

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-4105

Appeal HA19-00057

Ministry of Long-Term Care

January 27, 2021

**Summary:** The appellant, whose father lives in a long-term care facility, made an access request to the Ministry of Long-Term Care under the *Freedom of Information and Protection of Privacy Act*. The appellant sought notes of a meeting between ministry representatives and facility staff about the appellant's complaints concerning her father's care. The ministry denied access, relying on the personal privacy exemption in section 49(b) of the *Act* and the exemption at section 49(a) (discretion to refuse access to requester's own personal information) read with section 14(1)(e) (endanger life or safety of another person). The adjudicator upholds the ministry's decision in part. She finds that there is personal information in the record that is exempt under section 49(b), but that the remainder of the information is not personal information and is also not exempt under section 49(a), read with section 14(1)(e). She orders the ministry to disclose the non-exempt information to the appellant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definition of "personal information"), 14(1)(e), 49(a) and 49(b), *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A, section 8(4).

**Orders and Investigation Reports Considered:** Orders PO-2225 and PO-1940.

### BACKGROUND:

[1] The appellant's father is a resident in a long-term care facility under the jurisdiction of the Ministry of Long-Term Care (the ministry). There is a history of discord between the appellant and the facility, which is explained in more detail below, and the facility has restricted her visits with her father. As a result of the appellant's complaints about various matters relating to her father's care, a meeting was held involving representatives from the facility and an inspector and manager of the

ministry's Long-Term Care Inspections Branch. The appellant states that after the meeting, the ministry sent her a letter advising that it had not made any findings of non-compliance with the *Long-Term Care Homes Act*.<sup>1</sup>

[2] The appellant then made a request to the ministry under the *Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for access to various records, including any records about the meeting that would contain the date of the meeting, its location, who was in attendance, what was discussed and how the meeting ended.

[3] The ministry found one record that was responsive to this part of the appellant's request,<sup>2</sup> consisting of a typewritten summary of the meeting in question. The ministry issued a decision letter denying access to the record, stating in part:

I am replying to your request, under the Personal Health Information Protection Act...

Per our discussion ... only the individual, whose personal health information is contained in a record, or the individual's substitute decision-maker, can make an access request for that record. No other person can make an access request under the Act for that record, unless all the personal health information in the record can reasonably be severed from it. In this case, the records you have requested contain the personal health information of another individual, and that information cannot be reasonably severed from the records. The ministry requires written consent from the individual's substitute decision-maker to release any personal health information.

[4] The requester sent the IPC a complaint about the ministry's decision under the *Personal Health Information Protection Act (PHIPA)*. During mediation, the ministry issued a revised decision, this time under *FIPPA*. It maintained its decision to withhold the record at issue, relying on the following exemptions in *FIPPA*: section 49(a) (discretion to refuse access to requester's own personal information) in conjunction with section 14(1)(e) (endanger life or safety), as well as the personal privacy exemptions in sections 21(1) and 49(b).

[5] The requester told the mediator that she still disagrees with the ministry's access decision regarding the record at issue and wanted to proceed to adjudication. The file was then moved to the adjudication stage.

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<sup>1</sup> 2007, S.O. 2007, c. 8.

<sup>2</sup> The ministry granted access to various other records. The appellant confirmed the meeting notes are now the only record that she seeks access to.

[6] I decided to conduct an inquiry under *FIPPA* and I began my inquiry by inviting representations from the ministry. The ministry provided representations, which were shared with the appellant, with the confidential portions withheld in accordance with the criteria for the withholding of representations set out in this office's *Practice Direction 7*. The appellant provided representations in response. I also notified the meeting's attendees as affected parties and invited their representations. One of the affected parties provided representations in response.<sup>3</sup> The ministry also provided additional representations for my consideration, which were not shared with the other parties as they met the confidentiality criteria in *Practice Direction 7*.

[7] In this order, I uphold the ministry's decision, in part, and find that some of the information in the record is exempt from disclosure under the section 49(b) personal privacy exemption. I find that the remaining information is not exempt under either of the claimed exemptions and order the ministry to disclose it to the appellant.

## **RECORD:**

[8] The record at issue consists of four pages of notes relating to a meeting between representatives of the long-term care facility and those of the ministry.

## **ISSUES:**

- A. Severance of personal health information under section 8(4) of *PHIPA*
- B. Does the record contain "personal information" as defined in section 2(1) of *FIPPA* and, if so, to whom does it relate?
- C. Does the discretionary personal privacy exemption at section 49(b) of *FIPPA* apply to the personal information in the record?
- D. Does the discretionary exemption at section 49(a) (discretion to refuse requester's own information) of *FIPPA*, read with the section 14(1)(e) exemption (endanger life or safety) apply to the information at issue?
- E. Did the ministry exercise its discretion under section 49(b) and if so, should its exercise of discretion be upheld?

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<sup>3</sup> I did not share them with the other parties to the appeal, as they meet the confidentiality criteria set out in *Practice Direction 7*.

## **DISCUSSION:**

### **Issue A: Severance of personal health information under section 8(4) of *PHIPA***

[9] There is no dispute that the ministry is both an institution under *FIPPA* (section 2(1)) and a health information custodian under *PHIPA*<sup>4</sup>. The ministry initially denied access to the record at issue on the basis that it contains someone else's personal health information and that the personal health information is not reasonably severable from the other information in the record. In its revised decision, the ministry changed its position and considered access to the record under *FIPPA*, denying access on the basis of exemptions found in *FIPPA*.

[10] Section 8(4) preserves the right of access under section 10 of *FIPPA*, to records of personal health information, provided that all personal health information is reasonably severed.<sup>5</sup> I invited the parties to make representations on whether the record contains any personal health information that ought to be severed pursuant to section 8(4), before considering the appellant's right of access to the remainder of the record under *FIPPA*.

[11] Personal health information is defined in section 4 of *PHIPA*, in part, as follows:

(1) In this Act,

"personal health information", subject to subsections (3) and(4), means identifying information about an individual in oral or recorded form, if the information,

(a) relates to the physical or mental health of the individual, including information that consists of the health history of the individual's family,

(b) relates to the providing of health care to the individual, including the identification of a person as a provider of health care to the individual,

(2) In this section,

"identifying information" means information that identifies an individual or for which it is reasonably foreseeable in the

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<sup>4</sup> O. Reg. 329/04, section 3(9).

<sup>5</sup> See Orders PO-3718-I and PO-3816-F.

circumstances that it could be utilized, either alone or with other information, to identify an individual.

(3) Personal health information includes identifying information that is not personal health information described in subsection (1) but that is contained in a record that contains personal health information described in that subsection.

[12] The ministry submits that the record contains some personal health information about a resident at the facility, and that the appellant is neither the resident nor the resident's substitute decision-maker. The appellant did not address this issue in her representations.

[13] I have reviewed the record and I agree that it contains the personal health information of a resident, under sections 4(1)(a) and (b) of the definition. Under section 4(3) of *PHIPA*, any other identifying information in the record about the resident is also their personal health information. I find that the record is a "record of personal health information" within the meaning of *PHIPA*.

[14] The appellant does not claim to be a substitute decision-maker for the resident in question and did not dispute the ministry's assertion that she is not a substitute decision-maker for the resident. Therefore, she has no access rights to the resident's personal health information under *PHIPA*.<sup>6</sup>

[15] However, as I stated above, *PHIPA* preserves access rights under *FIPPA*. Section 8(4) of *PHIPA* states, in part:

This Act does not limit a person's right of access under section 10 of the Freedom of Information and Protection of Privacy Act.. to a record of personal health information if all the types of information referred to in subsection 4(1) are reasonably severed from the record.

[16] The resident's personal health information appears in discrete portions of the record and I am satisfied that it is reasonably severable from the remainder of the record.

[17] As will become evident below, the record also contains the appellant's own personal information and so her right of access to the record is found not in section 10 of *FIPPA*, which provides for a right of access to general records, but rather, under section 47(1) of *FIPPA*, which gives individuals a general right of access to their own personal information held by an institution.

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<sup>6</sup> Under sections 25 and 52 of *PHIPA*, the right of access to a record of personal health information belongs only to the information about the individual or their substitute decision maker.

[18] Section 8(4) of *PHIPA* preserves access rights under section 10 of *FIPPA* but is silent on the issue of access rights under section 47(1) of *FIPPA*. In my view, section 8(4) of *PHIPA* should be read to include reference to section 47(1) of *FIPPA*.

[19] The IPC has previously considered other circumstances where the legislature has made specific reference to provisions in Part II of *FIPPA* (where section 10 is found) but no specific reference to provisions in Part III of the *FIPPA* (where section 47 is found). For example, in Order P-541,<sup>7</sup> the adjudicator found that although the public interest override provision in section 23 does not refer to the exemptions in sections 49(a) and (b), they should be read in. She stated:

In my view, where an institution has properly exercised its discretion under section 49(b) of the *Act* ...an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21. Were this not to be the case, an individual could theoretically have a lesser right of access to his or her own personal information than would the "stranger"...

The same approach should be taken in cases in which an institution has properly exercised its discretion under section 49(a) ...

[20] A similar rationale applies here. In my view, it would not have been the legislature's intent under section 8(4) of *PHIPA* that a requester *would* have a right of access to the remainder of the record if it does *not* contain her personal information (section 10 of *FIPPA*) but *would not* have a right of access to the remainder of the record if it *does* contain her personal information (section 47(1) of *FIPPA*).

[21] I conclude that section 8(4) preserves a requester's right of access under either section 10 or 47(1) of *FIPPA*, as the case may be. I will now consider the appellant's right of access under *FIPPA* to the remainder of the record.

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

[22] In order to determine which exemption(s) from a right of access in *FIPPA* may apply, it is necessary to decide whether the record contains "personal information" and, if so, whose.

[23] Specifically, in this case, I need to determine whether the record contains the appellant's personal information, and whether it contains the personal information of other individuals.

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<sup>7</sup> Followed in Orders PO-2246, PO-2409 and PO-3073, among others.

[24] Personal information 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;

[25] 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>8</sup>

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

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<sup>8</sup> Order 11.

(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.

[27] 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.<sup>9</sup> 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.<sup>10</sup>

### ***Representations***

[28] 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 record relates to her.

[29] The ministry submits that the record contains the personal information of the appellant and of other individuals, including a current resident and former resident of the facility and the individuals who were present at the meeting in question.

[30] With respect to the meeting participants, the ministry says that the individuals who attended the meeting included ministry staff, staff from the facility, and staff from the county in which the facility is located. The meeting notes were made by a ministry inspector who was present at the meeting. The purpose of the meeting was for ministry staff to determine the facility’s compliance with the *Long Term Care Homes Act* and the meeting notes were included as part of the ministry inspector’s inspection file.

[31] The ministry submits that although the individuals who attended the meeting attended in their professional capacities, the record contains more than merely professional information. It says that information about the employment activities of the facility staff members in their place of work is their personal information. Moreover, it submits that any allegations that staff’s caregiving responsibilities were performed in an improper or unprofessional manner is the personal information of those individuals. The ministry provided additional confidential representations on why it views the information

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<sup>9</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>10</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.



about the facility staff as their personal information.

### ***Analysis and findings***

[32] Having reviewed the record and the parties' representations, I conclude that the record contains the personal information of both the appellant and other individuals.

[33] First, with respect to the appellant, I agree with the ministry that the record contains her personal information. The record relates to a meeting that was held as a result of the appellant's complaints about the facility. The record contains information about her including her name along with the details of her relationship with residents and staff at the facility, and statements about her conduct that were made by the meeting attendees. The record also contains some information about the appellant's views and opinions of her father's care. This is the appellant's personal information under paragraphs (a), (e), (g) and (h) of the definition in section 2(1).

[34] I find that the information relating to the former resident mentioned by the ministry is their personal information under paragraphs (a), (b), (d), and (h) of the definition. The information identifies them as a former resident at the facility, and sets out their views and opinions of certain matters.<sup>11</sup>

[35] With respect to the meeting participants, I have reviewed the information relating to them and have considered the parties' representations. For the following reasons, I find that some, but not all of the information of these parties is their personal information.

[36] 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*. See *FIPPA*, section 2(3) and also Order PO-2225, where former Assistant Commissioner Tom Mitchinson set out 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

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<sup>11</sup> The personal information of the current resident is no longer at issue because it is part of their personal health information to be severed under *PHIPA*, section 8(4).

information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

[37] This two-step test has been consistently adopted and applied in IPC jurisprudence.<sup>12</sup> I agree with the test and adopt it here.

[38] Starting with the first part of the test, I find that the names of these individuals together with the fact that they attended the meeting on a particular date and in a particular location is information that appears in a professional context. The remainder of the record, which is a transcript of sorts, setting out or paraphrasing what was said by each participant, is also information that appears in a professional context.

[39] I now turn to the second part of the test, which is whether there is something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual.

[40] With respect to the names of the individuals who attended the meeting, the meeting date and the location of the meeting, I find that this is not the personal information of the individuals who attended. In my view, disclosing this information would not reveal anything of a personal nature about these individuals.

[41] Some of the remaining information is also not personal information of the meeting attendees or others, but rather, simply sets out some factual observations made by them, as recounted during the meeting. These observations relate to their professional duties.

[42] However, some of the information relayed by the meeting attendees reveals information of a personal nature about them. In my view, some of the information in the record is of a subjective nature and reveals personal information about the attendees or others. I cannot say more without revealing the content of the record.

[43] Having found that the record contains the appellant's personal information as well as that of other individuals, I will next, under Issue C, address whether the personal privacy exemption at section 49(b) applies to the personal information of the other individuals. Specifically, this personal information relates to a former resident, some of the meeting attendees and other staff persons.

[44] However, the information that I have found is not personal information, that is, the professional information about the meeting attendees, cannot be exempt from disclosure under the personal privacy exemption at section 49(b). I will assess the ministry's other exemption claim for this information under Issue D.

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<sup>12</sup> 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.

**Issue C: Does the discretionary personal privacy exemption at section 49(b) of *FIPPA* apply to the personal information in the record?**

[45] 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.

[46] 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>13</sup>

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

[48] 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). Section 21(4) lists situations that would also not be an unjustified invasion of personal privacy. Neither section 21(1) nor 21(4) is relevant to the matter before me.

[49] The factors in section 21(2) and presumptions in section 21(3) also help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 49(b). 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.<sup>14</sup>

***Parties’ representations***

[50] The ministry provided confidential and non-confidential representations. In its non- confidential representations, it submits that paragraphs 21(2)(f) and (h) apply. These paragraphs state:

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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<sup>13</sup> See below in the “Exercise of Discretion” section for a more detailed discussion of the institution’s discretion under section 49(b).

<sup>14</sup> Order MO-2954.

(f) the personal information is highly sensitive;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; and

[51] The ministry says that the personal information of the former resident of the facility is highly sensitive and would fit within the meaning of paragraph (f) of subsection 21(2). It also says that the personal information relating to the participants at the meeting was supplied in confidence to the ministry inspector who recorded the information in the meeting notes. The participants were not advised that the meeting notes would be provided to the appellant.

[52] The ministry also submits that disclosure of the record is presumed to be an unjustified invasion of personal privacy under section 21(3)(b), which states, that disclosure is presumed to constitute an unjustified invasion of personal privacy where the personal information was compiled and is identifiable as part of an investigation into a possible violation of law (here, the *Long Term Care Homes Act*).

[53] The appellant filed lengthy representations in which she sets out her concerns with both the facility and the ministry. She states that she requires the record at issue<sup>15</sup> for reasons of transparency and accountability.

### ***Analysis and findings***

[54] Section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>16</sup> 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).<sup>17</sup>

[55] I agree with the ministry that some of 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>18</sup> I am satisfied that this is the case for all the personal information at issue. The factor at section 21(2)(f) therefore applies.

[56] I also find that some of the personal information was supplied to the ministry in

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<sup>15</sup> In her representations, the appellant also says that she wants copies of transcripts of the telephone calls she has placed to the ministry. However, those transcripts, if they exist, are not records at issue before me.

<sup>16</sup> Order P-239.

<sup>17</sup> Order P-99.

<sup>18</sup> Orders PO-2518, PO-2617, MO-2262 and MO-2344.

confidence. While I would not find it reasonable for the meeting participants to expect all the information exchanged to remain confidential, I am satisfied there was a reasonable expectation in the circumstances that the personal information of the meeting's attendees would. The factor at section 21(2)(h) therefore applies.<sup>19</sup>

[57] The appellant did not specifically raise any of the section 21(2) factors in her representations. However, I have considered her submission that she wants the withheld information for reasons of accountability and transparency into the ministry's oversight role. Transparency into oversight of long-term care facilities is a legitimate objective. In my view, however, disclosure of the personal information of third parties at issue in this appeal would not serve to promote transparency of the ministry's oversight role.

[58] I also considered whether fairness requires disclosure, since the appellant has a legitimate interest in the outcome of her complaints to the ministry about the facility. However, I am not satisfied that the personal information at issue would provide any further insight into that matter.

[59] Given the factors weighing against disclosure, and the absence of any factors weighing in favour of disclosure, I find that the disclosure of the personal information at issue would be an unjustified invasion of personal privacy and the information is, therefore, exempt under the discretionary personal privacy exemption in section 49(b). In the circumstances, I do not need to decide if the section 21(3)(b) presumption applies.

[60] I will address the ministry's exercise of discretion under section 49(b) in Issue E below.

**Issue D: Does the discretionary exemption at section 49(a) (discretion to refuse requester's own information), read with the section 14(1)(e) exemption (endanger life or safety) apply to the information at issue?**

[61] 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. I have found that the personal information of individuals other than the requester is exempt from disclosure under section 49(b).

[62] I will now consider whether the remaining information is exempt under section 49(a).

[63] Section 49(a) reads:

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<sup>19</sup> Order PO-1670.

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, or 22 would apply to the disclosure of that personal information.

[64] Section 49(a) of the *Act* ("may" refuse to disclose) 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.<sup>20</sup> Even where a record qualifies for an exemption under section 49(a), the institution must demonstrate that, in deciding to deny access, it considered whether a record should be released to the requester because the record contains his or her personal information. Here, however, for the following reasons, I find that the section 49(a) exemption does not apply.

[65] The ministry relies on section 49(a) read with section 14(1)(e). Section 14(1)(e) states:

(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person;

[66] The term "person" is not necessarily limited to a particular identified individual, and may include the members of an identifiable group or organization.<sup>21</sup>

[67] It is not enough for an institution to take the position that the harms under section 14 are self-evident from the record or that the exemption applies simply because of the existence of a continuing law enforcement matter.<sup>22</sup> The 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.<sup>23</sup>

[68] A person's subjective fear, while relevant, may not be enough to justify the exemption.<sup>24</sup>

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<sup>20</sup> Order M-352.

<sup>21</sup> Order PO-1817-R.

<sup>22</sup> Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

<sup>23</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>24</sup> Order PO-2003.

## ***Representations***

[69] Only one affected party made representations, which did not address this issue.

[70] The ministry made confidential and non-confidential representations on the issue. In its non-confidential representations, the ministry submits that the record contains information that, if disclosed to the appellant, could reasonably be expected to endanger the physical safety of both staff at the facility and the individuals who attended the meeting in question.

[71] The ministry notes that it established a dedicated phone line as a result of the appellant's frequent and, at times, threatening phone calls to its staff. The phone line permitted the appellant to leave messages outlining her concerns about the facility without speaking directly to ministry staff.

[72] The ministry says that the appellant has also exhibited threatening behaviour towards staff at the facility, which can be summarized as follows:

- In 2016, a Notice of Trespass was issued by the facility following an interaction in which the administrator of the facility felt threatened by the appellant.
- In 2018, there was a significant escalation of calls from the appellant to the ministry following the presence of inspectors at the facility and the visitation restrictions imposed on the appellant by the facility.
- In 2018, the facility tried to give the appellant a letter setting out restrictions on the appellant's access to the unit within the facility and setting out a protocol for visits. The appellant refused the letter and destroyed it in the presence of inspectors and police officers. Police escorted the appellant out of the facility.
- In 2018, the administrator of the facility advised the appellant that she was entitled to visit with her parent in the common areas of the facility.
- In 2019, a meeting was held between facility staff, the appellant and a representative from Victim Services to discuss expectations placed on appellant in relation to visitation and how to achieve unrestricted visitation.
- In 2019, the administrator of the facility provided the following information to a senior manager of the ministry:
  - The appellant has threatened staff and management in the facility.
  - The appellant is abusive and the staff are fearful of the appellant. The staff are afraid to leave the premises alone.
  - The appellant follows facility staff in restricted areas and yells at them, "I am going to get you."

- The facility's legal counsel hired an external investigator to investigate allegations of workplace discrimination and harassment.
- The appellant has a fractured relationship with the staff and leadership team in the facility.
- The administrator advised that employees of the facility are making statements such as, "If something happens to me, it's (the appellant) and sue the County. They did nothing to protect me."

### ***Analysis and findings***

[73] I find, for the following reasons, that neither the ministry nor the affected party who submitted representations has established that section 14(1)(e) would apply to the withheld information remaining at issue.

[74] From my review of the appellant's representations, it is clear that she is unhappy with her father's care. It is also clear that others have found her behaviour in relation to the facility troubling. The ministry has provided some information about specific incidents of harassment by the appellant and staff's fear of her.

[75] I have carefully reviewed this information. I find, however, the ministry has 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. Significantly, none of the affected parties provided representations to that effect, either.

[76] In this regard, the post-script to Order PO-1940 is instructive. In that case, the institution relied on the section 20 exemption (which is similarly worded to section 14(1)(e)) as well as section 14(1)(e) to redact the names of staff from records disclosed to the requester. In that case, the adjudicator concluded that the information at issue was properly withheld under section 49(a) in conjunction with section 20 of the *Act*, but in the post-script, 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.

[77] I agree with these comments and particularly the idea that any expectation of harm must be a result of disclosure of the information at issue. In the case before me,



the ministry raises some legitimate concerns about the appellant's behaviour, but it has not satisfied me that the threat, if one exists, is linked to the disclosure of the information remaining at issue. The issue before me is not whether the appellant poses a risk generally, but whether disclosure of the information remaining at issue could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person.

[78] It is clear from a review of the parties' 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 or even harassing or threatening behaviour, but rather, whether *disclosure of the information at issue to her* could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person.

[79] Having reviewed the information remaining at issue, I am not satisfied that it could reasonably be expected to do so. The information does not include the affected parties' home addresses or any other personal information about them. It is largely factual in nature and, from my review of the parties' representations, it appears that much of it is already known to the appellant in a general sense.

[80] I find, therefore, that section 14(1)(e) does not apply to the information remaining at issue. As a result, I will order the ministry to disclose this information to the appellant.

[81] I have also considered the ministry's confidential and non-confidential representations on whether this non-exempt information can reasonably be severed from the personal information of third parties, which I found above to be exempt from disclosure. I am satisfied that severing and disclosing the non-exempt information will not amount to mere "meaningless snippets" of information being provided to the appellant and I am not persuaded that the ministry's concern outlined in its confidential representations could reasonably be expected to occur if a severed version of the record is disclosed to the appellant.

**Issue E: Did the ministry exercise its discretion under section 49(b) and if so, should its exercise of discretion be upheld?**

[82] 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 IPC may determine whether the institution failed to do so.

[83] In addition, the IPC 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.

[84] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>25</sup> It may not, however, substitute its own discretion for that of the institution.<sup>26</sup>

[85] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>27</sup>

- 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

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<sup>25</sup> Order MO-1573.

<sup>26</sup> Section 43(2).

<sup>27</sup> Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

### ***Representations and finding***

[86] The ministry submits that it took the following factors into account when reaching the decision not to disclose the record at issue to the appellant:

- the circumstances under which the record was created by the ministry inspector as part of an inspection into a possible violation of the *Long-Term Care Homes Act*,
- the fact that the record was not created pursuant to any obligation to do so under the *Long-Term Care Homes Act*,
- the possibility for a 'chilling effect' on the willingness of long-term care home staff to outline their health and safety concerns to the ministry,
- whether or not any interest of the appellant to access the relevant record clearly outweighed the privacy interests of the affected individuals in the circumstances, and
- the fact that there is no general public interest in the information contained in the record at issue, beyond the appellant's desire to obtain access to it.

[87] The appellant did not directly address this issue.

[88] Having reviewed the ministry's representations and the record, I am satisfied that the ministry took into account relevant factors when it decided to withhold the personal information of third parties. I am not persuaded that it took into account any irrelevant factors or that it exercised its discretion in bad faith. As a result, I uphold the ministry's exercise of discretion.

### **ORDER:**

1. I uphold the ministry's section 49(b) exemption claim, in part, and do not uphold its section 49(a) claim.
2. I order the ministry to disclose a severed copy of the record to the appellant. With the ministry's copy of this order is a highlighted copy of the record. The **highlighted information is to be withheld** because either it is the resident's personal health information or section 49(b) of *FIPPA* applies to it.
3. The ministry is to disclose the record by **February 26, 2021 but not before February 19, 2021**. This time may be extended if the ministry is unable to comply with it in light of the current COVID-19 situation. I remain seized in order to determine any resulting extension request.

Original Signed by: \_\_\_\_\_  
Gillian Shaw  
Senior Adjudicator

\_\_\_\_\_ January 27, 2021