



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

ORDER P-447

Appeal P-911028

Ministry of Natural Resources



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ORDER

BACKGROUND:

The Ministry of Natural Resources (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to an investigation of an allegation of sexual harassment. Specifically, the request was for the questions asked and responses provided by all persons interviewed by the investigator, which were used to determine the result of the investigation.

The Ministry identified eight typewritten summaries of interviews conducted during the investigation as responsive to the request. Pursuant to section 28 of the Act, the Ministry notified seven persons who were interviewed, inviting them to make representations concerning the release of the records. Five persons consented to disclosure, and two requested that access be denied.

The Ministry granted access to the typewritten summary of the appellant's interview, and partial access to the five typewritten summaries of interviews with the five persons who consented to the disclosure of their personal information with severances pursuant to section 49(b) of the Act. The Ministry denied access to those parts of the interview summaries which it considered to pertain to individuals other than the appellant. The Ministry also denied access to the typewritten summaries of the interviews with the two persons who did not consent to the disclosure of their personal information, pursuant to section 49(b) of the Act.

The requester appealed the Ministry's decision to deny access to part of the record, and stated that he believed additional records responsive to his request existed in the custody or under the control of the Ministry.

During mediation, the Ministry located handwritten notes of interviews with nine individuals, and issued a decision with respect to the notes. It stated that no handwritten notes existed for one person for whom a typewritten summary was located, and handwritten notes were located for two people for whom a typewritten summary was not located. The Ministry provided access to the notes of the appellant's own interview and partial access to notes of interviews with five persons who consented to the disclosure of their personal information. The requester continued his appeal of the Ministry's decision to deny access to part of the records, and asked for an affidavit to authenticate the records he received, as he had seen no notation as to the identity of the writer or the dates they were written.

Further mediation was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to appellant, the Ministry, the person who alleged that sexual harassment had occurred (the primary affected person), and the seven of the eight persons interviewed during the course of the investigation (the secondary affected persons). Written

representations were received from the Ministry, the appellant, the primary affected person and one secondary affected person. The secondary affected person consented to the disclosure of his personal information to the appellant, and the primary affected person objected to disclosure of the records to the appellant.

ISSUES:

The issues in this appeal are:

- A. Whether the Ministry conducted a reasonable search for records responsive to the appellant's request.
- B. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- C. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.
- D. Whether the discretionary exemption provided by section 14 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Ministry conducted a reasonable search for records responsive to the appellant's request.

During mediation, the Ministry located additional records responsive to the request, and issued a decision under the Act. In response to the Notice of Inquiry, the Ministry provided two affidavits which indicate that no additional records responsive to the request exist within the custody or under the control of the Ministry. The investigator has also indicated on the records that they are a true copy of her notes.

Having carefully reviewed the representations of both parties, and the affidavit evidence submitted to me, I am satisfied that the Ministry has now taken all reasonable steps to locate any records responsive to the appellant's request and, in my view, the search conducted by the Ministry was reasonable in the circumstances of this appeal.

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

"Personal information" is defined in section 2(1) of the Act, in part, as follows:

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

...

(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,

...

The records consist of typewritten summary notes and handwritten notes of interviews with the primary affected person and eight secondary affected persons. These notes were created during the Ministry's investigation of a complaint of sexual harassment made against the appellant. I have reviewed the records and, in my view, all of the records consist of recorded information about the appellant, parts of each record consist of recorded information about the primary affected person, and parts of some of the records consist of recorded information about other identifiable individuals (including the secondary affected persons). In my view, this information, where it appears, qualifies as the personal information of the individual to whom it relates.

One of the secondary affected persons died since the interviews were conducted. Section 2(2) of the Act states:

Personal information does not include information about an individual who has been dead for more than thirty years.

Section 2(2) has no application in the circumstances of this appeal, as the death of the secondary affected person occurred within the past 30 years.

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

In Issue B, I found that all of the records contain the personal information of the appellant, parts of each record contain the personal information of the primary affected person and parts of some of the records contain the personal information of the other individuals. Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of 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:

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;

As has been stated in previous orders, section 49(b) introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his or her own personal information against the rights of other individuals to the protection of their privacy. If the head determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 49(b) gives the head the discretion to deny the requester access to the personal information (Order 37).

The Ministry received the consent of six of the secondary affected persons to disclose their personal information to the appellant, and one of the secondary affected persons indicated in his representations that he consents to the disclosure of his personal information to the appellant. In my view, disclosure of the personal information of these seven individuals would not constitute an unjustified invasion of their privacy, and section 49(b) does not apply.

The information remaining at issue is the parts of the typewritten summary and notes of the interviews which do not contain the personal information of the seven secondary affected persons who consented to disclosure of their personal information.

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 Ministry contends that the information contained in the records consists of personal evaluations of individuals other than the appellant and, therefore, section 21(3)(g) of the Act applies. This section states:

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

consists of personal recommendations or evaluations, character references or personnel evaluations;

In my opinion, the terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards. The records contain opinions, comments and observations provided by the primary and secondary affected persons during the course of an investigation of an allegation of sexual harassment and, in my view, do not consist of personal or personnel evaluations. Accordingly, I find that the presumption of unjustified invasion of personal privacy contained in section 21(3)(g) does not apply.

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. The Ministry submits that sections 21(2)(f) and (h) are relevant considerations, and appears to submit that section 21(2)(g) is relevant. The primary affected person submits that sections 21(2)(e), (f) and (h) are relevant considerations. The appellant contends that 21(2)(d) is relevant, and weighs in favour of disclosure of the records. 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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

Section 21(2)(f)

The Ministry submits that "because of the circumstances in which the comments were made" and, in some cases, the negative slant of the comments, it was felt that these comments were highly sensitive. Further, in regard to some of the records, the Ministry submits that the appellant, who is still working within the Ministry, may come into contact with certain of the witnesses, and that disclosure may harm their relationships.

In Order M-82, I stated:

In my opinion, information pertaining 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 restrict discussion of workplace relationships and conduct and to find such information distressing in nature ... Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant.

In my view, section 21(2)(f) is relevant in the circumstances of this appeal, but only to the personal information of persons other than the appellant who have not consented to disclosure, and not to that information which directly addresses the substance of the complaint.

Section 21(2)(g)

The Ministry states that, with regard to notes of several interviews, the comments made represented only the interviewee's view of an affected person and may not be accurate or reliable.

I have no evidence before me to suggest that the Ministry was able to discount or did not rely on this information, and only one of the secondary affected persons has indicated an error exists in the typewritten summary of his interview. This secondary affected person has consented to a corrected version being disclosed to the appellant and, in my view, section 21(2)(g) is not a relevant consideration in this appeal.

Section 21(2)(h)

The Ministry indicates that it has no evidence of an explicit assurance that the records of the interviews would be kept confidential. However, given the sensitive nature of the issues involved, the fact that the interviews were conducted in a room with only the investigator

present, and its claim that the process does not provide for a review of the evidence by either the complainant or the person who is the subject of the complaint, the Ministry submits that the comments were implicitly given in confidence. One of the secondary affected persons concurs that he thought that his evidence would be kept in confidence. The primary affected person states that the investigator was authorized to guarantee that the evidence would remain confidential, and that the notes taken were never intended to be released to a third party. Further, the primary affected person states that personal candour was conditional upon this guarantee.

As I stated in Order M-82, it is my view that it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of allegations of this nature. If the parties to a 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 in order that they may address the validity of the allegations.

In the circumstances of this appeal, the investigation culminated in proceedings under the Public Service Act. Section 13(7) of Regulation 977 under the Public Service Act states that the public servant whose conduct is the subject of a hearing may cross-examine witnesses as "reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence." The appellant states that, although the regulation provides for a hearing with an opportunity to "call and examine witnesses", neither the individual who made the allegations nor any of the other witnesses were present. The appellant was not given an opportunity to review the

evidence, to appeal the decision or to see the report of the hearing officer and his recommendations concerning the decision.

In my opinion, section 21(2)(h) of the Act is a relevant consideration in the circumstances of this appeal, but only with regard to the personal information of persons other than the appellant who have not consented to disclosure, and not to that information which directly addresses the substance of the complaint.

Section 21(2)(e)

The primary affected person claims that section 21(2)(e) of the Act applies to exempt the records from disclosure, because of a fear of retaliation. In my view, I have not been provided with sufficient evidence to establish a direct connection between disclosure of the record and the harm described in section 21(2)(e) is relevant in the circumstances of this appeal.

Section 21(2)(d)

The appellant submits that section 21(2)(d) of the Act is relevant, because the investigation culminated in proceedings under the Public Service Act which resulted in disciplinary action against the appellant. 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 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.

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The Ministry submits that section 21(2)(d) does not apply, stating that disciplinary action has been taken and, therefore, the appellant does not need access to the information for a fair determination of his rights because the issue has been determined. The Ministry submits that complainants are often embarrassed and afraid as a result of harassment. The Ministry takes steps to limit access to reports and supporting documents relating to complaints of sexual harassment, access only being granted on a "need to know basis". In my opinion, a situation in

which a penalty is to be imposed after a proceeding legislatively mandated to provide disclosure presents the strongest case for the need to know of the person whose conduct is being investigated.

The appellant states that he has commenced an action against the Ministry for damages flowing from the investigation documented in the records. The Ministry submits that if the appellant proceeds with a court application or action, the Rules of Civil Procedure provide for disclosure of relevant information. In my view, if an alternative means of disclosure is available at a certain stage in another type of proceeding, disclosure under the Freedom of Information and Protection of Privacy Act is not ruled out. The Ministry cites former Commissioner Sidney B. Linden's Order 139 to support its contention that, where alternative means for disclosure exist, the balancing of rights weighs in favour of non-disclosure under this Act. The circumstances

of that appeal, however, were different. In that appeal, most of the evidence held by the institution had been disclosed to the appellant, the only information withheld was some names of the informants or complainant.

In my opinion, all four of the criteria required to establish the relevance of section 21(2)(d) have been met. The information is significant to the determination of the appellant's legal right to seek damages from the Ministry and, in my opinion, is required to prepare for the proceeding he has commenced.

In summary, I have found sections 21(2)(d), (f) and (h) to be relevant considerations in the circumstances of this appeal. Sections 21(2)(f) and (h) are relevant only with regard to information provided by individuals other than the appellant who have not consented to disclosure, where it does not directly concern the allegations made by the complainant. These two sections weigh in favour of privacy protection.

With regard to the information provided by the complainant and by others directly concerning the allegations made by the complainant, I have found that section 21(2)(d) is a relevant factor, and this factor weighs in favour of disclosure of the records.

In Order 37, former Commissioner Linden dealt with an employment-related complaint, and stated that "fairness demands that the person complained against be given as much disclosure of the substance of the allegations as is possible. The degree of disclosure ... should be more extensive if the complaint is likely to result in discipline."

In Order 182, dated June 27, 1990, then Assistant Commissioner Wright stated:

In my view, investigations into allegations of sexual harassment must be carried out with meticulous fairness to all involved -- the complainant, the person complained against and any witnesses who may be interviewed ...

In my view, an improper finding of sexual harassment can have significant consequences for the person against whom the finding is made. It may impair the

ability of that person to advance in his or her employment or in fact prevent him or her from obtaining employment.

In the present appeal, I find that disclosure of the personal information about the primary affected person which was provided by the secondary affected persons would constitute an unjustified invasion of the primary affected person's personal privacy, and section 49(b) applies. Additionally, I find that disclosure of the personal information of individuals other than the appellant which is not directly concerned with the allegations being investigated would constitute an unjustified invasion of another individual's privacy, and section 49(b) applies. I have highlighted those portions of the records on the copy forwarded to the Ministry with this order.

I acknowledge that disclosure of the personal information of the primary affected person and certain other individuals may invade their privacy to a degree. However, in balancing the interests of the appellant in disclosure and the interests of the primary and secondary affected persons in the protection of their privacy, I find that, in these circumstances disclosure of the personal information would not constitute an **unjustified** invasion of their personal privacy.

Section 49(b) is a discretionary exemption which allows the Ministry to deny a requester access to his or her own personal information if disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. The Ministry 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 Ministry's exercise of discretion, and would not alter it on appeal.

ISSUE D: Whether the discretionary exemption provided by section 14 of the Act applies.

In its submissions, the Ministry claims that sections 14(1)(i) and 14(1)(l) of the Act are applicable to a small part of the records. I have already determined that part of the record is properly exempt under section 49(b), as it consists of information provided by an individual other than the appellant and is not directly related to the allegations made by the primary affected person. Accordingly, it is not necessary for me to consider the application of sections 14(1)(i) and (l) to this part of the records.

ORDER:

1. I order the Ministry to disclose the records to the appellant in accordance with the highlighted copy of these records which I have provided to the Ministry. The highlighted portions identify the parts of the records which should not be disclosed.

2. I order the Ministry to disclose the records 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 records which are disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ April 20, 1993