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

ORDER 182

Appeal 890045

Ministry of Government Services

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On January 13, 1989, the Ministry of Government Services (the "institution") received a request for access to all documentation relating to a sexual harassment complaint against the requester.

2. On February 10, 1989, the Deputy Minister for the institution wrote to the requester advising that:

> ...access is granted to all documents with the following exceptions: written notes of interviews by C. Legedza and J. Corbet; note to file from J. Corbet dated December 1, 1988; pages 2 to 8 of the Complaint Investigation Report dated December 20, 1988.
>
> Access is denied pursuant to sections 14, 21, and 49 of the Act because the records contain personal information about other individuals and in addition could interfere with an internal investigation.

3. By letter dated March 1, 1989, the requester appealed the decision of the head to this office. In his letter of appeal he stated that although the investigators indicated that there was no justification for a finding of sexual harassment, they recommended that he should be disciplined for unprofessional conduct.

The requester indicated that his Director instructed him to attend a meeting to answer to the charges of the unprofessional conduct. He states that at the meeting, he was refused proof that he had acted in an unprofessional manner and that he was advised to apply under the Act for any information.

In the requester's view, the information disclosed to him by the institution in response to his request does not support a finding of unprofessional conduct on his part.

4. Notice of the appeal was given to the appellant and the institution on March 8, 1989.

5. The records at issue in this appeal, which were obtained and reviewed by the Appeals Officer, consist of 26 pages of handwritten interview notes taken by two investigators and pages 2 through 8 of the Complaint Investigation Report which summarizes the handwritten interview notes. These records resulted from the investigators' interviews with the person who made the allegations against the appellant and two witnesses who were present during the alleged incident of sexual harassment. The identities of those interviewed are known to the appellant since they were contained in records already disclosed to him.

The institution had previously indicated that the "note to file", which records the contents of a telephone call from one of the persons interviewed to one of the investigators, was exempt from disclosure pursuant to sections 14, 21 and 49 of the Act. However, in its representations, the institution stated that the note was not relevant to the request. I have reviewed this "note" and concur that it is unrelated to the request and therefore not at issue in this appeal.

6. On May 3, 1989, the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") wrote to the appellant to provide the following clarification:

> Subsection 14(1)(b)(d), 2(c).
> This provision applies because the case could have proceeded to the Human Rights Commission and it would not be appropriate to disclose prematurely.
>
> Subsection 49(b).
> Revealing this information would be an unjustified invasion of privacy of individuals who made comments.
>
> Subsection 21(2)(f)(g)(h)(i).
> The comments attributed to the witnesses amount to hearsay and at best are paraphrased. Disclosure could unfairly damage persons referred to in the record.

7. By letters dated June 28, 1989 and July 11, 1989, notice of the appeal was given to the three persons (the "affected persons") who were interviewed and who could be affected by disclosure of the records. The Appeals Officer also attempted to obtain consent from the affected persons for the release of the interview notes.

8. Since consent of the affected persons was not obtained and the institution maintained its position with respect to the records, a mediated settlement was not possible.

9. On August 21, 1989, all parties were notified that an inquiry was being conducted to review the decision of the head. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

10. Representations were received from the institution and two of the affected persons. The person who made the allegations against the appellant advised that she did not wish to make

any representations. I have considered all of the representations in making my Order.

The issues arising in this appeal are as follows:

A. Whether the information contained in the requested records qualifies as "personal information" as defined by subsection 2(1) of the Act.

B. Whether the requested records fall within the exemptions provided by subsections 14(1)(b), (d) and 14(2)(c) of the Act and, if so, whether the exemption provided by subsection 49(a) of the Act applies.

C. Whether the requested records fall within the discretionary exemption provided by subsection 49(b) of the Act.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter balancing privacy protection purpose of the Act. This provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to their own personal information.

It should also be noted that section 53 of the Act provides that the burden of proof that a record or part of a record falls within one of the specified exemptions lies upon the head.

ISSUE A: Whether the information contained in the requested records qualifies as "personal information", as defined by subsection 2(1) of the Act.

In all cases where the request involves access to personal information it is my responsibility, before deciding whether the exemptions claimed by the institution apply, to ensure that the information in question falls within the definition of "personal information" in subsection 2(1) of the Act, and to determine

whether this information relates to the appellant, another individual, or both.

Subsection 2(1) of the Act states:

> "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 where 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;

In my view, the information contained in the records at issue in this appeal falls within the definition of personal information under subsection 2(1). I find that the information contained in the requested records is properly considered personal information either about the appellant or about both the appellant and the affected persons.

Subsection 47(1) of the Act gives individuals a general right of access to:

> (a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and
>
> (b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

However, this right of access under subsection 47(1) is not absolute. Section 49 provides a number of exceptions to this general right of access to personal information by the person to whom it relates.

Section 49 of the Act provides that:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> (a) where section 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; (emphasis added)

> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> ...

In this appeal, the institution has claimed that sections 14, 49(a), and 49(b) of the Act apply to exempt the requested records from disclosure, and I will now consider the application of these exemptions.

ISSUE B: Whether the requested records fall within the exemptions provided by subsections 14(1)(b), (d) and 14(2)(c) of the Act and, if so, whether the exemption provided by subsection 49(a) of the Act applies.

Subsections 14(1)(b) and (d) of the Act read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> ...
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> ...
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
>
> ...

Subsection 14(2)(c) of the Act reads as follows:

> A head may refuse to disclose a record,

...

(c) that is a law enforcement record where the disclosure could reasonably be expected to expose the author of the record or any person who has been quoted or paraphrased in the record to civil liability;

The words "law enforcement" are defined in subsection 2(1) of the Act as follows:

"law enforcement" means,

(a) policing,

(b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and

(c) the conduct of proceedings referred to in clause (b);

In its written representations, the institution stated that:

...the records in question were created during the course of an investigation into alleged sexual harassment in the workplace. They contain written notes of two internal Ministry staff relations officers who interviewed witnesses and compiled a report for management.

...

It is the position of the Ministry that, as a responsible employer, it must be able to conduct internal investigations when complaints of this nature arise. It is submitted that the premature disclosure of statements made by witnesses could be expected to interfere with the investigation of the complaint undertaken by the Ministry. Because of the potential of involvement by the Human Rights Commission, it is submitted that these complaints qualify as a law

> enforcement matter. The Ministry feels the legislators clearly intended this under the definition of "law enforcement" in section 2(1)(b) "investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings".

In Order 157 (Appeal Number 890173) dated March 29, 1990, Commissioner Sidney B. Linden considered an appeal in which the records at issue related to an internal investigation conducted by the Ontario Securities Commission. The investigation centred upon the background and activities of an employee who may have breached his employment contract as it related to the internal security of the Ontario Securities Commission.

Commissioner Linden considered whether an investigation conducted within the context of internal security at an institution satisfies the second part of the law enforcement definition (i.e. investigations or inspections that lead or could lead to proceedings in a court or tribunal...). At page 10 of that Order he stated that:

> The investigation or inspection was not conducted with a view to providing a court or tribunal with the facts by which it would make a determination of a party's rights, but rather, was conducted with a view to providing the employer with information respecting its employee. In this latter instance, the employer can go on to impose an
>
> employment penalty without recourse to a court or tribunal.

I concur with Commissioner Linden's view and similarly I find that, in the circumstances of this appeal, the institution's internal investigation was not conducted with a view to

proceedings in a court or tribunal where a penalty or sanction could be imposed. The investigation which generated the records at issue in this appeal was conducted by the institution's personnel in their capacity as human resources and staff relations specialists. That the complainant might have taken her concerns to the Ontario Human Rights Commission does not alter my view of the nature of the institution's investigation. While sexual harassment is a prohibited ground of discrimination under Ontario's Human Rights Code, this investigation was not conducted by or on behalf of the Ontario Human Rights Commission.

Therefore, it is my view that the investigation which generated the records at issue in this appeal does not satisfy the definition of "law enforcement" as found in subsection 2(1) of the Act. As such, subsections 14(1)(b), (d) and 14(2)(c) cannot apply to exempt any of the records from disclosure. Each of these exemptions requires the satisfaction of this definitional threshold; subsections 14(1)(b) and (d) protect investigations undertaken with respect to actual or possible "law enforcement proceedings", and "confidential sources of information in respect of law enforcement matters", respectively. Subsection 14(2)(c) protects a law enforcement record where the disclosure may expose persons to civil liability.

Accordingly, I do not uphold the head's decision to exempt from disclosure any records pursuant to subsections 14(1)(b), (d) and 14(2)(c) and as a result the head is unable to rely on subsection 49(a).

ISSUE C: Whether the requested records fall within the discretionary exemption provided by subsection 49(b) of the Act.

I found in Issue A of this Order, that the information contained in the records at issue qualified as personal information of the appellant and the affected persons. I must now determine whether the records fall within the exemption provided by subsection 49(b).

Subsection 49(b) of the Act states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> ...
>
> (b) where the disclosure would constitute an unjustified invasion of another individual's personal privacy;
>
> ...

In Order 37, (Appeal Number 880074), dated January 16, 1989, Commissioner Linden stated at page 9:

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

One of the affected persons provided this office with a copy of a letter to the Co_ordinator in which he consented to the release of the handwritten interview notes and typed summary. He commented that "the notes reflect generally the content of the interview, however, I do not recall the last sentence found on Page 6 of the typed notes." This witness had the same comment for line 16 and 17 on Page 2 of the handwritten notes.

Another affected person indicated that the decision to disclose the records to the appellant would be left to this office.

The individual who made the allegations of sexual harassment against the appellant indicated that she did not wish to make representations to this office. She had previously declined to consent to the release of her personal information.

Subsection 21(2) of the Act provides some guidance in determining what constitutes an "unjustified invasion of personal privacy".

In his letter of appeal, the appellant indicates that he was called to a meeting with his Director to "answer charges of unprofessional conduct". When the appellant requested proof of the "charges", he was advised to make a request under the Act. The appellant's ability to respond to the "charges", in his view, is dependent upon disclosure of the records at issue in this appeal. This particular situation is addressed by the wording of subsection 21(2)(d) of the Act which reads as follows:

> 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,
>
> ...
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> ...

The institution relied upon subsections 21(2)(f)(g)(h)(i) of the Act. These subsections provide that:

> 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;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
>
> (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In support of its position, the institution submitted that:

> The comments attributed to the witnesses amount to hearsay and at best are paraphrased. Disclosure could unfairly damage persons referred to in the record.

The institution further submitted that:

> One of the great difficulties that employers face in these situations is getting the complainants to come forward and stand by their complaints. Usually, circumstances dictate that confidence be assured before the witnesses will provide necessary information required for management to investigate a complaint. On balance, the head is mindful of the fact that persons could be victims of all sorts of malicious allegations and each case has to be viewed independently. It would seem appropriate that, where the complaint is likely to result in disciplinary action, the employee be granted as much information as possible to support the action.
>
> It is submitted that this is not the case for this request and the denial of the personal information pursuant to subsection 49(b) is supported by subsection 21(2)(h) of the Act.
>
> This submission is supported by Order 37.

The institution referred to Order 37 supra in which Commissioner Linden dealt with an employment_related complaint. At page 11 of that Order, Commissioner Linden stated:

> In applying the subsection 49(b) balancing test to the circumstances of this appeal, I am mindful of the fact that the records under consideration were originally produced in the course of an employment_related complaint concerning the appellant. In such situations, fairness demands that the person complained against be given as much disclosure of the substance of the allegations as is possible. The degree of disclosure would depend on the circumstances of each particular case, but should be more extensive if the complaint is likely to result in discipline. In this case, the head did disclose a significant portion of the records, including a

description of the substance of the complaints made against the appellant. In this case, the complaints did not proceed to the point where there was any likelihood of discipline, and, in my

view, the degree of disclosure by the head was fair in the circumstances.

This is the second Order in which access to records created in the context of investigations into allegations of sexual harassment has been an issue. As the nature of such investigations raises concerns from both the access and privacy perspectives, I would like to comment on the way in which they are carried out.

In my view, investigations into allegations of sexual harassment must be carried out with meticulous fairness to all involved - the complainant, the person complained against and any witnesses who may be interviewed. The potential consequences of such an investigation are serious for both the person making the allegation as well as the person against whom the allegation is made.

Improperly dismissing the valid allegations of an individual who has been sexually harassed may cause the complainant to be seen by others in the workplace as having made unwarranted accusations. Furthermore, others with similarly valid allegations may be discouraged from advising their employer and requesting an investigation.

In my view, an improper finding of sexual harassment can have significant consequences for the person against whom the finding is made. It may impair the ability of that person to advance in his or her employment or in fact prevent him or her from obtaining employment.

If witnesses are interviewed, it is essential that their statements be recorded as fully and accurately as possible. Each witness should be given the opportunity to review his or her statement to allow for the correction of any errors or omissions.

In this particular appeal, the institution submitted that, "The comments attributed to the witnesses amount to hearsay and at best

are paraphrased". Yet, I am drawn to the conclusion that the institution was prepared to make a decision with respect to the validity of the allegations based on what it has described as "hearsay" evidence.

As previously indicated, the appellant was called to a meeting to address "charges of unprofessional conduct". When he requested proof of these "charges" he was advised to request this information under the Act. His request did not result in full disclosure, as is evident by this appeal.

It has not been established to my satisfaction that disciplinary action against the appellant is not being contemplated. In the circumstances, I find that the personal information contained in the records at issue in this appeal is relevant to a fair determination of the appellant's rights.

In reaching my decision, I am mindful of the fact that the personal information of the affected persons relates to allegations within an employment context. I acknowledge that disclosure of the personal information of the affected persons may invade their privacy to a certain degree. However, the Act

requires that the personal information not be disclosed when doing so would constitute an "unjustified invasion of personal privacy". (emphasis added)

In balancing the interests of the appellant in disclosure of the personal information and the interests of the affected persons in the protection of their privacy, I find that disclosure of the personal information i.e. the handwritten interview notes and pages 2 through 8 of the Complaint Investigation Report, would not constitute an unjustified invasion of the personal privacy of the affected persons.

Accordingly, I order the institution to disclose the records to the appellant. I also order that the institution not release these records until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial

review of my decision before the records are actually released. Provided notice of an application for judicial review has not been served on the Office of the Information and Privacy Commissioner/ Ontario and/or the institution within this thirty (30) day period, I order that the records be released within thirty_five (35) days of the date of this Order.

The institution is further ordered to advise me in writing within five (5) days of the date on which disclosure was made. The said notices should be forwarded to the attention of Maureen Murphy, Registrar of Appeals, Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:
Tom Wright
Assistant Commissioner

June 27, 1990
Date