



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

ORDER P-443

Appeal P-9200710

Ministry of Education



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/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ministry of Education (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the investigation report dated July 24, 1990, concerning an allegation of sexual harassment made by the requester. The Ministry provided access to parts of the responsive record, and denied access to the rest of the record, pursuant to sections 21(1) and 49(b) of the Act. The requester appealed the Ministry's decision.

The parts of the record originally provided to the appellant consist of the introductory section of the report, subject to the severance of the names of the people interviewed during the course of the investigation; the notes of two interviews with the appellant, subject to the severance of the names of the people referred to in the notes; and the discussion, findings and recommendations sections of the report in their entirety. During mediation, the Ministry agreed to provide access to the names of the people referred to in the appellant's interview notes.

Further mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, and the seven individuals who had been interviewed in the course of the investigation (the affected persons). Written representations were received from the appellant, the Ministry, and five of the affected persons. The parts of the record which remain at issue in this appeal consist of the names of the affected persons (severed from page 1 of the record), and the notes of interviews with these individuals (pages 4-15 of the record).

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the record.

SUBMISSIONS/CONCLUSIONS:

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

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

"personal information" means recorded information about an identifiable individual, including,

...

- (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,

...

- (e) the personal opinions or views of the individual except where they relate to another individual,

...

- (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;

The record at issue in this appeal was compiled during an investigation into an allegation of sexual harassment. The parts of the record which have not already been released to the appellant include information relating to the affected persons' employment, actions, feelings, and their opinions or views of the appellant. In my view, the remaining parts of the record contain information which qualifies as personal information under one or more of the above-mentioned paragraphs of section 2(1) of the Act, and relates to both the appellant and the affected persons.

ISSUE B: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to the record.

I have found under Issue A that the record contains the personal information of both the appellant and the affected persons.

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;

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the appellant's right of access to her own personal information against other affected persons' right to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the affected persons' personal privacy, then section 49(b) gives the Ministry the discretion to deny the appellant access to her personal information (Order 37).

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

Section 21(3) lists the type of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. I have considered these presumptions and, in my view, none of them are applicable in the circumstances of this appeal.

Section 21(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. Some of the factors favour disclosure and others favour protection of personal privacy.

In its representations, the Ministry merely states that section 21(1) applies, without referring to any specific provisions of the Act. The affected persons who provided representations make reference to an expectation of confidentiality (section 21(2)(h)), and other statements which concern the factor listed in section 21(2)(i). The appellant does not refer specifically to any of the section 21(2) factors, but it can be inferred from her representations that she is raising the considerations contained in section 21(2)(d). These sections read 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;
- (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.

Section 21(2)(d)

In Order P-312, I made the following comments regarding section 21(2)(d) of the Act:

In my view, in order for section 21(2)(d) to be regarded as a relevant consideration, 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 apposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right in question 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 her representations, the appellant states that she needs the investigative report for use in an appeal under a different statute, which, in my view, would constitute a legal right. However, the appellant provides no evidence to establish that this other appeal proceeding is either existing

or contemplated; nor does she explain how the record has any bearing on or is significant to the determination of the right in question; nor does she identify why the record is required in order to prepare for any proceeding or to ensure an impartial hearing. Therefore, I find that section 21(2)(d) is not a relevant factor in the circumstances of this appeal.

Sections 21(2)(h)

All of the affected persons who provided representations state that they believed, and were explicitly advised, that the information they gave to the person who prepared the investigation report was private and confidential. Some of the affected persons also state that they would not have co-operated with the investigation if they had thought that their input was going to be made public.

In Order M-82, Inquiry Officer Holly Big Canoe discussed the issue of confidentiality in the context of workplace harassment, and made the following comments regarding section 14(2)(h) of the Municipal Freedom of Information and Protection of Privacy Act, which is the equivalent of section 21(2)(h):

In my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace. If the parties to the complaint are to have any confidence in the process, respondents in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace.

I agree with Inquiry Officer Big Canoe's view, and feel that it was neither practical nor possible to guarantee the affected persons complete confidentiality during the investigation which led to the creation of the record at issue in this appeal. In my view, the extent to which confidentiality can be afforded to the affected persons is directly related to the extent of disclosure provided to the appellant. In the circumstances of this appeal, the appellant was provided with the discussion, findings, and recommendations sections of the record in their entirety and, in my view, the release of these parts of the record is sufficient to enable her to ensure that her allegations were adequately investigated. Accordingly, I find that section 21(2)(h) is a relevant consideration with respect to the names and interview notes of the affected persons.

Section 21(2)(i)

One affected person states that the disclosure of this information would cause "irreversible damage to the reputations of parties involved". This individual did not, however, explain the nature of the damage that would arise if the information is disclosed, and I find that section 21(2)(i) is not a relevant factor in the circumstances of this appeal.

In summary, I have found that only section 21(2)(h) is a relevant factor in the circumstances of this appeal. This factor weighs in favour of privacy protection, and in my view, disclosure of the parts of the record which remain at issue would constitute an unjustified invasion of personal privacy of the affected persons and, therefore, section 49(b) applies.

Section 49(b) is a discretionary exemption, which gives the Ministry discretion to refuse to disclose personal information to the person to whom it relates where the disclosure would constitute an unjustified invasion of another person's privacy. I have reviewed the Ministry's representations regarding its decision to exercise discretion in favour of claiming this exemption, and I find nothing improper in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ April 1, 1993