



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

ORDER P-417

Appeal P-910325

Ontario Human Rights Commission



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 Ontario Human Rights Commission (the OHRC) received a request for access to all information regarding the human rights complaint initiated by the requester. The OHRC provided partial access to the records. Access was denied in full or in part to 49 pages, pursuant to sections 13, 14(2)(a), 19 and 21 of the Freedom of Information and Protection of Privacy Act (the Act). The requester appealed the OHRC's decision.

Mediation was not successful, and notice that an inquiry was being conducted to review the OHRC's decision was sent to the appellant and the OHRC. Written representations were received from the OHRC.

The records have been described by the OHRC as follows:

1. Intake Data Sheets (pages 1 - 4)
2. Investigation Reports (pages 5 - 21)
3. Case Disposition form (pages 22 - 24)
4. Memorandum dated March 5, 1986 (page 25)
5. Legal memoranda (pages 26-39)
6. Severed portions of a memorandum dated March 4, 1986 (page 41)
7. Severed portions of a Case Analysis dated April 28, 1980 (pages 43 - 44)
8. Severed portions of a memorandum dated January 30, 1989 (pages 46, 47 and 49)
9. Severed portions of a briefing note dated March 10, 1989 (pages 52 - 53)
10. Severed portion of a briefing note dated November 2, 1987 (pages 59 and 60)

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records at issue qualifies as "personal information", as defined in section 2(1) of the Act.
- B. Whether Records 5, 6, 8, 9 and/or 10 qualify for exemption under section 19 of the Act.

- C. Whether Records 1, 3, 4, 5, 6, 7, 8, 9 and/or 10 qualify for exemption under section 13 of the Act.
- D. Whether Records 1, 2, 3 and/or 5 qualify for exemption under section 14(2)(a) of the Act.
- E. Whether the discretionary exemption provided by section 49(a) of the Act applies.
- F. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to Records 2, 3, 5 and/or 7.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records at issue 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,

- (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,
- ...
- (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,
- ...
- (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 records contain the personal information of the appellant, and Records 1, 2 (with the exception of pages 18 and 21) and 7 also contain the personal information of other identifiable individuals.

ISSUE B: Whether Records 5, 6, 8, 9 and/or 10 qualify for exemption under section 19 of the Act.

The OHRC submits that section 19 applies to Records 5, 6, 8, 9 and 10. Section 19 reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, and
- (b) the communication must be of a confidential nature, and
- (c) the communication must be between a client (or his agent) and a legal adviser, and
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Record 5 consists of two memos. One was written by counsel employed by the OHRC, and the other was written by counsel retained by the OHRC. Having reviewed these memos, I am satisfied that they are confidential written communications between a client and a legal adviser, and relate directly to the giving of legal advice. Accordingly, I find that Record 5 qualifies for exemption under section 19 of the Act.

The information which has been severed from paragraph (d) on page 41 of Record 6, pages 46 and 47 of Record 8, pages 52 and 53 of Record 9 and the two paragraphs entitled "Legal Opinion" on page 59 of Record 10 consists of direct quotes from the memos comprising Record 5. These records were written by employees of the OHRC, and are directed to members of the OHRC. The above-mentioned portions of Records 6, 8, 9 and 10 are direct quotes of a confidential communication between a client and a legal advisor which is directly related to giving legal advice, and I am satisfied that these portions of the records qualify for exemption under section 19.

ISSUE C: Whether Records 1, 3, 4, 5, 6, 7, 8, 9 and/or 10 qualify for exemption under section 13 of the Act.

The OHRC claims section 13 of the Act applies to Records 1 and 3 - 10. In Issue B, I found that Record 5, paragraph (d) on page 41 of Record 6, the information severed from pages 46 and 47 of Record 8, the information severed from Record 9 and the two paragraphs entitled "Legal Opinion" on page 59 of Record 10 qualify for exemption under section 19 of the Act. Consequently, it is not necessary for me to consider the application of section 13(1) to these records or parts thereof. 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.

Record 1 consists of two "Intake Data Sheets". One is an account of a telephone call with an individual who called on behalf of the appellant and the other is an account of an interview with the appellant. The OHRC submits that the portion of these records entitled "Disposition or Referral" contains a suggested course of action, which is confirmed in the latter part of the record.

Section 13 is designed to protect the free flow of advice and recommendations to policy-makers and decision-makers within the government (Order 94). In Record 1, the "advice" identified was given to a member of the public -- the appellant in this case -- and, in my view, Record 1 does not qualify for exemption under section 13 of the Act.

Record 3 consists of three pages (pages 22, 23 and 24) and is entitled "Case Disposition". Page 22 contains a recommendation as to what decision should be made and provides reasons for the proposed decision. I am satisfied that this page qualifies for exemption under section 13(1) of the Act. Page 23 consists of comments of the Human Rights Officer, including a summary of findings but does not contain advice or recommendations. Page 24 consists of a factual summary of the complaint, and does not, in my view, contain advice or recommendations. Accordingly, I find that pages 23 and 24 do not qualify for exemption under section 13(1) of the Act.

Record 4, paragraph (e) and the last sentence on page 41 in Record 6, the information severed from page 44 in Record 7, the information severed from page 49 in Record 8, and the section entitled "Conclusions and Recommendations" on pages 59 and 60 in Record 10 consist of or refer to the submission of a suggested course of action by a public servant which will ultimately be accepted or rejected by its recipient during the deliberative process. I am satisfied that these records and parts thereof qualify for exemption pursuant to section 13(1) of the Act.

ISSUE D: Whether Records 1, 2, 3 and/or 5 qualify for exemption under section 14(2)(a) of the Act.

The OHRC claims section 14(2)(a) of the Act applies to Records 1, 2, 3 and 5. In Issue B, I found that Record 5 qualifies for exemption under section 19 of the Act and, accordingly, it is not necessary for me to consider the application of section 14(2)(a) to this record. Section 14(2)(a) of the Act states:

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]

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 (Order 200).

I have reviewed Records 1, 2 and 3 and, in my view, only Record 3 can accurately be described as a "report". This record is an account of the results of matters that have been dealt with in the investigation of the appellant's complaint. Therefore, I find that the first part of the subsection 14(2)(a) test has been satisfied with respect to this record.

I am satisfied that Record 3 was prepared in the course of an investigation, and that the OHRC has the function of regulating compliance with the law. Accordingly, all three parts of the test have been met, and I find that Record 3 qualifies for exemption under section 14(2)(a) of the Act.

Record 1 is two "Intake Reports" completed by a human rights officer 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 OHRC, 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).

ISSUE E: Whether the discretionary exemption provided by section 49(a) of the Act applies.

Under Issue A, I found that all of the records contain the personal information of the appellant. In Issues B, C and D I found that Records 3, 4, 5, 6, 8, 9 and 10 qualify for exemption under section 14(2)(a), 13(1) or 19 of the Act.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution under the Act. However, this right to access is not absolute. Section 49 provides a number of exemptions to this general right of access, including section 49(a) of the Act, which reads as follows:

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

where section 12, **13**, 14, 15, 16, 17, 18, **19**, 20, or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) is a discretionary exemption which allows the OHRC to grant or deny a requester access to information that relates to him/her. The OHRC has provided representations regarding its decision to exercise discretion in favour of denying access in the circumstances of this appeal. I have reviewed these representations and find nothing improper in the OHRC's exercise of discretion.

ISSUE F: If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies to Records 2, 3, 5 and/or 7.

Under Issue A, I found that all of the records contain the personal information of the appellant, and Records 1, 2 and 7 also contain the personal information of other individuals.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of the OHRC. However, this right to access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is found in section 49(b) of the Act, which reads as follows.

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;

Subsection 49(b) of the Act introduces a balancing principle. The OHRC must look at the information and weigh the requester's right of access to his/her own personal information against another individual's right to the protection of his/her privacy. If the OHRC determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, subsection 49(b) gives the OHRC 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 the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. The OHRC submits that section 21(3)(b) applies to Record 1, 2 (with the exception of pages 18 and 21), and the information severed from page 43 of Record 7. Section 21(3)(b) reads:

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;

The personal information contained in the records was provided during conversations and meetings with individuals who were interviewed as part of the OHRC's investigation into the appellant's complaint of possible violation of the Ontario Human Rights Code. In my view, the requirements of section 21(3)(b) have been satisfied, and I find that disclosure of the address on page 1 of Record 1, Record 2 (with the exception of pages 18 and 21) and the information severed from page 43 of Record 7 would constitute a presumed unjustified invasion of the personal privacy of the other individuals.

Once it is determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been established, I must consider whether any other 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, the records do not contain any information relevant to section 21(4).

Section 14(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. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling as to outweigh a presumption under section 14(3); however, such a case would be extremely unusual.

The appellant has not submitted that the listed or any unlisted factors are relevant to the circumstances of this appeal and, in my view, there is no combination of listed and/or unlisted factors weighing in favour of disclosure of the information I have found to fit within the presumption contained in section 21(3)(b). Accordingly, I find that the presumption has not been rebutted. In my view, disclosure of the address on page 1 of Record 1, Record 2 (with the exception of pages 18 and 21), and the information severed from page 43 of Record 7 would constitute an unjustified invasion of privacy of another individual, and section 49(b) applies.

Section 49(b) is a discretionary exemption. I have reviewed the OHRC's representations regarding the exercise of discretion to refuse to disclose the information, and I find nothing to indicate that the exercise of discretion was improper.

ORDER:

1. I order the OHRC to disclose Record 1 (with the exception of the address of the affected person on page 1) and pages 18 and 21 of Record 2 to the appellant within 15 days of the date of this order.
2. I uphold the OHRC's decision not to disclose the remaining records at issue.
3. In order to verify compliance with this order, I order the OHRC to provide me with a copy of the record which is disclosed to the requester pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ February 24, 1993