

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4289

Appeal PA20-00777

Ministry of Labour, Training and Skills Development

August 17, 2022

Summary: The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Labour, Training and Skills Development (the ministry) for records related to an Employment Standards claim filed against her by an individual (the affected person). The ministry sought consent from the affected person, which was not provided, and issued a decision denying access in full to responsive records pursuant to section 21(1) of the *Act* (personal privacy). During adjudication, the application of section 49(b) (discretion to refuse requester's own information) was added to the scope of the appeal as the records appeared to contain the appellant's personal information. Also, during adjudication, the ministry issued two revised decisions, disclosing additional information to the appellant. In this order, the adjudicator finds that the withheld personal information is exempt from disclosure pursuant to section 49(b) and dismisses the appeal.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1) (definition of *personal information*), 21(1), 21(2)(f), 21(3)(d), 24 and 49(b).

OVERVIEW:

[1] This appeal arises after an individual (the affected person), who provided personal assistant services to another individual (the appellant), filed an Employment Standards claim with the ministry against the appellant (the claim). The appellant then sought access to the file for the claim (the claim file).

[2] The appellant submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of Labour, Training and Skills

Development (the ministry) for the following:

Copies of all documents, materials and emails provided by the complainant [the affected person] in relation to Employment Standards Claim (Claim [specified claim number]).

[3] The ministry contacted the affected person, seeking consent to release his personal information, which was not provided. It also contacted the appellant, who confirmed the scope of her request was for materials provided by the affected person to the ministry for the claim.

[4] The ministry issued a decision, denying access in full to the responsive records pursuant to section 21(1) of the *Act*, stating the following:

An Employment Standards Claim file is considered to be the claimant's personal information and cannot be released without the individual's consent. It was necessary for our office to contact the [affected person] concerning information he provided to the ministry. [The affected person] did not consent to the release of his information. All of this information is protected by the personal privacy provisions in section 21 of [the *Act*].

[5] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC).

[6] During mediation, the ministry provided the appellant with a spreadsheet that referenced the responsive records and whether they contained certain types of information of concern to the appellant, namely, any statements of fact that relate to the appellant's personal residence or her own employment.

[7] Upon review, the appellant maintained her appeal of the ministry's decision, believing that some of the information can be disclosed to her under the *Act*. The ministry maintained its position that section 21(1) of the *Act* applies to all of the responsive records in their entirety. It also advised that some of the records in the claim file were being withheld because the affected person did not provide them and therefore, they are not responsive to the appellant's request. After the Mediator's Report was issued, the appellant confirmed that she is not seeking access to records that were withheld because they are not responsive.

[8] As mediation did not resolve this appeal, it was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[9] The adjudicator originally assigned to this appeal decided to conduct an inquiry. Based on her review, she understood that the appellant asserts that the records contain her personal information and section 49(b) was added to the scope of the appeal. She began her inquiry by inviting representations from the ministry and an affected person. Both parties provided representations.

[10] The ministry also issued a revised decision, partially disclosing information in records 1-4, 13 and 16 and taking the position that the remaining information withheld is no longer within the scope of this appeal. In this decision, the ministry indicated that the scope of the appeal had been narrowed as follows:

...from all materials submitted by the [affected person] to an agreed statement of facts regarding [the appellant's] personal residence and [her] employment details.

[11] The appellant did not express any disagreement with the above characterization of her request.

[12] The ministry issued another revised decision, resulting in the disclosure of records 8, 10-12 and 14-15.¹

[13] The adjudicator then invited representations from the appellant by providing her with the non-confidential portions of the ministry's representations and the Notice of Inquiry, which added the issue of whether the information at issue is responsive to the request, made a preliminary determination about the responsiveness of some records and included a summary of the affected person's position.

[14] The appellant submitted brief representations, outlining her belief and her interest in what the affected person had provided the ministry with documentation or explanation of the nature of the contract position performed by the appellant, namely, a description of the skills, clearance and type of work the appellant performs herself or similar details.

[15] This appeal was then transferred to me to continue with the adjudication of the appeal.² In this order, I find that the withheld personal information is exempt from disclosure pursuant to section 49(b) and dismiss the appeal.

RECORDS:

[16] At the start of adjudication, records 1-6, 8-17, 28-30, 32, 34 and 36-37 were at issue.

[17] During adjudication, the scope of the information remaining at issue in this appeal was narrowed. First, the appellant indicated that she is only interested in access to records and information provided by the affected person to the ministry and in particular, information about her residence and her own employment. Second, the ministry revised its decision and disclosed additional records and information to the

¹ The IPC did not make any findings with respect to these records.

² I have reviewed all the file materials and representations and have determined that I do not require further information before making my decision.

appellant. Third, the previous adjudicator made a preliminary determination on the responsiveness of some of the records at issue in this appeal,³ which I agree with. Accordingly, records 3-6, 8-17, 28-30, 32, 34 and 36-37 are no longer at issue in this appeal.

[18] The remaining information at issue is contained in records 1 and 2, which are the ministry's online claim forms in English and French as completed by the affected person and provided to the ministry when filing his claim. While these records were provided by the affected person, only the first and third sentences of the withheld information under the heading of "Additional Comments" relate to information about the appellant's residence and/or her own employment details (the withheld information).

[19] Accordingly, I will consider whether records 1 and 2 contains "personal information" and if so, whether the withheld information at issue in these records is exempt from disclosure pursuant to section 21(1) or 49(b) of the *Act*.

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 exemption at section 49(b) apply to the withheld personal information?
- C. Did the ministry exercise its discretion under section 49(b)? If so, should the IPC 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?

[20] As explained below, I find that records 1 and 2 contain the personal information of the appellant and the affected person.

[21] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "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,

³ The appellant did not challenge the adjudicator's preliminary determination.

(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;

[22] 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.⁴

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

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their

⁴ Order 11.

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

[24] To qualify as personal information, the information must be about the individual in a personal capacity. Generally, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.⁵

[25] 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.⁶

[26] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁷

Representations of the parties

[27] The ministry submits that the records contain information that qualifies as the personal information of both the affected person and the appellant. It submits that the affected person would be identifiable from the appellant’s knowledge of the issues and the individual involved, and from the other information already disclosed by the ministry in its revised decisions.

[28] It also submits that information relating to employment history of an identifiable individual is considered to be their personal information.⁸ It explains that all of the records at issue contain the employment history of the affected person.

[29] It further submits that information related to the personal opinions or views of the individual is considered to be personal information.⁹ It explains that the affected person’s perspective of his own actions, his employer in the scope of her role as his employer, and various circumstances and incidents in the course of his employment and corresponding entitlements are included in all records at issue through both the contents and tone of the records. Accordingly, it submits that the records should be found to be the affected person’s personal information.

[30] The ministry also submits that some of the records contain the mixed personal information of the appellant and the affected person. It refers to Order PO-3458, where the IPC found that parts of the records, setting out the allegation that the appellant’s relative made about the appellant, contained the mixed personal information of both

⁵ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁶ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁷ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

⁸ Order M-71.

⁹ Order P-998.

the appellant and her sister.¹⁰ In the present appeal, the ministry submits there are similar circumstances to Order PO-3458 because the records at issue in this appeal contain a mix of personal information relating to the opinions and views of an individual (the affected person), as well as another individual to whom the opinions and allegations relate (the appellant).

[31] The affected person submits that the records contain his own sensitive personal information and do not contain the appellant's personal information. He also submits that the only information he disclosed about the appellant was her name, address and contact information required to file a claim with the ministry.

[32] The appellant did not directly address this issue in her representations.

Analysis and findings

[33] The IPC applies the "record-by-record" method of analysis to records subject to an access request. Applied to requests for access to one's own personal information, the "record-by-record" approach gives requesters a right of access to an entire record (or the withheld portions of records) that contain their own personal information, subject to any applicable exemptions. Using this approach, the unit of analysis is the whole record, rather than individual pages, paragraphs, sentences or words contained in a record. Also, where the information at issue is the withheld portion of a record that has been partially released, the whole of the record (including released portions) is analyzed in determining a requester's right to access the withheld information.¹¹

[34] I agree with the affected person that records 1 and 2 contain his personal information. However, I disagree with the affected person's submission that these records do not contain the appellant's personal information.

[35] Based on my review of records 1 and 2, I find that they contain the personal information of the appellant and the affected person. These records are the ministry's publicly available online claim forms as completed by the affected person to begin his claim against the appellant – one is an English form, while the other is a French form. These records contain information about the parties, including their names, contact information, the affected person's concerns about his workplace, the affected person's work history and additional information provided by the affected person. While these records may relate to the parties in a professional capacity, I also find that the information within them would still reveal something of a personal nature about each of the individuals. Accordingly, I find that records 1 and 2 as a whole contain the mixed personal information of the affected person and the appellant.

[36] I considered whether the appellant's personal information could be severed from the withheld information at issue. However, based on my review of records 1 and 2 and

¹⁰ At para. 25.

¹¹ See Orders M-352 and PO-3642.

the withheld information at issue, I find that the appellant's personal information is inextricably intertwined with the affected person's and cannot be reasonably severed.

[37] Having found that records 1 and 2 contain the personal information of both the appellant and the affected person (the withheld personal information), I will now determine whether the withheld personal information is exempt from disclosure under section 49(b) of the *Act*.

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

[38] 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 some exemptions from this right.

[39] Under the section 49(b) exemption, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosure of that information would be an "unjustified invasion" of the other individual's personal privacy.

[40] The section 49(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if doing so would result in an unjustified invasion of the other individual's personal privacy.

[41] If disclosing another individual's personal information would not be an unjustified invasion of personal privacy, then the information is not exempt under section 49(b).

[42] In the context of this appeal and given my finding above that records 1 and 2 contain the mixed personal information of the appellant and the affected person, I will be determining whether the discretionary exemption at section 49(b) applies to the withheld personal information in records 1 and 2.

Do any of the exceptions in sections 21(1)(a) to (e) apply?

[43] The ministry submits that none of the exceptions in sections 21(1)(a) to (f) apply. It specifically notes that the affected person did not consent to the disclosure of his personal information and that disclosure of the withheld personal information would be an unjustified invasion of privacy.

[44] Given the circumstances of this appeal, I find that none of the exceptions in sections 21(1)(a) to (e) apply. I will now consider whether disclosure of the withheld personal information would be an unjustified invasion of privacy.

Unjustified invasion of personal privacy

[45] In applying the section 49(b) exemption, sections 21(2) and (3) help in

determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[46] Given the circumstances of this appeal and the information at issue, I find that section 21(4) does not apply. Below I will consider the application of sections 21(2) and

[47] When considering the application of the section 49(b) exemption because records contain the requester's personal information, in addition to the personal information of another individual, the IPC will consider, and weigh, the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties in determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy.¹² 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).¹³

Representations of the parties

[48] The appellant and affected person did not directly address this issue.

[49] The ministry submits that, in determining whether disclosure would be an unjustified invasion of privacy, it considered the factors and presumptions in subsections 21(2) and (3) of the *Act*.

Do any of the presumptions in section 21(3) apply?

[50] The ministry relies on the presumption at section 21(3)(d) (employment history) with respect to the withheld personal information because it relates to the employment history of the affected person. It refers to Order PO-3115, which dealt with information relating to the educational and employment history of an individual and where the IPC held that disclosure would constitute a presumed unjustified invasion of privacy under section 21(3)(d).

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

[51] The ministry relies on the factors in sections 21(2)(e), (f), (h) and (i) favouring non-disclosure.

[52] With respect to section 21(2)(e), the ministry submits that the withheld personal information relating to the affected person's opinions and accounts of his experiences would expose the affected person unfairly to pecuniary or other harm.

[53] In Order P-1167, Inquiry Officer Anita Fineberg stated, in the context of

¹² Order MO-2954.

¹³ Order P-99.

documents related to sexual harassment complaints against the police, that:

once the parties have followed the appropriate procedures to file a complaint with the [Ontario Human Rights] Commission and have reached a satisfactory settlement, they are entitled to consider the matter as 'closed'... I accept that disclosure of the records at this time could expose the complainants unfairly to harm in the form of a continuing, and potentially public, reminder of these unpleasant events.

[54] In the present appeal, as in Order P-1167, the ministry submits that the information provided by the affected person, including his accounts and opinions, could lead to continuing reminders of unpleasant events experienced by the affected person, if disclosed to the appellant.

[55] The ministry submits that the withheld personal information relating to the affected person's opinions and allegations is highly sensitive and subject to section 21(2)(f). The ministry refers to Order PO-2518, where Senior Adjudicator John Higgins stated that "...a reasonable expectation of 'significant' personal distress is a more appropriate threshold in assessing whether information qualifies as 'highly sensitive'".

[56] It also refers to Order PO-2612, where an appellant sought the personal information of affected individuals about "allegations" he believed were made against him. In that order, the IPC considered all the circumstances and concluded that releasing the information at issue would cause the affected parties "significant personal distress" and the information fell under section 21(2)(f).

[57] Similarly, the ministry submits that disclosing the personal views of the affected person contained in the withheld personal information would cause the affected person significant personal distress. It submits that the affected person's feelings need to be considered highly relevant in determining the sensitivity of the information and why section 21(2)(f) is a relevant factor favouring non-disclosure.

[58] With respect to section 21(2)(h) (supplied in confidence), the ministry submits that the withheld personal information was supplied by the affected person to the ministry in order to facilitate an investigation into his potential employment standards entitlements. It submits that there is no clear indication of an expectation that these documents would be shared beyond the employment standards officer (the ESO).

[59] With respect to section 21(2)(i), the ministry submits that knowledge of the particular information provided to the ESO by the affected person may unfairly damage the affected person's reputation, if disclosed to the appellant.

Analysis and findings

[60] Based on my review of the withheld personal information and the circumstances of this appeal, I find that the discretionary exemption at section 49(b) applies to it.

The section 21(3)(d) presumption (employment history) applies to the withheld personal information

[61] The ministry submits that the presumption in section 21(3)(d) of the *Act* applies to the withheld personal information because it relates to the affected person's employment history. It also refers to Order PO-3115, where the IPC held that disclosure of information relating to the employment history of an individual would constitute a presumed unjustified invasion of privacy under section 21(3)(d).

[62] Under section 21(3)(d), information which reveals the dates on which former employees are eligible for early retirement, the start and end dates of employment, the number of years of service, the last day worked, the dates upon which the period of notice commenced and terminated, the date of earliest retirement, entitlement to and the number of sick leave and annual leave days used and restrictive covenants in which individuals agree not to engage in certain work for a specified duration has been found to fall within the section 21(3)(d) presumption.¹⁴ While information contained in resumes¹⁵ and work histories¹⁶ falls within the scope of section 21(3)(d), a person's name and professional title, without more, does not constitute "employment history."¹⁷

[63] Based on my review of the withheld personal information, I am satisfied that it contains information about the affected person's employment history. While the withheld personal information provides some minor details about the appellant's residence and her own employment, it also provides some detail about the nature of the work performed by the affected person for the appellant. This would constitute information about the work history of the affected person. Accordingly, I find that the presumption at section 21(3)(d) applies to the withheld personal information because it relates to the affected person's employment history.

[64] Under section 49(b), the presumptions in section 21(3) must be weighed and balanced with any relevant factors in section 21(2). Accordingly, I will now consider whether the factors in section 21(2) apply to the withheld personal information.

The section 21(2)(h) factor applies but those in sections 21(2)(e), (f) and (i) do not

[65] The ministry relies on the factors in sections 21(2)(e), (f), (h) and (i), all of which favour non-disclosure.

21(2)(e) and (i): pecuniary or other harm and unfair damage to reputation

[66] In order for section 21(2)(e) to apply, the evidence must demonstrate that the

¹⁴ Orders M-173, P-1348, MO-1332, PO-1885 and PO-2050; see also Orders PO-2598, MO-2174 and MO-2344.

¹⁵ Orders M-7, M-319 and M-1084.

¹⁶ Orders M-1084 and MO-1257.

¹⁷ Order P-216.

damage or harm envisioned by the clause is present or foreseeable, and that this damage or harm would be "unfair" to the individual involved. With respect to section 21(2)(e), the ministry submits that the withheld personal information relating to the affected person's opinions and accounts of his experiences would expose the affected person unfairly to pecuniary or other harm. It refers to Order P-1167, which dealt with documents related to sexual harassment complaints against various police parties.

[67] The applicability of section 21(2)(i) is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.¹⁸ With respect to section 21(2)(i), the ministry submits that knowledge of the particular information provided by the affected person to the ESO may unfairly damage the affected person's reputation, if disclosed to the appellant.

[68] Given the nature of the withheld personal information, I do not agree that Order P-1167 is relevant because the withheld personal information in the present appeal appears to be different from the type of information considered in that order. The withheld personal information relates more to factual information about the nature of the services provided by the affected person to the appellant. Accordingly, I do not agree that the affected person would be exposed to pecuniary or other harm, or lead to continuing reminders of unpleasant events experienced by the affected person, if disclosed to the appellant. Nor do I agree that the disclosure of the withheld personal information may unfairly damage the affected person's reputation. Therefore, I find that the section 21(2)(e) and (i) factors do not apply and I give them no weight in my consideration of whether disclosure of the withheld personal information would be an unjustified invasion of the affected person's personal privacy.

21(2)(f): highly sensitive

[69] To be considered highly sensitive, there must be a reasonable expectation of significant personal distress if the information is disclosed.¹⁹ The ministry submits that the withheld personal information is highly sensitive because it relates to the affected person's views, opinions and allegations.

[70] Based on my review of the withheld personal information, I do not agree that it contains the personal views of the affected person regarding his work situation with the appellant. Nor do I agree that its disclosure would reasonably lead to the type of "significant personal distress" referred to in Orders PO-2518 and PO-2612, given the factual nature of the withheld personal information. Accordingly, I find that the withheld personal information is not "highly sensitive", as found in prior orders of the IPC because it is not reasonable to expect that disclosure of the withheld personal information would cause significant personal distress to the affected person. Therefore,

¹⁸ Order P-256.

¹⁹ Orders PO-2518, PO-2617, MO-2262 and MO-2344.

I find that the section 21(2)(f) factor does not apply and I give it no weight in my consideration of whether disclosure of the withheld personal information would be an unjustified invasion of the affected person's personal privacy.

21(2)(h): supplied in confidence

[71] 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.²⁰

[72] The ministry submits that the withheld personal information was supplied by the affected person to the ministry to facilitate an investigation and there is no clear indication that such information would be shared beyond the ESO.

[73] While I may agree that the affected person supplied information to the ministry in confidence as part of his claim, I note that the claim form states that:

Any information you provide *may* be shared with the employer and their representative, if applicable. The [m]inistry may also otherwise disclose this information as authorized or required by law. [Emphasis added.]

[74] Based on this, I am unable to conclude that the ministry, as the recipient of the affected person's claim form, had a similar expectation that the information would be treated confidentially, as it could have shared the information with the appellant as part of its investigation of the claim. Therefore, I find that the section 21(2)(h) factor applies and I give it only *minor* weight in my consideration of whether disclosure of the withheld personal information would be an unjustified invasion of the affected person's personal privacy.

Other factors/relevant circumstances under section 21(2)

[75] While previous IPC orders have considered other factors and relevant circumstances in determining whether the disclosure would be an unjustified invasion of personal privacy,²¹ I find that there are no other factors or relevant circumstances for consideration given the circumstances of this appeal.

Conclusion re: sections 21(2) and (3)

[76] Above, I found that the presumption at section 21(3)(d) (employment history) applies to the withheld personal information. I also found that the factor at section 21(2)(h) (supplied in confidence) applies in favour of privacy protection and gives it

²⁰ Order PO-1670.

²¹ Orders M-50, M-82, M-129, P-237, P-1014, P-1493, PO-1717, PO-1731, PO-1750, PO-1767, PO-1923, PO-1936, PO-2012-R and PO-2657.

some weight in my consideration of whether disclosure of the withheld personal information would be an unjustified invasion of the affected person's personal privacy.

[77] Considering the withheld personal information, weighing the presumption and the relevant factor and balancing the interests of the parties, I am not persuaded that the appellant's desire to access the withheld personal information outweighs the privacy interests of the affected person, whose personal information is contained in the withheld personal information. I find that disclosing the withheld personal information would result in an unjustified invasion of the personal privacy of the affected person, and I find therefore that it is exempt under section 49(b) of the *Act*.

[78] I will now consider whether my finding leads to an absurd result.

Absurd result

[79] The absurd result principle may apply where the requester originally supplied the information, or is otherwise aware of it. Where circumstances are present, the information may not be exempt under section 49(b) because withholding the information would be absurd and inconsistent with the purpose of the exemption.²²

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

- the requester sought access to his or her own witness statement²³
- the requester was present when the information was provided to the institution²⁴
- the information is clearly within the requester's knowledge²⁵

[81] 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.²⁶

Representations of the parties

[82] The ministry submits that it would not be absurd to withhold the information at issue in the circumstances. It explains that while the appellant may be aware of some of this information due to its nature, the affected person created the information at issue and the appellant does not appear to have seen this information in this particular form. The ministry explains that the form employed by the affected person contains his opinion and implicit allegations to which the appellant may not have had prior access. It further explains that the information at issue is clearly not within the appellant's

²² Orders M-444 and MO-1323.

²³ Orders M-444 and M-451.

²⁴ Orders M-444 and P-1414.

²⁵ Orders MO-1196, PO-1679 and MO-1755.

²⁶ Orders M-757, MO-1323 and MO-1378.

knowledge, and the nature of the personal information outlined above weighs in favour of withholding this information despite some overlap with the information the appellant may have had prior knowledge of.

[83] The appellant and affected person did not directly address this issue.

Analysis and findings

[84] Based on my review of the withheld personal information, I find that the absurd result principle does not apply. While the appellant may be aware of the withheld personal information at issue, she is seeking access to it to determine what the affected person told the ESO as part of his claim against her. As such, it is not clear that the withheld personal information is within her knowledge even though it may be.

[85] Therefore, based on the circumstances of this appeal, I find it would not be absurd or inconsistent with the purpose of the section 49(b) exemption to withhold the withheld personal information.

Conclusion - Unjustified invasion of personal privacy

[86] Since withholding the withheld personal information at issue in this appeal would not be absurd, I find that the withheld personal information is exempt from disclosure pursuant to the discretionary exemption at section 49(b) of the *Act*, subject to my findings on the ministry's exercise of discretion below.

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

[87] As I found that the withheld personal information in records 1 and 2 is exempt under section 49(b), I must consider the ministry's exercise of discretion in withholding it.

[88] 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.

[89] 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.

[90] In either case, the IPC may send the matter back to the institution for an

exercise of discretion based on proper considerations.²⁷ The IPC may not, however, substitute its own discretion for that of the institution.²⁸

[91] Relevant considerations may include those listed below. 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; and
 - 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; and
- the historic practice of the institution with respect to similar information.

Representations of the parties

[92] The ministry submits that it exercised its discretion in applying subsection 49(b) appropriately in the circumstances of this appeal and that it considered the following relevant factors in its exercise of discretion:

²⁷ Order MO-1573.

²⁸ Section 54(2).

²⁹ Orders P-344 and MO-1573.

- The purposes of the *Act*, including that exemptions from the right of access should be limited and specific;
- Individuals should have a right to their own personal information;
- Only withholding in full the responsive records that contained the sensitive personal information of the affected person and could not be severed from the personal information of the appellant;
- The privacy of individuals should be protected. The appellant is seeking documents containing sensitive personal details where the disclosure of this personal information could reasonably cause distress to the affected person;
- There is no apparent relevance to a fair determination of rights affecting the appellant. The claim has been decided and the ministry is not aware of any application for review of this decision, which concluded without any order issued to the appellant;
- The context in which the records were created (in the course of providing a personal account of the claim's context); and
- The relationship between the appellant and affected person, and the sensitivity of the issues arising from the claim and in the information.

[93] It also submits that in accordance with section 10(2) of the *Act*, it has disclosed as much of the responsive records as possible without disclosing material that is subject to the personal privacy exemption, in addition to issuing revised decisions and disclosing several records to the appellant, including some in full.

[94] The appellant and affected person did not directly address this issue.

Analysis and findings

[95] After considering the representations of the ministry and the circumstances of this appeal, I find that the ministry did not err in its decision to deny access to the withheld personal information. I am satisfied that the ministry did not exercise its discretion in bad faith or for an improper purpose.

[96] I am also satisfied that the ministry considered relevant factors, and did not consider irrelevant factors in the exercise of discretion. In particular, it is evident that the ministry considered the fact that the withheld personal information contained the appellant's own personal information, and I am satisfied that the ministry provided the appellant with access to as much information as possible by revising its decision during my inquiry and thereby applying the exemption in a limited and specific manner.

[97] Accordingly, I find that the ministry exercised its discretion in an appropriate

manner in this appeal and I uphold it.

ORDER:

I find that the withheld personal information is exempt from disclosure pursuant to section 49(b) and dismiss the appeal.

Original signed by: _____

Valerie Silva
Adjudicator

_____ August 17, 2022