Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2119

Appeal PA-020084-1

Ministry of the Attorney General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant made a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ministry of the Attorney General (the Ministry) – Office of the Children's Lawyer (the OCL) for access to records concerning himself, his former spouse and their children.

The Ministry located 57 pages of responsive records, and granted access to 39 of them. The Ministry withheld the remaining 18 pages on the basis of the exemption at section 49(a) (discretion to refuse requester's own information) in conjunction with sections 13 (advice or recommendations) and 19 (solicitor-client privilege). The Ministry also refused access to these records on the basis of section 49(b) (discretion to refuse requester's own information) in conjunction with section 21 (unjustified invasion of another individual's personal privacy).

The appellant appealed the refusal.

During mediation, the appellant raised the possible application of the exception under section 21(1)(d) (authorized disclosure under another *Act*) in conjunction with the *Children's Law Reform Act*. The issues were not resolved by mediation and the matter subsequently moved to adjudication.

I received representations from the Ministry. The Ministry's representations indicated that portions of some of the records at issue could be severed and disclosed to the appellant so long as the author of the record, the affected person who is the appellant's former spouse, was first provided with an opportunity to make representations about whether or not that information should be disclosed.

As a result, I then sought representations from the affected person, enclosing the same Notice of Inquiry sent to the Ministry and the non-confidential portions of the Ministry's representations. The affected person sent representations in response.

While I sent a copy of the Notice of Inquiry along with the non-confidential representations of the Ministry and the affected person to him, the appellant did not provide representations.

The 18 pages of records at issue can be divided into five distinct documents as described below:

Record 1 - an information sheet (page 6);
Record 2 - one page of handwritten notes (page 7);
Record 3 - a one-page review addendum (page 8);
Record 4 - a file activity sheet (page 9); and
Record 5 - a 14-page intake form (pages 22-35).

CONCLUSION:

Only certain portions of Records 1, 3, 4 and 5 are exempt under section 49 of the *Act*. None of the information in Record 2 qualifies for exemption under this provision.

DISCUSSION:

PERSONAL INFORMATION

The personal privacy exemptions in section 49 apply only to information that qualifies as personal information. Therefore, I must first assess whether the relevant records contain personal information and, if so, to whom that information relates. The term "personal information" is defined in section 2(1) of the *Act*, in part, as recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and 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 [paragraph (h)].

I have considered the representations before me and examined all of the records at issue. I find that Records 1, 3, 4 and 5 all contain information relating to both the appellant and other individuals, including the affected person (the appellant's former spouse), their children and another individual. The information includes their age, sex and family status [paragraph (a)], education, medical, psychiatric, psychological and employment history [paragraph (b)], names and addresses [paragraphs (d) and (h)], as well as, in some cases, the views or opinions of one individual about another individual [paragraphs (e) and (g)].

For similar reasons, I find that Record 2 also contains the personal information of the appellant. However, this record does not contain the personal information of any other individual.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

While 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 exceptions to this general right of access.

Under section 49(a), the institution has the discretion to deny an individual access to his or her own personal information where the exemptions in sections 12, 13, 14, 15, 16, 17, 18, 19, 20, 20.1 or 22 would apply to the disclosure of that information.

Under section 49(b), where a record contains the personal information of both the requester and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

In this case, the Ministry applied both of sections 49(a) and (b) in refusing access to the records. In my analysis, I will consider first the applicability of section 49(a). I will then examine the applicability of section 49(b) and whether the disclosure of the personal information in the records would be an unjustified invasion of the personal privacy of other individuals and therefore exempt from disclosure.

The Ministry relies on section 49(a) in conjunction with sections 13 and 19 to withhold Records 1, 2, 3 and 4. In respect of Record 5, the Ministry applied section 49(a) with section 19 only. As section 19 was applied to all of the records, I will consider it first.

SOLICITOR-CLIENT PRIVILEGE

Introduction

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue

The Ministry submits that the second head of privilege, litigation privilege, applies to all of the records at issue in this appeal.

Litigation privilege

General

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.

> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

In Order MO-1337-I, Assistant Commissioner Tom Mitchinson found that even where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have "found their way" into the lawyer's brief [see *General Accident*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.); *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.)]. The court in *Nickmar* stated the following with respect to this aspect of litigation privilege:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

In Order MO-1337-I, the Assistant Commissioner elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere", and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief". Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation [privilege] under the *Nickmar* test and should be tested under "dominant purpose".

Representations

The Ministry makes the following representations with respect to the applicability of the section 19 exemption:

> The sole purpose for the creation of the documents was existing or reasonably contemplated litigation. The records would assist the Children's Lawyer in making a decision about the involvement of OCL in the ongoing custody/access dispute between two parents.

In-house staff at OCL prepared all the records at pages 6 to 9. The Children's Lawyer is a member of the bar of Ontario, as required by section 89(2) of the *Courts of Justice Act*. As such, he is Crown counsel. The records were prepared by staff at OCL so that the Children's Lawyer, in the exercise of his mandate to provide services to children in custody/access cases, could make a decision about the appropriateness of his involvement in this particular case. The records were therefore all prepared by or for Crown counsel, in contemplation of or for use in the custody/access litigation in which the court requested the Children's Lawyer's involvement.

In the Divisional Court decision in *Ontario (Attorney General) v. Big Canoe* [reported at (2001), 208 D.L.R. (4th) 327, affirmed [2002] O.J. No. 4596 (C.A.)], the Divisional Court considered and interpreted the scope and intent of section 19 of the *Act*. The Court held that "Branch 2" of section 19 constitutes a statutory privilege that is separate and distinct from the common law solicitor-client privilege reflected in "Branch 1" of section 19. Speaking for the Court, Justice Carnwath stated:

> In contrast [to Branch 1], when it comes to Branch 2, there is no issue to "clarify". There is no reference in Branch 2 to the common law principle of solicitor-client privilege (which includes litigation privilege). A head may refuse to disclose a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of, or for use in, litigation. The language is clear and unambiguous. Unlike Branch 1, no external considerations such as a change in the common law, can serve to import a different way of construing the meaning of Branch 2. We find no need to resort to the legislative history of the exemption in order to properly interpret it. As A.P Herbert's Lord Mildew put it – "if Parliament does not mean what it says, it must say so." Thus, if it was not the intention of Branch 2 of s.19 to enable government lawyers to assert a privilege more expansive or durable (the Inquiry Officer found that it was not), it was open to the legislature to say so. (paragraph 32)

The Court held that the language of section 19 is clear: a head has discretion to refuse to disclose "a record that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of, or for use in, litigation". If the conditions of Branch 2 are met, the section 19 exemption applies to the records at issue, even if the records are not subject to the common law solicitor-client privilege. As the Court noted, Branch 2 statutory discretion to refuse disclosure is not to be confused with common law solicitor-client privilege. The Court also held that records exempt under this statutory privilege are exempt for all time, even after the litigation ends.

And, with respect to Record 5 - the intake form – the Ministry makes the following specific submissions:

> . . . Prior to the order of the court requesting the involvement of the Children's Lawyer, the matter before the court was a private custody/access dispute. The parties were asked to submit intake forms to OCL, so that staff could review the forms and determine whether to become involved in the case. If the case is accepted, the intake form is shared with the lawyer or clinical agent assigned to the case, in order to become acquainted with the issues and to know where to contact the parties and child. It is therefore submitted that the intake form is prepared specifically by a parent for the Children's Lawyer, and is used firstly to determine whether to become involved in the litigation, and thereafter, if the case is accepted, to conduct the case on behalf of the child. It is therefore submitted that, because the documents fall within the second Branch of section 19, OCL has the statutory discretion to refuse disclosure.
>
> In Order P-1617, the Commissioner found that an intake form was prepared to determine the best support needed by the child, and that the dominant purpose for an intake form is not litigation. The OCL submits that, in fact, the Children's Lawyer does not supply supportive services to a child, but is involved only for the purposes of litigation. Just as a parent involved in custody/access litigation is not provided with support by his or her counsel, similarly a child who is given legal representation or is being investigated as part of a Children's Lawyer investigation and report is not being provided with support. Accordingly, when a parent prepares an intake form, it is prepared for Crown counsel so that it can be used in the decision-making process about involvement in the ongoing litigation.

The affected person makes no specific representations on this issue. She indicates that she adopts the representations of the Ministry, with one exception not applicable to this issue.

Findings

I do not agree with the Ministry.

The Ministry's submissions are premised on the Divisional Court decision in *Ontario (Attorney General) v. Big Canoe*. Although the outcome of that decision was upheld by the Court of Appeal, the reasons offered by the two courts are different and, in my view, it would be appropriate to follow the reasoning of the Court of Appeal, which differs somewhat from the analysis at the lower court.

In the Court of Appeal decision, Carthy J.A., writing for the court, quotes the analysis of Adjudicator Holly Big Canoe in Order P-1561 and continues as follows [at paragraphs 9, 12-13]:

> Thus her conclusion that once the litigation is completed the protection ends. Her analysis ignores the fact that branch 2 has no temporal limit expressed in s. 19. It is expressed as a permanent exemption just as is solicitor-client privilege.

. . . . .

> In fact [the words of branch 2] describe the work product or litigation privilege which covers material going beyond solicitor-client confidences and embraces such items as are the subject of this proceeding, photographs and a video gathered in the preparations for litigation.

. . . . .

> The error made by the inquiry officer was in assuming the intent to grant litigation privilege to Crown counsel and then reading in the common law temporal limit.

The Court of Appeal judgment equates Branch 2 with litigation privilege, subject to the proviso that, unlike the situation at common law, litigation privilege in the context of section 19 continues to apply even after the litigation has been completed.

Accordingly, the proper analysis for determining whether section 19 applies to documents for which the litigation privilege aspect of the exemption has been claimed is to determine whether they were prepared for the dominant purpose of litigation, or whether the rule in *Nickmar* might apply, exactly as outlined by Assistant Commissioner Mitchinson in Order MO-1337-I.

Based on the material before me, I am not satisfied that the records were produced for the dominant purpose of their being used in the conduct of litigation. Rather, it appears that they were created for the dominant purpose of determining whether the OCL should involve itself at all in the existing dispute, a purpose that is distinct from the actual conduct of the litigation. This conclusion is clear from the very representations of the Ministry. In respect of the information sheet, the handwritten notes, the review addendum, and the file activity sheet, the Ministry states:

> In-house staff at OCL prepared all the records at pages 6 to 9 . . . The records were prepared by staff at OCL so that the Children's Lawyer, in the exercise of his mandate to provide services to children in custody/access cases, could make a decision about the appropriateness of his involvement in this particular case.

In reference to the intake form, the Ministry asserts:

> The parties were asked to submit intake forms to OCL, so that staff could review the forms and determine whether to become involved in the case. If the case is accepted, the intake form is shared with the lawyer or clinical agent assigned to the case, in order to become acquainted with the issues and to know where to contact the parties and child.
>
> . . . . .
>
> . . . Accordingly, when a parent prepares an intake form, it is prepared for Crown counsel so that it can be **used in the decision-making process about involvement** in the ongoing litigation [emphasis added].

Also, I have not been provided with any evidence to suggest that any of the records found their way into a lawyer's brief for litigation as the result of a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor. Therefore, the records do not qualify under the *Nickmar* aspect of litigation privilege.

Since the records at issue do not meet the test for litigation privilege, sections 49(a)/19 do not apply to exempt them from disclosure.

ADVICE/RECOMMENDATIONS

The Ministry applied section 13 to Records 1 to 4.

Introduction

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, the purpose of the exemption is to ensure that:

> . . . persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363 and P-1690].

A number of previous orders have established that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Orders 118, P-348, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order P-883, upheld on judicial review in *Ontario (Minister of Consumer and Commercial Relations) v. Ontario (Information and Privacy Commissioner)* (December 21, 1995), Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)]..)].

In Order P-434 Assistant Commissioner Tom Mitchinson made the following comments on the "deliberative process":

> In my view, the deliberative process of government decision-making and policy-making referred to by Commissioner Linden in Order 94 does not extend to communications between public servants which relate exclusively to matters which have no relation to the actual business of the Ministry. The pages of the record which have been exempt[ed] by the Ministry under section 13(1) [of the provincial *Act*] in this appeal all deal with a human resource issue involving the appellant and, in my view, to find that this type of information is exemptible

> under section 13(1) of the *Act* would be to extend the exemption beyond its purpose and intent.

This approach has been applied in several subsequent orders of this office (Orders P-1147 and P-1299).

In addition, information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 13(1) of the *Act*: see Orders 94, P-233, M-847, P-1709.

Ministry's representations

The Ministry submits the following with respect the application of section 13 to Records 1 to 4 – the information sheet, the one page of handwritten notes, the review addendum and the file activity sheet:

> . . . Those documents contain the deliberations and recommendations of in-house staff, who were considering whether or not to accept the case following the receipt of the court orders requesting the involvement of OCL . . .
>
> The Children's Lawyer is responsible for delivering a province-wide programme on behalf of the Ministry for, among other things, the delivery of services on behalf of children in custody/access disputes. When court orders are received by OCL, it is the responsibility of intake clerks to conduct a preliminary review of the files, and then the Legal Director of Personal Rights and/or the Clinical Coordinator make a decision, on behalf of the Children's Lawyer, on whether to accept a case. There must be free and frank discussions within OCL about whether a case is appropriate for the involvement of the Children's Lawyer. A litigant must not, at a later stage, become privy to these discussions and recommendations, because he or she may conclude, erroneously, in the charged atmosphere that surrounds many of these cases, that OCL has in any way prejudged the position that will ultimately be taken in the case.

The affected person made no independent representations in this regard.

Findings

I agree with the Ministry only in part.

Having regard to the Ministry's representations and having examined these four records, it is clear to me that only small portions of two of them contain information that constitutes advice or recommendations.

Record 1 is an information sheet containing basic personal information about the parents and children and also basic factual detail about the case. The only information that qualifies as advice or recommendations is found in two notations made by the intake clerk who initially

assessed the case. Only this information is exempt from disclosure pursuant to section 13 because it reveals a course of action recommended by the intake clerk.

Similarly in Record 3, after summarising the circumstances and the claims and concerns of the parties, the intake clerk again offers suggestions for a course of action. Only this line would be exempt from disclosure pursuant to section 13 because it clearly constitutes the clerk's advice or recommendation for dealing with the case.

Record 2 does not contain advice or recommendations. The record is comprised of copies of brief notes exchanged by OCL staff. Generally, these notes do not reveal any advice provided by one staff member to another. Questions of clarification are asked but no recommendations are evident. There are some comments recorded which reveal a final decision having been made, presumably by either the Legal Director for Personal Rights and/or the Clinical Coordinator, but the very nature of this comment makes it a direction for action, and not advice or a recommendation for a course of action that may be accepted or rejected in the deliberative process (see Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)).

Record 4 is a file activity sheet. While it does contain personal information relating to both the appellant and another individual as well, it is essentially a docket of duties performed or jobs done in relation to the file. There is no information contained in it that qualifies for exemption under section 13 of the *Act*.

To conclude, section 49(a) in conjunction with section 13 applies to portions of Record 1 and 3. These exemptions do not apply to the remainder of Records 1 and 3, or to any portions of Records 2 and 4.

INVASION OF PRIVACY

Introduction

As noted earlier, section 49 provides an exception to the general right of access to one's own personal information.

Section 49(b) of the *Act* introduces a balancing principle. The institution must look at the information and weigh the requester's right of access to his or her own personal information against another individual's right to the protection of their privacy. If the institution determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the institution the discretion to deny access to the personal information of the requester.

In determining whether the exemption in section 49(b) applies, sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the institution to consider in making this determination.

Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767].

If none of the presumptions in section 21(3) applies, the institution must consider the application of the factors listed in section 21(2), as well as all other considerations that are relevant in the circumstances of the case.

In addition, if any of the exceptions to the section 21(1) exemption at paragraphs (a) through (e) applies, then disclosure would not be an unjustified invasion of privacy under section 49(b).

The Ministry applied section 49(b) in conjunction with section 21 to Records 1, 3 and 5 – the information sheet, the review addendum, and the intake form.

Representations

The Ministry makes several specific claims with respect to the application of sections 49(b) and 21 to Records 1, 3 and 5.

First, the Ministry submits that:

> Section 49(b) would apply to exempt from disclosure the appellant's own personal information because it is so intertwined with the mother and the children's personal information that access to these records could result in an unjustified invasion of their personal privacy.

With respect to the information contained in the Record 5 only, the Ministry claims that there is a presumed unjustified invasion of personal privacy under sections 21(3)(a), (d), and (f).

Additionally, and in general, the Ministry submits that a consideration of the criteria found in sections 21(2)(e), (f), (h) and (i) leads to a conclusion that disclosure of the records constitutes an unjustified invasion of the personal privacy of the other individuals.

Earlier in this process, the appellant contended that section 21(1)(d) of the *Act* applies. Section 21(1)(d) reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > under an *Act* of Ontario or Canada that expressly authorizes the disclosure.

The Act expressly authorizing disclosure is said to be section 20(5) of the *Children's Law Reform Act*, which reads:

> The entitlement to access to a child includes the right to visit with and be visited by the child and the same right as a parent to make inquiries and to be given information as to the health, education and welfare of the child.

Here, the Ministry concedes that the entirety of the fourth page of Record 5 (page 25) could be disclosed as it contains information about the children's health, education and welfare but it reiterates that the balance of the information in this record and the others relates to other individuals as well as the children and would therefore not be available to the appellant pursuant to section 21(1)(d).

The affected person essentially adopts all of the representations made by the Ministry save for the submission that the fourth page of Record 5 can be severed and disclosed. The affected person argues and is concerned that an agreement to waive confidentiality with respect to some of the information could be taken as a waiver with respect to all of the information. The affected person, therefore, submits that no information should be disclosed to the appellant.

Findings

Section 21(1)(d) and 49(b) of the Act, and section 20(5) of the Children's Law Reform Act

Where an access parent seeks information as to the health, education and welfare of the child within the meaning of section 20(5) of the *Children's Law Reform Act*, the section 21(1)(d) exception applies and the record is not exempt under section 21 or section 49(b) to the extent that it contains this type of information [see Orders P-1246, P-1423, P-1617].

Based on the material before me, I am satisfied that the appellant qualifies as an "access parent" within the meaning of the *Children's Law Reform Act*.

In addition, based on my review of the fourth page of Record 5 (page 25), I accept the Ministry's position that the only personal information in that page relating to an individual other than the appellant is information as to the health, education and welfare of the appellant's children. Therefore, this information is not exempt under section 49(a) in conjunction with section 21.

I am also satisfied that none of the remaining information in Record 5 or the other records at issue under this exemption (Records 1 and 3) falls within the scope of section 20(5) of the *Children's Law Reform Act*.

Sections 21(3) and 49(b)

Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. In particular, sections 21(3)(a), (d) and (f) read:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

As already mentioned, once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2). I have examined Record 5 and I find that some of the information in this record is specific personal information about an individual other than the appellant that falls within the scope of paragraphs (a), (d) and (f) of section 21(3). Therefore I find that section 21(3) applies and this information is exempt under section 49(b). However, portions of Record 5 (at page 23) consist of the appellant's personal information only, and this information does not qualify for exemption under section 49(b) and should be disclosed to the appellant.

Sections 21(2) and 49(b)

Sections 21(2)(f) and (h) are factors weighing against disclosure. Those sections read:

> 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,
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence;

In my view, both of these factors apply to most of the personal information in the records, given the context of a highly contested custody/access case. In the absence of any applicable factors weighing in favour of disclosure, I find that most of the personal information in the records is exempt under section 49(b) of the *Act*, with some exceptions as discussed below.

With respect to Record 3, I find that disclosure to the appellant of his own personal information found at the foot of the record would not constitute an unjustified invasion of personal privacy. To continue to withhold this information from the appellant would be an absurdity. It is clear to me, having examined all of the records before me that this information was actually provided to the OCL by the appellant himself. The information is essentially quoted from the appellant's intake form, a record that has already been disclosed to him. In Order M-444, former Adjudicator John Higgins found that non-disclosure of information the appellant in that case had

provided to the police in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders and has been extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).

As for the remainder of the record, I agree with the Ministry that, where one finds the personal information of the appellant, it is so intertwined with the personal information of others that access to this information could result in an unjustified invasion of the personal privacy of others.

With respect to Record 1, the information sheet, the Ministry made the following representations:

> . . . [T]he appellant's name, place of residence, and counsel information, and the children's names, birth dates and ages, on page 6 can be severed and disclosed.

I agree but also find that the rest of the record, save for what is the personal information of others and what I have found exempt pursuant to section 13, should also be disclosed to the appellant as the rest of it is not personal information and therefore can not be exempt under 21 of the *Act*.

Conclusion

I find that section 49(b) applies to portions of Records 1, 3, 4 and 5, but that other portions do not qualify for exemption under that section.

EXERCISE OF DISCRETION

As indicated, section 49 is a discretionary exemption. Therefore, once it is determined that a record qualifies for exemption under one or both of sections 49(a) and (b), the Ministry must exercise its discretion in deciding whether or not to disclose it. An institution's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility to ensure that this exercise of discretion is in accordance with the *Act*. If I conclude that discretion has not been exercised properly, I can order the institution to reconsider the exercise of discretion: see Orders 58, MO-1286-F and MO-1287-I.

The Ministry provided representations about the OCL's exercise of discretion under both sections 49(a) and (b). The Ministry made clear and detailed submissions about the various factors considered by the OCL in deciding not to exercise its discretion in favour of disclosure. It is also clear to me that the OCL was reasonably exercising its discretion when it decided that certain portions of the records, previously withheld, could now be disclosed. While I have disagreed in part with the OCL's application of the exemptions raised, I can find no reason to conclude that the OCL did not properly consider and exercise its discretion.

ORDER:

1. I order the Ministry to disclose to the appellant all of Record 2 and the portions of Records 1, 3, 4 and 5 which have not been highlighted in the copies of these records included with the Ministry's copy of this order. To be clear, the Ministry shall not disclose the highlighted portions of the records. Disclosure shall be made by **March 28, 2003** but not before **March 21, 2003**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the material it discloses to the appellant.

Original signed by: February 28, 2003
Rosemary Muzzi
Adjudicator