



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

ORDER P-446

Appeal P-9200711

Ministry of the Solicitor General and Correctional Services



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 the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act for access to all information pertaining to a workplace harassment complaint. The Ministry denied access to the six records identified as responsive to the request pursuant to sections 21(1), 49(b), and 14(1)(k) of the Act. The requester appealed the Ministry's decision.

During mediation, the appellant agreed that only one record, an occurrence report which directly concerned the appellant, is at issue in this appeal.

Mediation of the appeal 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 another individual named in the record (the affected person). Written representations were received from the Ministry and the affected person. In the Ministry's representations it withdrew its application of section 14(1)(k), and indicated that it was exercising its discretion not to disclose the personal information of the appellant pursuant to section 49(b) of the Act.

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.
- C. Whether disclosure of the record is prohibited under the Young Offenders Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the record 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 in question falls within the definition of "personal information" found in section 2(1) of the Act. Where information does qualify as personal information, I must then determine to whom the personal information relates.

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,

(c) any identifying number, symbol or other particular assigned to 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;

I have reviewed the record and, in my view, it contains recorded information about a number of identifiable individuals and qualifies as personal information as defined in the subparagraphs quoted above. I find that the record contains the personal information of the appellant, the affected person, and other named individuals.

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.

In Issue A, I found that the record contains the personal information of the appellant, the affected person, and the other named 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;

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

Sections 21(2) and (3) of the of 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(2) provides some criteria for the head to consider in making this determination.

The Ministry's view is that disclosure of this record would constitute an unjustified invasion the personal privacy of the affected person and one other named individual. The Ministry submits that sections 21(2)(e), (f) and (h) are relevant considerations in the circumstances of this appeal. The affected person submits that sections 21(2)(f) and (i) are relevant considerations. These sections read:

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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (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.

The Ministry advises that the occurrence report was written following a complaint to the management of a Young Offenders Act facility regarding workplace harassment. The Ministry states that following an investigation, the complaint was found to be substantiated.

Given the circumstances of this appeal, I will not disclose the representations made by the Ministry and the affected person in support of section 21(2)(e) of the Act. Although, I understand the concerns of the Ministry and the affected person and their reluctance to disclose this record, it is my view that the Ministry and the affected person have not demonstrated a direct relationship between disclosure of the record and the harm set out in section 21(2)(e). Accordingly, I am not satisfied that section 21(2)(e) of the Act is a relevant consideration with regard to the contents of this particular record.

In its representations the Ministry advises that section 21(2)(f) is relevant in relation to the personal information of a resident of a Young Offenders Act facility. The Ministry states that the disclosure of the resident's personal information would constitute an unjustified invasion of that person's privacy.

The resident named in the record is identified as a young offender inferentially, by virtue of the fact that the record documents an incident which took place in a facility where dispositions are being served under the Young Offenders Act (the YOA). In my view, this information could be considered "sensitive", and section 21(2)(f) is a relevant consideration in respect of the personal information of this individual.

The affected person submits that the information which relates to her is highly sensitive and when placed with other pieces of information, becomes even more so.

In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to find such information distressing in nature, as the affected person has indicated here. Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondent. Accordingly, I find that section 21(2)(f) is not a relevant consideration in respect of the personal information of the affected person.

The Ministry and the affected person submit that all of the information was supplied under an implicit understanding of confidentiality. The Ministry submits that all information concerning such complaints is to be kept confidential according to its harassment policy.

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. Accordingly, in my view, section 21(2)(h) is not a relevant consideration in the circumstances of this appeal.

The affected party advises that disclosure of this record could unfairly damage the reputation of parties mentioned in the record, and again makes reference to other information or records which are not subject to this appeal. On the basis of the record before me and the representations provided, I am not satisfied that section 21(2)(i) is a relevant consideration in this matter.

In balancing the interests of the appellant in disclosure of the personal information and the interests of the affected person and other named individuals in the protection of their privacy, I find that disclosure of the record, with the exception of the personal information of the individuals other than the appellant and the affected person, would not constitute an unjustified invasion of the personal privacy of another individual, and therefore, section 49(b) does not apply. I have attached a highlighted copy of the record with the copy of this order provided to the Ministry, which identifies the information which qualifies for exemption.

Because section 49(b) is a discretionary exemption, I have reviewed the Ministry's representations regarding its decision to exercise discretion in favour of denying access to these portions of the record, and I find nothing improper in the circumstances of this appeal.

ISSUE C: Whether disclosure of the record is prohibited under the Young Offenders Act.

The Ministry submits that the record contains information about an individual serving a disposition under the Young Offenders Act, and references the federal legislative paramountcy of the YOA to the Act.

Section 40, 42 and 43 of the YOA regulate record keeping practices of courts and government agencies with respect to their dealings with the activities of young persons within the justice system. Section 46 of the YOA makes it an offence to disclose any such records or any information contained in them to any person "... where to do so would serve to identify the young person to whom it relates as a young person dealt with under [the YOA]".

In Order P-378, former Assistant Commissioner Tom Mitchinson found there is an express contradiction between the disclosure scheme contained in the YOA and the disclosure scheme in the Act and, in accordance with the doctrine of federal legislative paramountcy, that the YOA prevails in respect of records kept by a provincial institution pursuant to section 43 of the YOA.

Former Assistant Commissioner Mitchinson also found that the Information and Privacy Commissioner has both the jurisdiction and a statutory obligation to determine whether the Act applies to any record in the custody or under the control of an institution covered by the Act. As the Commissioner's delegate, I have a duty to ensure, as best I can, that records are not improperly withheld from scrutiny under the Act on the basis that they are "YOA records" when, in fact, this may not be the case.

In my view, the record at issue in this appeal does not qualify as a record which falls within the scope of the YOA. The record concerns a complaint about the conduct of certain employees of the Ministry in relation to other employees. The investigation which led to the creation of the record was not conducted for the purpose of investigating an offence alleged to have been committed by a young person; for use in proceedings against a young person; or for any other type of activity outlined in sections 40, 42 or 43 of the YOA. Even if the record in question is found to be a record within the meaning of the YOA, in my view, there is no conflict between the YOA and this order. The severed record which I am ordering to be disclosed does not

contravene section 46 of the YOA as it in no way serves to identify any young persons dealt with under the YOA.

ORDER:

1. I order the Ministry to disclose the record to the appellant, with the exception of the personal information of the individuals other than the appellant and the affected person. I have attached a highlighted copy of the record with the copy of this order provided to the Ministry, which identifies the information which should not be disclosed.
2. I order the Ministry to disclose the record referred to in Provision 1 within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ April 19, 1993