h) of the definition in section 2(1).

[21] The ministry withheld information relating to the appellant's father, two police civilian employees (Computer Assisted Dispatch operators) and the two affected parties that I notified. The ministry did so on the basis that the information of these individuals is their personal information, and that the personal privacy exemptions at sections 21 or 49(b) apply to it. It is necessary, therefore, to decide whether this information is the personal information of these individuals.

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

[22] I find that the information relating to the appellant's father, including his name and descriptions of his care at the facility, is his personal information under paragraphs (a), (b), (d), and (h) of the definition. The WIN identifiers of the CAD operators is also their personal information under paragraph (c) of the definition.[5]

[23] As mentioned above, the records relate to incidents where the police were called to the long-term care facility and interacted with the appellant and others. The ministry has withheld the names and contact information of the two affected parties, i.e. the "involved persons" named in the occurrence reports.

[24] I have reviewed the information relating to the affected parties and have considered the parties' representations. For the following reasons, I find that some, but not all of the information of the affected parties is their personal information.

[25] As I noted above, information associated with an individual in their professional capacity is not normally considered to be their personal information under the *Act*. In Order PO-2225, former Assistant Commissioner Tom Mitchinson proposed the following two-step test for distinguishing between personal and professional information:

> [T]he first question to ask ... is: "in what context do the names of the individuals appear"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere? ...
>
> The analysis does not end here. I must go on to ask: "is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[26] This two-step test has been consistently adopted and applied in IPC jurisprudence.[6] I agree with the test and adopt it here.

[27] Turning to the first part of the test, I find that the names and other information relating to the affected parties appear in a professional context. Without disclosing the content of the records, I can confirm that the information associated with the affected parties relates to them in the course of their professional duties.

[28] I have also considered the second part of the test, which is whether there is something about the particular information at issue that, if disclosed, would reveal

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[5] See Order PO-3742, which found that a WIN identifier qualifies as the employee's personal information.
[6] See, for example, Orders PO-3617, PO-3960-R, and MO-3449-I. See also *Ontario Medical Association v. (Ontario) Information and Privacy Commissioner*, 2018 ONCA 673.

something of a personal nature about the individual.

[29] Here, the first occurrence report contains the home addresses and other personal contact information of the affected parties. In my view, disclosure of this information would clearly reveal something of a personal nature about the affected parties, i.e. their personal contact information (paragraph (d) of the definition). There is no evidence before me to the effect that these individuals carry out their professional duties from their home addresses so as to engage the exception to the definition of personal information in section 2(4). I find, therefore, that this information is their personal information. The date of birth of one affected party appears in the first occurrence report and that too is that individual's personal information (paragraph (a) of the definition).

[30] I find, however, that much of the remaining information about the affected parties in the first occurrence report is not their personal information. The fact of the police's engagement in the matters that unfolded on the days in question is not sufficient, in and of itself, to characterize the information relating to the affected parties as "personal information". In this regard, I agree with the conclusion in Order MO-3310, where the adjudicator found on the facts of that case that the identity of an individual who made a complaint to the police in their professional capacity was not the individual's "personal information". In the case before me, the interactions with the police took place in the affected parties' professional capacities and for the most part, there is no personal aspect to the information in the records relating to them, other than the contact and birth date information referred to above. I will, therefore, order the disclosure of this information, subject to my findings below on whether sections 49(a)/20 apply to it.

[31] However, there are some pieces of information about the affected parties in the first occurrence report which, despite their appearing in a professional context, would reveal something of a personal nature about them. I cannot elaborate because to do so would disclose the content of one of the records. I find, therefore, that this is their personal information.

[32] Regarding the second occurrence report, the only information about the affected parties that the ministry has withheld is the name of one affected party where it appears in several places in the record. I do not need to decide in the circumstances whether the name of the affected party is personal information because I find below under Issue B that it is not exempt in any event.

[33] Finally, for the sake of completeness, I find that some of the information that the ministry has withheld from the records is either information that is solely about the appellant, or is information that does not relate to any individual, whether in a personal

capacity or otherwise.[7] This information also does not fall into the category of police codes or non-responsive information that the appellant no longer seeks. Therefore, I will order the ministry to disclose this information to the appellant, subject to my findings below on whether section 49(a)/20 applies to any of it.

[34] Having found that the records contain the appellant's personal information as well as that of other individuals, I will next address whether the personal privacy exemption at section 49(b) applies to the personal information of the other individuals.

Issue B: Does the discretionary personal privacy exemption at section 49(b) apply to the personal information at issue?

[35] 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.

[36] 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.[8] If the information qualifies for exemption under section 49(b) and the institution decides to withhold it, it must show that in exercising its discretion, it considered the fact that the record contains the requester's own personal information.

[37] As noted above, the ministry initially claimed both section 21(1) (the mandatory personal privacy exemption) and section 49(b) (the discretionary personal privacy exemption) in withholding the personal information of individuals other than the appellant. Since the records contain the personal information of the appellant, the appropriate personal privacy exemption to consider is that at section 49(b) and not section 21(1).[9]

[38] However, sections 21(1) to (4) are relevant because they provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b).

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[7] There also appears the first name of an individual which is clearly their professional information and reveals nothing of a personal nature about them.

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

[9] Where records contain the requester's own personal information, the request falls under Part III of the *Act* and the exemption at section 49 may apply. Where records do not contain the requester's own personal information, the request falls under Part II of the *Act* and the exemptions at sections 12-22 may apply.

[39] 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 section 49(b). None of these paragraphs is relevant to the information at issue.

[40] Sections 21(2) and (3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy. None of the situations listed in section 21(4) is present here.

[41] 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 will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.[10]

[42] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 49(b).

[43] Section 21(2) lists various factors that may also be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.[11] Some of the factors, if present, weigh in favour of disclosure while others weigh in favour of non-disclosure. 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).[12]

Representations

[44] The ministry submits that the presumption at section 21(3)(b) (investigation into violation of law), and the factor at section 21(2)(f) (highly sensitive), apply to all of the personal information at issue.

[45] The appellant filed fifteen pages of representations, which outline her concerns with her father's long-term care facility and the Ministry of Long-Term Care, and what she sees as her mistreatment at the hands of certain individuals. She refers to the recent news reports about the conditions in long-term care homes and states that she requires the records at issue to obtain some accountability.

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[10] Order MO-2954.
[11] Order P-239.
[12] Order P-99.

Analysis and findings

The personal information of the affected parties and the CAD operators

[46] I agree with the ministry's submission that the above presumption and factor apply to the personal information of the two affected parties (regarding the first occurrence) and the two CAD operators (regarding both occurrences). I will address the personal information of the appellant's father, and the name of an affected party in the second occurrence, separately below.

[47] Sections 21 (2) and (3) state, 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,
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> > (f) the personal information is highly sensitive;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (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;

[48] I agree with the ministry that section 21(3)(b) applies in these circumstances. Even if no criminal proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law.[13] The presumption can also apply to records created as part of a law enforcement investigation where charges are subsequently withdrawn.[14] Here, the police attended at the long-term care facility in question to investigate, and I am satisfied that they did so because there was a possible violation of law.

[49] I also agree that the personal information of the two affected parties is highly sensitive. To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.[15] I accept that, given the history of the relationship between the appellant and the long-term care facility's staff, there is a reasonable expectation of significant personal distress to the affected parties if their personal information, which includes their personal contact information, is

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[13] Orders P-242 and MO-2235.
[14] Orders MO-2213, PO-1849 and PO-2608.
[15] Orders PO-2518, PO-2617, MO-2262 and MO-2344.

disclosed.

[50] I have also taken into account the concerns the appellant raises in her representations. In particular, her concern about accountability and insight into the state of long-term care is a relevant unlisted factor under section 21(2).

[51] Taking into account the presumption and factor weighing against disclosure, as well as the factor weighing in favour of disclosure, I find that disclosure of the information would be an unjustified invasion of the personal privacy of the CAD operators and the affected parties. In coming to my conclusion, I observe that there is no accountability interest in the disclosure of the CAD operators' WIN numbers or the affected parties' home addresses. I also find that the accountability interest in the remainder of the affected parties' personal information is limited.

[52] I conclude, therefore, that the personal information of these individuals is exempt from disclosure under section 49(b).

The personal information of the appellant's father, and an affected party's name in the second occurrence

[53] There is little personal information of the appellant's father in the records, and most the information about him is information that would already be known to the appellant. Previous orders of this office have found that, where a 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.[16]

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

- the requester sought access to his or her own witness statement[17]
- the requester was present when the information was provided to the institution[18]
- the information is clearly within the requester's knowledge.[19]

[55] 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.[20]

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[16] Orders M-444 and MO-1323.
[17] Orders M-444 and M-451.
[18] Orders M-444 and P-1414.
[19] Orders MO-1196, PO-1679 and MO-1755.
[20] Orders M-757, MO-1323 and MO-1378.

[56] Here, I find that most of the information relating to the appellant's father is contained in her own statements to the police or is otherwise clearly within her knowledge. I also find that none of that information is particularly sensitive. In these circumstances, I am satisfied that disclosure to the appellant would not be inconsistent with the purpose of the exemption. I find, therefore, that the absurd result principle applies to most of the father's personal information and I will order it disclosed to the appellant.

[57] There is, however, a small amount of personal information relating to the father that is not clearly within the appellant's knowledge. The same factor (section 14(2)(f)) and presumption (section 14(3)(b)) discussed above apply to this information, and there is no accountability interest in its disclosure. I find, therefore, that it is exempt under section 49(b).

[58] I find that the name of the affected party in the second occurrence report is not exempt under section 49(b). The name was supplied by the appellant herself to the police, and disclosing it would not be inconsistent with the purpose of the section 49(b) exemption. Therefore, even if this information is personal information of the affected party, I find that the absurd result would apply to it. I will, therefore, order it disclosed to the appellant.

[59] Next, I will consider the application of the section 49(a) exemption, in conjunction with section 20, to the information that I have found is not exempt under section 49(b).

Issue C: Should the ministry be permitted to raise the section 49(a) exemption, in conjunction with section 20 (threat to safety or health), after the time period for raising discretionary exemptions has passed? If so, does the exemption apply to the information remaining at issue?

[60] Before turning to the ministry's claim that section 49(a), in conjunction with section 20, applies to the withheld information, I must first decide whether it can claim this discretionary exemption, which it raised late.

[61] The *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[62] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where an institution had notice of the 35-day rule, the Divisional Court has found no denial of natural justice in the IPC's refusing to consider a discretionary exemption claimed outside the 35-day period.[21]

[63] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[22] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[23]

[64] Here, the ministry raised the new exemption claim during mediation, but after the 35-day period for claiming new discretionary exemptions had passed. The ministry submits that there is no prejudice to the appellant in these circumstances, given that the ministry raised the exemption during mediation and no delay resulted, and given that the ministry had already claimed another exemption for the same information. The ministry also refers to Order P-1544, where the adjudicator spoke of "erring on the side of caution" in permitting an institution to raise the section 20 exemption late.

[65] Neither the appellant nor the affected party spoke to this issue in their representations.

[66] I am satisfied in the circumstances that I ought to allow the ministry to claim this exemption despite the late raising. I agree that there is little to no prejudice to the appellant and that the interests that section 20 seeks to protect are deserving of consideration on their merits here.

[67] I now turn to whether the ministry and/or the affected party who provided representations have established that the exemption applies to the information that remains at issue.

[68] As I mentioned above, section 47(1) gives individuals a general right of access to their own personal information held by an institution, and section 49 provides a number of exemptions from this right.

[69] Section 49(a) reads:

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[21] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[22] Order PO-1832.
[23] Orders PO-2113 and PO-2331.

> 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.

[70] 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.[24] Even where a record qualifies for an exemption under section 49(a), the institution must demonstrate that, in exercising its discretion to deny access, it considered whether a record should be released to the requester because the record contains his or her personal information.

[71] In this case, the ministry relies on section 49(a) in conjunction with section 20. Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[72] For this exemption to apply, an institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[25]

[73] An individual's subjective fear, while relevant, may not be enough to justify the exemption.[26]

[74] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[27]

Representations

[75] The ministry submits that disclosing these records could reasonably be expected to seriously threaten the safety or health of an individual, and identifies in its confidential representations the individual(s) it is concerned about. The ministry notes that when the OPP arrived at the long-term care facility, they requested that the

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[24] Order M-352.
[25] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[26] Order PO-2003.
[27] Order PO-1817-R.

appellant exit the building, but the appellant initially objected to the OPP's direction. In addition, when the OPP gave the appellant a letter which had been prepared by the long-term care facility, the appellant ripped it up into several pieces.

[76] The ministry relies on Order PO-1939, which held that a threat to safety as contemplated by section 20 is not restricted to an actual physical attack, and that where an individual's behaviour is such that the recipient reasonably perceives it as a threat to his or her safety, the requirements of this section have been satisfied.

[77] The ministry submits that as a result of the past actions of the appellant, the risk of harm is well beyond the merely possible or speculative. The ministry submits that the appellant's actions and the circumstances in which they are alleged to have occurred (in a long-term facility that houses vulnerable adults) leads it to conclude that the threshold for this exemption has been met.

[78] I have also taken into account the appellant's representations, both their tenor and content, in coming to my conclusions. In addition, I taken into account the affected party's confidential representations, which contain some information over and above what the ministry provided.

Analysis and findings

[79] I find, for the following reasons, that neither the ministry nor the affected party has established that section 20 applies to the withheld information remaining at issue.

[80] From my review of the appellant's representations, it is clear that the appellant is unhappy with her father's care. It is also clear that others have found her behaviour in relation to the long-term care facility troubling.

[81] In my view, however, the concerns about the appellant do not establish a reasonable expectation of a serious threat to the safety or health of an individual under section 20 of the *Act*.

[82] The parties resisting disclosure have not provided me with sufficient information to establish that the appellant's behaviour amounts to a serious threat to the safety or health of an individual. In this regard, the post-script to Order PO-1940 is instructive. In that case, the ministry relied on the section 20 exemption to redact the names of staff from records disclosed to the requester. The institution in that appeal submitted that it did "not see any justifiable need for the individual to have access to the names of those present at the meeting, other than to possibly harass those individuals." In that case, the adjudicator concluded that the information was properly withheld under section 49(a) in conjunction with section 20 of the *Act* but in the post-script, the adjudicator stated the following:

> There are occasions where staff working in "public" offices […] will be required to deal with "difficult" clients. In these cases, individuals are

> often angry and frustrated, are perhaps inclined to using injudicious language, to raise their voices and even to use apparently aggressive body language and gestures. In my view, simply exhibiting inappropriate behaviour in his or her dealings with staff in these offices is not sufficient to engage a section 20 or 14(1)(e) claim. Rather, as was the case in this appeal, there must be clear and direct evidence that the behaviour in question is tied to the records at issue in a particular case such that a reasonable expectation of harm is established.

[83] I agree with these comments and particularly the notion that any expectation of harm must be tied to disclosure of the information at issue. In the case before me, both the ministry and the affected party raise concerns about the appellant, but neither one has satisfied me that the alleged threat is linked to the disclosure of the information remaining at issue to the appellant. The issue before me is not whether the appellant poses a risk generally, but whether disclosure of the information at issue could reasonably be expected to seriously threaten the safety or health of an individual. It is clear from a review of the appellant's representations that some individuals at her father's long-term care home view her behaviour as problematic. It also seems fair to say that the appellant's behaviour may continue. However, the issue before me is not whether the appellant can reasonably be expected to exhibit inappropriate behaviour, but rather, whether disclosure of the information at issue to her could reasonably be expected to seriously threaten the safety or health of an individual.

[84] Having reviewed the information remaining at issue, I am not satisfied that its disclosure to the appellant could reasonably be expected to seriously threaten the safety or health of an individual. The information remaining at issue does not include the affected parties' home addresses or other personal information about them. It is largely factual in nature and, from my review of the appellant's representations, it appears that much of it is already known to her in a general sense.

[85] I find, therefore, that section 20 does not apply to the information remaining at issue. As a result, I will order the ministry to disclose this information to the appellant.

Issue D: Did the ministry exercise its discretion under section 49(b)? If so, should this office uphold the exercise of discretion?

[86] As I stated above, 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 adjudicator may determine whether the institution failed to do so.

[87] In addition, the adjudicator 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
- it fails to take into account relevant considerations.

[88] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[28] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[89] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[29]

- 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.

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[28] Order MO-1573.
[29] Orders P-344 and MO-1573.

[90] Having reviewed the parties' representations and the records, I am satisfied that the ministry appropriately exercised its discretion in choosing to withhold the information that I have found to be exempt from disclosure under section 49(b). There is no indication that the ministry considered improper factors, failed to take into account relevant factors or exercised its discretion in bad faith. Specifically, the ministry took into account that the records contain the appellant's own personal information. I uphold the ministry's exercise of discretion.

ORDER:

1. I uphold the ministry's decision, in part.

2. I order the ministry to disclose to the appellant the information that I have found not to be exempt from disclosure. This disclosure is to be made by **October 5, 2020** but not before **September 28, 2020**.

3. Enclosed with the ministry's copy of this order is a copy of the records at issue, with the information to be disclosed highlighted in yellow.

4. The timelines in order provision 2 above may be extended if the ministry is unable to comply due to the current Covid-19 situation, and I remain seized to consider any resulting extension request.

Original signed by: August 28, 2020

Gillian Shaw
Senior Adjudicator