



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

ORDER P-363

Appeal P-911166

Ontario Human Rights Commission



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ORDER

BACKGROUND:

The requester filed a complaint with the Ontario Human Rights Commission (the Commission) alleging that his employer had discriminated against him on the basis of race, contrary to the provisions of the Ontario Human Rights Code (the Code).

Following an investigation, the Commission decided that the evidence did not warrant the appointment of a Board of Inquiry to hear the complaint.

The requester later sought access under the Freedom of Information and Protection of Privacy Act (the Act), to the material in the Commission's file.

The Commission released some of the material to the requester and denied access to the remainder, either in whole or in part, claiming sections 13(1), 14(2)(a), 21(3)(b) and (d), and 49(a) and (b) of the Act. The requester appealed the Commission's decision.

During mediation, the Commission provided the appellant with additional records, and also raised sections 14(1)(d) and 17(1)(b) as new exemption claims.

Further mediation of the appeal was not possible, and notice that an inquiry was being conducted to review the Commission's decision was sent to the appellant and the Commission. Written representations were received from the Commission, but not from the appellant.

A list of the records at issue in this appeal, together with the corresponding exemptions claimed by the Commission, is attached to this order as Appendix A.

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether any of the information contained in the records qualifies as "personal information", as defined by section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.
- C. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.
- D. Whether the discretionary exemption provided by section 14(1)(d) of the Act applies.

- E. Whether the discretionary exemption provided by under section 13(1) of the Act applies.
- F. If the records contain the personal information of the appellant. and the answer to any of Issues C, D or E is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.
- G. If the records contain the personal information of individuals other than the appellant, whether the discretionary exemption provided by section 49(b) of the Act applies.
- H. Whether the mandatory exemption provided by section 17(1)(b) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

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

In all cases where the request involves access to personal information, I must ensure that the information falls within the definition of "personal information" as set out in section 2(1) of the Act, and determine whether this information relates to the appellant, another identifiable individual or both.

Section 2(1) of the Act states, in part:

"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 view 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;

I have examined the records and, in my view, all of the information contained in them, with the exception of the information on page 2 of Record 6 and page 5 of Record 8, qualifies as personal information of either the appellant or other identifiable individuals.

The Commission submits that Records 1 and 2 contain the personal information of both the appellant and other identifiable individuals, and that the information is "so intertwined that any attempt to disclose the former would necessarily reveal the latter". I do not agree. In my view, these records can be divided into two distinct parts, the first containing the personal information of the appellant, and the second containing the personal information of other individuals. For the purposes of this order, I will refer to the parts containing the personal information of the appellant as the "A" excerpts, and the parts containing the personal information of other individuals as the "B" excerpts (eg. "excerpt A of record 1" refers to the part of Record 1 which contains only the appellant's personal information). I have attached highlighted copies of Records 1 and 2 to the copy of this order provided to the Commission, which indicate the A and B excerpts for each record. The A excerpts are highlighted in blue, and the B excerpts in yellow.

I find that Record 5, page 1 of Record 6, and the A excerpts from Records 1 and 2 contain the personal information of the appellant; and Records 3, 4, 7, page 4 of Record 8, and the B excerpts from Records 1 and 2 contain the personal information of individuals other than the appellant.

ISSUE B: If the answer to Issue A is yes, whether the mandatory exemption provided by section 21 of the Act applies.

In my discussion of Issue A, I found that Records 3, 4, 7, page 4 of Record 8, and the B excerpts from Records 1 and 2 contain the personal information of individuals other than the appellant.

Once it is has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances. Specifically, section 21(1)(f) reads:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and 21(3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to be an unjustified invasion of personal privacy. In its representations the Commission specifically relies on sections 21(3)(b) and (d) which read as follows:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

- (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;
- (d) relates to employment or educational history;

The Commission submits that sections 21(3)(b) and (d) apply to all of Records 3, 4, 7 and 8. Because I have determined that the B excerpts from Records 1 and 2 contain the personal information of other individuals, I will also consider whether the B excerpts qualify for exemption under this section. Also, regarding Record 8, I will restrict my consideration to page 4, since it is the only part of Record 8 which contains personal information.

Excerpt B of Record 1 consists of the names of individuals who worked with the appellant. These names were provided to the Commission by the appellant during the course of investigating his complaint. All references in excerpt B to these co-workers are preceded by statements like "Mr. [name of appellant] stated..." or "Complainant said...". Record 7 is a copy of a letter to the appellant from the Commission. In the circumstances of this appeal, I find that the disclosure of the names of co-workers contained in excerpt B of Record 1, which were provided by the appellant, would not constitute an unjustified invasion of the personal privacy of these individuals. I also find that the disclosure of Record 7, which has previously been provided in its entirety to the appellant, would not constitute an unjustified invasion of the personal privacy of any individual referred to in the record. I find that excerpt B of Record 1 and Record 7 do not qualify for exemption under section 21 of the Act.

In my view, the remaining records - Records 3, 4, page 4 of Record 8, and excerpt B from Record 2 - contain information that was "compiled as part of an investigation into a possible violation of law", and the requirements for a presumed unjustified invasion of the personal privacy under section 21(3)(b) have been established.

Once it has been determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must then consider whether any other provision of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the records do not contain any information relevant to section 21(4).

I have also carefully considered the provisions of section 21(2) and, in my view, there is no combination of factors listed in section 21(2) which would operate to rebut the presumption of an unjustified invasion of personal privacy. Therefore, the presumption raised by section 21(3)(b) of the Act applies, and disclosure of the information contained in Records 3, 4, page 4 of Record 8 and excerpt B from Record 2 would constitute an unjustified invasion of the personal privacy of the individuals other than the appellant, and should not be released.

ISSUE C: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.

The Commission claims section 14(2)(a) applies to Records 1, 2 and 6.

Section 14(2)(a) reads:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement,
inspections or investigations by an agency which has the

function of enforcing and regulating compliance with a law;

For a record to qualify for exemption under section 14(2)(a), each part of the following three part test must be satisfied:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

In Order 200, Commissioner Wright clarified the type of record which would satisfy the first part of the section 14(2)(a) test:

The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

Having reviewed the information contained in Records 1, 2 and 6, I am of the opinion that none of these three records fall within the definition of "report".

Record 1 is a "Fact Sheet" and "Intake Report" completed by the human rights officer assigned to the appellant's case, together with notes of a telephone conversation between the officer and the appellant, made at the initial stage of the investigation. In my view, the information in Record 1 is more accurately characterized as recordings of fact rather than a formal statement of the results of the investigation, and I find that this record does not qualify as a "report".

Similarly, with respect to Record 2, although it is labelled as "Investigation Reports" by the Commission, the information contained in this record consists of memos of telephone conversations and interviews conducted by the human rights officer who investigated the appellant's complaint. It does not contain "a factual statement or account of the results of the collation and consideration of information", and I find that it does not qualify as a "report" for the purposes of section 14(2)(a).

Turning to Record 6, the Commission submits that it is a final report prepared for the Commission's decision makers to consider in deciding whether to appoint a Board of Inquiry. This record, which has been referred to by the Commission as the "Case

Disposition Form", contains an outline of the allegations raised by the appellant, the recommendations of staff, as well as certain information relating to the disposition of the case. (The actual case analysis is contained in Record 8, and has been provided to the appellant, subject to some severances.) In my opinion, Record 6 does not contain an analysis of the results of the investigation and is not a "report" as contemplated by section 14(2)(a).

In summary, I find that the discretionary exemption provided by section 14(2)(a) does not apply to Records 1, 2 and 6.

Because no other exemptions have been claimed with respect to Record 1, it should be released to the appellant in its entirety.

ISSUE D: Whether the discretionary exemption provided by section 14(1)(d) of the Act applies.

The Commission submits that section 14(1)(d) applies to Record 2. That section states:

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

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;

In order for Record 2 to qualify for exemption under this section, the matter which generated the record must satisfy the definition of the term "law enforcement" as found in section 2(1) of the Act. It has been established in a number of previous orders that investigations into complaints made under the Code are properly considered law enforcement matters and proceedings [Orders 89, 178, 208 and P-253]. I find that Record 2 was similarly generated in the course of a law enforcement matter.

As to whether it is reasonable to expect that disclosure of Record 2 would reveal the identity of a confidential source, the Commission submits the following:

It is the procedure of the OHRC to conduct interviews in a confidential setting. In the early years, witnesses were also given assurances of confidentiality within the framework of the Code. The identities of

witnesses were withheld from both complainants and respondents. The rationale for this was to avoid the possibility of undue influence by either party on the testimony of witnesses. Often, the willingness and candidness of witnesses to speak for or against a complainant or respondent in a human rights investigation depends on the extent of confidentiality provided by the officer.

Under my discussion of Issue B, I found that excerpt B of Record 2, which includes the names of persons interviewed by the human rights officer, qualifies for exemption pursuant to section 21 of the Act. In my view, release of the remainder of this record - excerpt A - would not disclose the identity of witnesses who provided statements during the course of the Commission's investigation, and I find that section 14(1)(d) does not apply to excerpt B of Record 2.

Because no other exemptions have been claimed with respect to excerpt A of Record 2, it should be released to the appellant.

ISSUE E: Whether the discretionary exemption under section 13(1) of the Act applies.

The Commission submits that section 13(1) applies to Records 5, 6 and page 5 of Record 8.

Section 13(1) of the Act states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and 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 [Order 118].

The Commission submits the following:

All the records cited in this paragraph [Records 5 and 6] clearly contain a recommended course of action given by Commission staff to the decision makers within the OHRC.

It is a fact of life that staff would not feel free and open to express their minds in writing on specific issues if they were aware that their advice or recommendations were subject to possible public scrutiny. Such "chilling effect" is precisely the rationale behind the exemption. In our opinion, the Commissioners must have the benefit of staff advice which is candid, direct and to the points.

Record 5 consists of a July 18, 1980 memo from the investigating human rights officer to her supervisor, together with the supervisor's reply, dated August 14, 1980. The July 18, 1980 memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the August 14, 1980 response, it just outlines the supervisor's direction on how the investigation should proceed. It does not contain any information that can properly be characterized as "advice or recommendations" as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission's governing legislation. In my view, the August 14, 1980 response also does not qualify for exemption under section 13(1).

With respect to Record 6, I find that disclosure of the title of the form and the bottom third of the document (commencing with the section entitled, "Investigating Officer") would reveal the advice of a public servant, and is properly exempt under section 13(1). Because this same information is found on page 5 of Record 8, I find that page 5 of Record 8 also qualifies for exemption under section 13(1). The remainder of Record 6 does not contain advice or recommendations and therefore falls outside the scope of section 13(1). I have attached a highlighted copy of Record 6 to the copy of this order provided to the Commission, which indicates the portions of page 1 which should not be released.

In summary, I find the discretionary exemption provided by section 13 of the Act applies only to parts of page 1 of Record 6 and page 5 of Record 8.

Because no other exemptions have been claimed with respect to Record 5 and page 2 of Record 6, they should be released to the appellant.

ISSUE F: If the records contain the personal information of the appellant, and the answer to any of Issues C, D or E is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.

Under Issue A, I found that Record 8 and page 1 of Record 6 contain the personal information of the appellant. Under Issue E, I found that parts of page 1 of Record 6 and page 5 of Record 8 qualify for exemption under section 13 of the Act.

Section 49(a) provides an exception to the general rule that a requester has a general right of access to his or her own personal information in the custody or control of an institution. It provides the Commission with the discretion to refuse to disclose to the appellant his own personal information where section 13 applies.

I have reviewed the Commission's reasons for exercising discretion in favour of denying the requester access to parts of page 1 of Record 6 and page 5 of Record 8, and I find nothing improper in the circumstances of this appeal.

Because of the way in which I have disposed of Issues A through F, it is not necessary for me to address Issues G or H.

ORDER:

1. I uphold the Commission's decision not to disclose Records 3, 4 and 8, excerpt B from Record 2, and parts of page 1 of Record 6 (the title of the document and the bottom third of the document commencing with the section entitled, "Investigating Officer").
2. I order the Commission to disclose to the appellant Records 1, 5 and 7 in their entirety. I also order the Commission to disclose to the appellant excerpt A of Record 2 and the remainder of Record 6. I have attached a highlighted copy of Record 6 to the copy of this order being sent to the Commission, which identifies the part of the document which should not be released. I have also attached highlighted copies of Records 1 and 2 which indicate the passages referred to throughout this order as excerpts A and B.
3. I order the Commission to disclose the records referred to in Provision 2 within thirty five (35) days of the date of this order, and not earlier than the thirtieth (30) day following the date of this order.
4. In order to verify compliance with the order, I order the head to provide me with a copy of the records which are disclosed to the appellant, only upon my request.

Original signed by: _____ November 4, 1992
Tom Mitchinson
Assistant Commissioner

Appendix A: List of Documents and Corresponding Exemptions

	Document	Exemption Cited by OHRC
1.	pages 4 and 5 of OHRC Fact Sheet - Initial Intake Report	Sections 14(2)(a), 49(a), (b) and 21(3)(b)(d)
2.	OHRC Investigation Reports	Sections 14(1)(d), 14(2)(a), 21(3)(b), (d) and 49(a) and (b)
3.	Personnel Records of Two Named Third Parties	Sections 17(1)(b) and 21(3)(b) and (d)
4.	Personnel Records of Identifiable Third Parties	Sections 17(1)(b) and 21(3)(b) and (d)
5.	page 1 of OHRC Interstaff Memos	Section 13(1)
6.	OHRC Case Disposition Form	Sections 13(1), 14(2)(a) and 49(a)
7.	Information severed from page 2 of OHRC Letter to the Appellant dated October 23, 1980	Sections 21(3)(b) and (d) and 49(b)
8.	Information severed from pages 4 and 5 of OHRC Case Analysis Sheet	Sections 21(3)(b) and (d) and 49(b) for page 4 severances and section 13(1) for page 5 severance.