

**PERSONAL INFORMATION AND THE  
INVASION OF PRIVACY EXEMPTIONS**

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**by**

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## PERSONAL INFORMATION AND THE INVASION OF PRIVACY EXEMPTIONS

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#### 1. How do *FIPPA* and *MFIPPA* define the term “personal information”?

The definition of the term “personal information” is contained in section 2(1) of the *Act*. It is described as “recorded information about an identifiable individual” and in the paragraphs that follow, the *Acts* go on to list a number of types of information which are considered to be “included” within the ambit of that term.

The perspective of both the Co-ordinator making a decision about access and the Commissioner’s office deciding whether to uphold that decision is the same. When determining whether information contained in a record qualifies as “personal information”, the information must be “about” an identifiable individual. The specified types of information listed in paragraphs (a) to (g) are generally straightforward to identify. With respect to information falling within one or more of these categories of information, it is a matter of determining whether the information relates to an identifiable individual or to an unascertained person.

The category of information in paragraph (h) requires that the record contain not only the name of an individual, but also “other personal information” relating to that person or that the disclosure of the name would then reveal “other personal information” about the individual. If the person’s name is not connected to any other personal information, the name alone will not qualify as “personal information” within the definition.

The question to be asked initially is whether the information in a record falls within the one of the types of information listed in the definition. The second question to be determined is whether the information is also “about” an identifiable individual. In order to qualify as “personal information” the information need not fit into one of the specified types listed in paragraphs (a) to (h). The listed categories in paragraphs (a) to (h) are not to be considered as an exclusive or exhaustive list of all types of personal information.

Information that pertains to an identifiable individual is not necessarily always the “personal information” of that individual for the purposes of the *Act*. The *Act* is intended to protect information that is “about” an individual in his or her personal capacity, as opposed to information that relates to them solely in their professional or employment lives.

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225] and

does not, therefore, qualify as their personal information for the purposes of the privacy protection provisions in the *Act*.

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 [Orders P-1409, R-980015, PO-2225]. Examples of this include information that is of a critical or evaluative nature about an individual's performance of his or her professional or employment duties.

**2. What are the ramifications of a finding that information qualifies as “personal information”?**

Only information that qualifies as “personal information” can be exempt from disclosure under the invasion of privacy exemptions in sections 21(1) [14(1) of *MFIPPA*] and 49(b) [38(b) of *MFIPPA*] of the *Act*. If the information does not meet the definition of personal information, it can only be found to be exempt under one of the other exemptions in the *Act*, or excluded from the scope of the *Act* under one of the exclusions like section 65(6) [54(3) of *MFIPPA*].

**3. Once a finding is made that a record contains personal information, then what?**

If a record contains the personal information of the requester, the decision-maker must determine whether it is exempt from disclosure under the discretionary exemption in section 49(b) [38(b) of *MFIPPA*]. The institution is required to exercise its discretion to either disclose the information sought by the requester or not. This applies whether the personal information in the record relates solely to the requester or to the requester and another identifiable individual.

If the record contains only the personal information of identifiable individual[s] other than the requester, the information in that record may fall within the mandatory exemption in section 21(1) [14(1) of *MFFIPA*]. This exemption prohibits the disclosure of the personal information, unless one of the exceptions listed in section 21(1) applies.

The analysis performed under either section 49(b) or 21(1) is similar. The difference lies in the discretionary nature of section 49(b). An institution has the discretion to disclose the personal information of the requester regardless of the fact that it may qualify for exemption under section 49(b). The same holds true for information that qualifies for exemption under one of the other discretionary exemptions. The institution may decide to exercise its discretion to disclose regardless of the fact that the exemption may apply.

**4. Determining whether disclosure would constitute an unjustified invasion.**

The preamble to section 21(1) contains the prohibition against the disclosure of personal information and then the section goes on to list a number of exceptions to the rule against disclosure of personal information. Most of these exceptions are clearly set out and

relatively straight-forward to apply. However, one of the exceptions, section 21(1)(f), allows for the disclosure of personal information only “if the disclosure does not constitute an unjustified invasion of personal privacy.”

Section 21(3) sets out a number of circumstances where disclosure is presumed to be an unjustified invasion of personal privacy. If one of the presumptions is present, the personal information cannot be disclosed, unless the public interest override in section 23 is established or one of the exceptions in section 21(4) applies. This approach is mandated by the decision in *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.

If none of the presumptions in section 21(3) apply, the institution’s decision-maker must then undertake a balancing exercise using the factors listed in section 21(2), as well as any unlisted considerations, to determine whether disclosure would result in an unjustified invasion of privacy. The considerations favouring disclosure are weighed against those against disclosure to determine this.

Section 21(4) sets out a number of situations where disclosure of personal information does not constitute an unjustified invasion. As is the case with the exceptions in section 21(1)(a) to (e), these are relatively clear and unambiguous and have limited application in the day-to-day administration of the *Acts*.

Effective June 22, 2006, a new limitation was introduced as sections 14(4)(c) [for the municipal *Act*] and 14(4)(d) [for the provincial *Act*]. These provisions come into play in situations where the requester is seeking the personal information of a deceased person who was their spouse or close relative. In such a case, if the institution is of the view that the disclosure is *desirable for compassionate reasons*, it may be disclosed to the spouse or the close relative of the deceased person. The terms for spouse and close relative are defined in section 2(1). This amendment is designed to address situations where family members are denied information about deceased family members and there is some compassionate component which enters into the determination of whether it would be an unjustified invasion of the deceased’s personal privacy to disclose the information. This new provision applies only to requests that are received by institutions after June 22, 2006.

## **5. Conclusion**

To reiterate the distinction between sections 21(1) and 49(b), if the personal information in the record relates to the requester, the institution has a responsibility to exercise its discretion in deciding whether or not to disclose it under section 49(b). It must be remembered that the exemption claimed to apply to personal information is section 21(1) (or 49(b) if the information relates to the requester). The presumptions in section 21(3) and the considerations listed in section 21(2) are there to provide guidance in making the call as to whether the disclosure of the information would result in an unjustified invasion. They are *not* the exemption.