



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

ORDER P-322

Appeal 900351

Ontario Human Rights Commission



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ORDER

BACKGROUND:

The appellant was a student at a named university (the university) from September 1987 to May 1988. He filed a complaint with the Ontario Human Rights Commission (the institution) alleging that the university (the respondent in his complaint) had discriminated against him because of his citizenship and place of origin by failing him in a number of courses and giving him low marks in others.

The appellant wrote to the institution requesting access to:

- (1) four letters between the institution and the Ecole Polytechnique of Montreal (a previous educational institution attended by the appellant);
- (2) investigation notes of the Human Rights Officer, consisting of telephone interviews of five witnesses;
- (3) information provided by the university in the context of the appellant's human rights complaint;
- (4) a letter from the institution's Chief Commissioner to the appellant;
- (5) an internal memorandum;
- (6) a facsimile transmission;
- (7) the Final Report of the investigation, dated March 19, 1990; and
- (8) the institution's Annual Reports for 1988, 1989 and 1990.

The institution granted access to the letter from the institution's Chief Commissioner, the investigating officer's Case Summary (Final Report), and the Annual Reports for 1987-88 and 1988-89. The Annual Report for 1989-90 was provided to the appellant after publication.

The institution denied access to the correspondence between the institution and the Ecole Polytechnic of Montreal, and the documents submitted by the university on March 2, 1990, claiming sections 14(1)(a) and (b) of the Act. Access was also denied to the internal memorandum, the facsimile transmission and the investigating officer's interview notes under sections 14(1)(a) and (b) and 14(2)(a) of the Act.

The appellant appealed the institution's decision to this office.

During mediation, the institution disclosed three letters written by the appellant to the university, one memorandum, and one letter from the university to the appellant. The institution also withdrew the section 14(2)(a) exemption claim for the interview notes. Finally, the institution's Freedom of Information Co-ordinator clarified that it had intended to cite the exemptions under sections 49(a) and (b) of the Act with respect to the personal information of the appellant and other individuals contained in the records.

The records at issue in this appeal have been listed in Appendix A to this order, under the following groupings:

- Group A** Four letters between the institution and the Ecole Polytechnique of Montreal;
- Group B** Records provided by the university to the institution on March 2, 1990;
- Group C** Investigation notes, relating to the appellant's human rights complaint, consisting of telephone interviews of five witnesses and two internal memoranda

Settlement of this appeal was not possible, and the matter proceeded to inquiry. Notices of Inquiry were sent to the institution and the appellant, together with an Appeals Officer's Report, intended to assist the parties in making their representation concerning the subject matter of the appeal. Representations were received from the institution and the appellant.

During the course of this inquiry, the investigation into the appellant's human rights complaint was completed. As a result, the institution reconsidered its position regarding disclosure of the records and withdrew its claims under sections 14(1)(a) and (b) of the Act. The institution agreed to disclose all of the records from Group A; Records 6, 7, 8, 10, 11, 16, 17, 18, 19, 20, 22, 23 and 24 and parts of Records 5, 9, 12, 13, 14 and 15 from Group B; and Record 30, with the exception of the second page, from Group C; but raised section 14(2)(c) of the Act as a new exemption with respect to the remaining records. The second page of Record 30 is not responsive to the appellant's request and therefore is not at issue in this appeal and should not be disclosed.

The institution and the appellant were given an opportunity to submit representations on the new section 14(2)(c) issue, and both parties did so. The parties also provided representation on the application of section 21 of the Act, which the Appeals Officer had found to be relevant in the circumstances. Notices of Inquiry were also sent to four individuals whose interests might be affected by the release of certain records (the affected persons). Three of the affected persons submitted representations.

The records or parts of records that remain at issue in this appeal are: the remaining parts of Records 5, 9 and 12-15, and Records 21 and 25 from Group B; and Records 26-29, 29a and 31 from Group C.

PRELIMINARY MATTERS:

The appellant has raised a number of issues which I will address briefly before proceeding with the substantive issues in this appeal.

On a number of occasions during the course of this appeal, the appellant raised issues relating to the way in which his human rights complaint was handled by the institution, and the information disclosure practices of the university.

It should be noted that my jurisdiction in this appeal is to determine whether or not the provisions of the Act have been properly applied by the institution. Issues relating to the human rights complaint system fall outside my jurisdiction and will not be addressed in this order. Similarly, the university is not an institution covered by the Act, and issues relating to its disclosure practices fall outside the scope of this appeal.

The appellant claims that the institution improperly disclosed information about him to the Ecole Polytechnique of Montreal, and provided documents from his investigation file to that educational institution. It is the practice of this office to investigate all complaints regarding allegations of unauthorized disclosure of personal information by an institution. The appellant's complaint was forwarded to the Compliance Department of this office for investigation. That investigation has been completed, and the findings have been forwarded to the appellant.

The appellant also claims that the institution has custody of examinations which he and other students wrote at the university, and that these records should have been included in the package of records forwarded by the university to the institution on March 2, 1990.

Examinations were not specifically mentioned in the appellant's request letter or in his letter of appeal, and no examinations were included in the set of records provided to this office by the institution. The institution submits that examination records were never obtained from the university and, therefore, are not in its custody or control. The appellant does not accept this. He submits that he had been advised "indirectly" that the institution received these documents from the university, but provides no evidence in support of his position.

Having examined all submissions provided by the institution on this issue, I am satisfied that the institution does not have custody or control of any examination records.

ISSUES/DISCUSSION:

The issues in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

- B. Whether any of the records qualify under the discretionary exemption provided by section 49(b) of the Act.
- C. Whether any of the records qualify under the mandatory exemption provided by section 21 of the Act.
- D. Whether any of the records qualify under the discretionary exemption provided by section 14(2)(c) of the Act.
- E. If the answer to Issues A and D is yes, whether the discretionary exemption provided by section 49(a) applies.

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 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 falls within the definition of "personal information" as set out in section 2(1) of the Act, and to determine whether this information relates to the appellant, another individual or both.

Section 2(1) of the Act reads, in part, as follows:

"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, all of the information contained in the records falls within the definition of personal information under section 2(1) of the Act. I find that the remaining parts of Record 5, and Records 21, 25, 26, 27, 28, 29, 29a, and 31 contain the personal information of the appellant and other individuals; and the remaining parts of Records 9, 12, 13, 14 and 15 contain the personal information of other individuals only.

ISSUE B: Whether any of the records qualify under the discretionary exemption provided by section 49(b) of the Act.

I have found under Issue A that the remaining parts of Record 5, and Records 21, 25, 26, 27, 28, 29, 29a and 31 contain the personal information of both the appellant and other individuals. Section 47(1) of the Act gives individuals a general right of access to personal information in the custody or control of institutions. However, this right of access is not absolute. Section 49(b) provides an exception to this general right of disclosure of personal information to the person to whom the information relates. Specifically, section 49(b) provides that:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Record 5 is a memo from the Dean of Science and Engineering to a Staff Relations Officer dated March 1, 1990, and lists the documents being provided to the Ontario Human Rights Commission in respect of the appellant's complaint. The last three paragraphs have been severed.

Record 21 is a memo dated March 29, 1988 from a Technologist to the Chairman of the Department of Chemistry. The memo concerns the appellant's complaint against the Technologist. Record 25 is a memo from the Dean of Science and Engineering to the Director of Student Services, dated July 26, 1988. Records 26, 27, 28, 29 and 29a consist of information provided to the Human Rights Officer by witnesses, and includes their names and telephone numbers. Record 31 is a memo to file dated February 13, 1990, from a Sudbury Human Rights Officer. All of these records have been withheld in their entirety.

Section 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 individuals's personal privacy, then section 49(b) gives him discretion to deny access to the personal information of the requester.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of another individual's personal privacy.

Section 21(3) of the Act sets out a list of the types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The institution claims that these records contain the type of information described in section 21(3)(b).

Section 21(3)(b) reads as follows:

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

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;

It has been established in a number of previous orders that investigations into complaints made under the Human Rights Code (the Code) are properly considered law enforcement matters and proceedings [Orders 89, 178, 208, P-253]. If there has been a violation, the Code provides that a penalty or sanction could be imposed. In my view, the personal information contained in the records was compiled and is part of an investigation into a possible violation of law and accordingly, the requirements for a presumed unjustified invasion of the personal privacy of other individuals 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 satisfied, I must then consider whether any provisions 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, these records do not contain any information that pertains to section 21(4).

In Order 20, former Commissioner Linden stated:

... a combination of circumstances set out in section 21(2) might be so compelling as to outweigh a presumption under section 21(3). However, in my view such a case would be extremely unusual.

Section 21(2) provides some criteria for the head to consider in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. While not referring to it specifically, the appellant's representations make reference to the substance of section 21(2)(d), which reads:

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,

the personal information is relevant to a fair determination of rights affecting the person who made the request;

In Order P-312, I established a four-part test which must be satisfied in order for section 21(2)(d) to be regarded as a relevant consideration. To satisfy this test, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

In the circumstances of this appeal, I find that the appellant has not established these requirements. The proceeding under the Code has been completed, and no other legal right has been identified. Therefore, I find that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

In weighing the appellant's right of access to his own personal information against the right to privacy of other individuals, I am satisfied that the head has exercised her discretion in accordance with proper legal principles and I will not alter it on appeal.

Therefore, I uphold the decision of the head to deny access to the remaining parts of Record 5, and Records 21, 25, 26, 27, 28, 29, 29a and 31 under section 49(b) of the Act. In my view, the personal information of the appellant which is contained in these records is so interwoven with the personal information of other individuals that no reasonable severance is possible.

ISSUE C: Whether any of the records qualify under the mandatory exemption provided by section 21 of the Act.

I found under Issue A that information contained in parts of Records 9, 12, 13, 14 and 15 qualifies as personal information related to individuals other than the appellant.

Record 9 is a memorandum from the Chairman of the Department of Chemistry to the Chairman of the Senate Appeals Committee, dated August 22, 1988, and discusses the marking of the appellant's examination paper. The last paragraph has been severed, because it contains the personal information of another student.

Records 12, 13, 14 and 15 consist of student mark lists identifying the course, the name of the professor, university and location, the term, the names of all students who took the examinations, their student numbers and final marks. The names of all other students, their student numbers and final marks have been severed from the record.

Once it has been determined that a record or part of a record contains personal information, section 21 of the Act prohibits the disclosure of this personal information to any person other than the individual to whom it relates, except in certain circumstances. One such circumstance is contained in section 21(1)(f) of the Act which 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.

Guidance is provided in sections 21(2) and (3) of the Act with respect to the determination of whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

The institution claims section 21(3)(b) as the basis for denying access. As stated earlier in this order, in my view, the personal information contained in the records was compiled and is part of an investigation into a possible violation of law and, accordingly, the requirements for a presumed unjustified invasion of the personal privacy of other individuals under section 21(3)(b) have been established.

Section 21(4) is not relevant with respect to these records and, for the same reasons discussed under Issue B, I find that no combination of circumstances under section 21(2) exists to rebut the presumption established under section 21(3)(b).

In my view, the presumed unjustified invasion of personal privacy of individuals other than the appellant has not been rebutted. Accordingly, I uphold the head's decision to withhold the information in the remaining parts of Records 9, 12, 13, 14 and 15.

Because I have found that the remaining parts of Record 5, and Records 21, 25, 26, 27, 28, 29, 29a and 31 are properly exempt under section 49(b), and the remaining parts of Records 9, 12, 13, 14 and 15 are properly exempt under section 21, it is not necessary for me to address Issues D and E.

ORDER:

1. I uphold the head's decision not to disclose Records 21, 25, 26, 27, 28, 29, 29a, and 31, the last three paragraphs of Record 5, the last paragraph of Record 9, and the names, student numbers and final marks of other students contained in Records 12, 13, 14 and 15. The second page of Record 30 is not responsive to the appellant's request and should also not be disclosed.
2. I order the head to disclose to the appellant Records 1, 2, 3, 4, 6, 7, 8, 10, 11, 16, 17, 18, 19, 20, 22, 23 and 24 in their entirety. I also order the head to disclose to the appellant Record 5, with the exception of the last three paragraphs; Record 9, with the exception of the last paragraph; Records 12, 13, 14 and 15 except for the names, student numbers and final marks of the other students; and the parts of Record 30 which are responsive to the appellant's request.
3. I order the head to disclose the records referred to in Provision 2 within fifteen (15) days of the date of this order, and to advise me in writing, within five (5) days from the date of disclosure, of the date on which disclosure was made. The notice covering disclosure should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

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: _____ June 25, 1992
Tom Mitchinson
Assistant Commissioner

APPENDIX A

Group A: Four letters between the institution and the Ecole Polytechnique of Montreal.

- Record 1. Letter from O.H.R.C. to Ecole Polytechnique dated August 28, 1989
- Record 2. Letter from Ecole Polytechnique to O.H.R.C. dated September 27, 1989
- Record 3. Letter from O.H.R.C. to Ecole Polytechnique dated October 5, 1989
- Record 4. Letter from Ecole Polytechnique to O.H.R.C. dated October 11, 1989

Group B Records provided by the university to the institution on March 2, 1990.

- Record 5. Memorandum from Dean of Science and Engineering to Staff Relations Officer dated March 1, 1990
- Record 6. Memorandum from Chairman, Department of Chemistry to Chairman, Department Appeal Committee
- Record 7. Attachment to Record 6: Method of Determining Final Grades of Chemistry course 3417
- Record 8. Course description of Chemistry 3417
- Record 9. Memorandum from the Chairman of the Department of Chemistry to Chairman, Senate Appeals Committee dated August 22, 1988
- Record 10. Evaluation of appellant's marks in chemistry course #4416.
- Record 11. Memorandum from Dean of Science and Engineering to Chairman, Department Appeals Committee.
- Record 12. Mark List for Chemistry 3417
- Record 13. Mark List for Chemistry 4126
- Record 14. Mark List for Chemistry 4416
- Record 15. Mark List for Chemistry 4537

- Record 16. Decision of Department of Chemistry Appeals Committee
- Record 17. Memorandum dated October 6, 1988
- Record 18. Memorandum dated September 12, 1988
- Record 19. Memorandum from Registrar dated October 14, 1988
- Record 20. Memorandum from Office of Admissions to Registrar dated October 14, 1988
- Record 21. Memorandum from Technologist to Chairman of Department of Chemistry dated March 29, 1988
- Record 22. Memorandum from Chairman, Department of Chemistry dated April 6, 1988
- Record 23. Memorandum to Chairman, Department of Chemistry dated April 28, 1988
- Record 24. Memorandum from Chairman, Department of Chemistry to Dean of Science and Engineering dated June 28, 1988
- Record 25. Memorandum from the Dean of Science and Engineering to Director of Student Services dated July 26, 1988

Group C **Investigation notes, relating to the appellant's human rights complaint, consisting of telephone interviews of five witnesses and two internal memoranda.**

- Record 26. Investigatory notes of Human Rights Officer dated March 20, 1990 (Telephone interview of witness)
- Record 27. Investigatory notes of Human Rights Officer dated March 16, 1990 (Telephone interview of witness)
- Record 28. Investigatory notes of Human Rights Officer dated March 19, 1990 (Telephone interview of witness)
- Record 29. Investigatory notes of Human Rights Officer dated October 20, 1989 (Telephone interview of witness)
- Record 29a. Investigatory notes of Human Rights Officer dated September 6, 1989 (Telephone interview of witness)

- Record 30. Facsimile transmittal from an employee of O.H.R.C. Toronto to O.H.R.C. Sudbury dated February 27, 1990
- Record 31. O.H.R.C. Internal memorandum dated February 13, 1990.