



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

ORDER P-473

Appeal P-9200824

Ontario Human Rights Commission



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ORDER

BACKGROUND:

The Ontario Human Rights Commission (the OHRC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of interview documents in an OHRC file for the period from December 1988 to May 1989. Following receipt of the request, the OHRC confirmed that the appellant was interested in obtaining copies of interview documents in the form of notes, memos and letters.

The OHRC identified seven documents as being responsive to the appellant's request and denied access to these documents, citing sections 21 and 49(b) of the Act. The appellant 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. Representations were received from both parties.

During the inquiry, the appellant raised the issue of the existence of additional records. A supplemental notice of inquiry was sent to the OHRC, and additional representations were received from the OHRC.

Appendix A to this order consists of a description of the records the OHRC has denied access to pursuant to section 21 or 49(b) of the Act.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. Whether the mandatory exemption provided by section 21 of the Act applies.
- C. Whether the discretionary exemption provided by section 49(b) of the Act applies.
- D. Whether the OHRC's search for records responsive to the request was reasonable in the circumstances.

SUBMISSIONS/CONCLUSIONS:

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

The OHRC submits that Records 4, 5 and 7 contain the personal information of other individuals exclusively and that they qualify for exemption under section 21 of the Act. With respect to the remaining records (Records 1, 2, 3 and 6), the OHRC submits that these documents contain the personal information of the appellant and other identifiable individuals and are exempt under section 49(b).

Before determining whether any parts of the records qualify for exemption under section 21 or 49(b), I must first determine whether the records contains personal information, and to whom the personal information relates.

Section 2(1) of the Act, defines "personal information", in part, as follows:

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

In my view, all of the records contain information which qualifies as the personal information of the appellant, as each relates to his complaint with the OHRC. The following parts of the records also contain the information of individuals other than the appellant: items 1 and 6 of Record 1, part of a sentence in Record 4, part of Record 6 and all of Records 5 and 7.

The OHRC submits that Records 2 and 3 contain the personal information of an individual other than the appellant. It acknowledges that this individual has been identified as an official at Laurentian University in Record 4, and that this person's involvement in the OHRC investigation was as a representative of Laurentian University. The OHRC submits that this person was also acting as a witness in the case and, therefore, the information provided constitutes this person's personal information.

I do not agree. It has been established in a number of orders that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not "personal information" (Orders 139, P-257, P-326). I find that the individual's comments in this case were offered as a representative of Laurentian University, the respondent in the OHRC complaint. Accordingly, I am not satisfied that the information provided by this individual qualifies as her personal information.

ISSUE B: Whether the mandatory exemption provided by section 21 of the Act applies.

In Issue A, I found that all of the records contain the personal information of the appellant and that parts of some of the records contain the personal information of the appellant and other

identifiable individuals. Section 21 of the Act prohibits the disclosure of personal information to any person **other** than the individual to whom the information relates. Because I have found that all of the records the appellant is seeking access to contain his own personal information, section 21 of the Act is not applicable in the circumstances of this appeal.

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

Under Issue A, I found that some parts of the records contain the personal information of both the appellant and other identifiable individuals (items 1 and 6 of Record 1, part of a sentence in Record 4, part of Record 6 and all of Records 5 and 7).

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;

Section 49(b) introduces a balancing principle. The OHRC must look at the information and weigh the appellant'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 OHRC determines that the release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 49(b) gives the OHRC the discretion to deny the appellant access to the 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 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. Specifically, section 21(3)(b) states:

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;

In my view, the information at issue was compiled as part of an investigation into a possible violation of law, namely, the Ontario Human Rights Code, and I find that disclosure of the personal information of other individuals would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b).

Once it is determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been met, 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 circumstances listed in section 21(4) are not present in 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. A combination of listed and/or unlisted factors weighting in favour of disclosure might be so compelling so as to outweigh a presumption under section 21(3), however such a case would be extremely unusual.

In his representations, the appellant has not made reference to the application of any of the factors listed in section 21(2) which weigh in favour of disclosure, and I find that none of these considerations are relevant in the circumstances of this appeal.

In summary, it is my view that the presumption of an unjustified invasion of personal privacy has not been rebutted and, therefore, the records qualify for exemption under section 49(b) of the Act.

Section 49(b) is a discretionary exemption. I have reviewed the OHRC's representations and I find nothing which would indicate that its exercise of discretion was improper, and would not alter it on appeal.

ISSUE D: Whether the OHRC's search for records responsive to the request was reasonable in the circumstances.

The appellant believes that other interview documents exist, in addition to those already identified by the OHRC, which are responsive to his request. In support of his position, the appellant has provided copies of correspondence between the OHRC and himself during the period from December 1988 to May 1989 as evidence of the existence of additional records in the OHRC's custody or control. These documents are:

- a letter dated December 5, 1988 to the appellant from the OHRC officer assigned to the appellant's case

- a questionnaire completed by the appellant on December 10, 1988 and a list of supporting documents provided by the appellant
- a letter dated December 14, 1988 to the appellant from the OHRC officer assigned to the appellant's case
- the formal complaint form dated April 7, 1989

The OHRC has provided an affidavit sworn by the OHRC's Freedom of Information and Protection of Privacy Co-ordinator (the Co-ordinator) which outlines the steps he took to locate records responsive to the request. The affidavit indicates that the Co-ordinator requested the appellant's entire file from the OHRC's Sudbury office. The affidavit also states that the Co-ordinator spoke with the OHRC officer assigned to investigate the appellant's complaint, and was advised that there are no other written records relating to this matter except those contained in the investigation file already provided.

I have carefully reviewed the representations from both parties and the OHRC's affidavit. In my view, a thorough search was conducted during the course of processing the appellant's request, and I am satisfied that the OHRC's search for responsive records was reasonable in the circumstances.

ORDER:

1. I uphold the OHRC's decision not to disclose items 1 and 6 of Record 1, part of one sentence of Record 4, part of Record 6, and all of Records 5 and 7.
2. I order the OHRC to disclose to the appellant Record 1 (with the exception of items 1 and 6), Record 2, Record 3, Record 4 (with the exception of one part of one sentence) and Record 6 (with the exception of the names, student numbers and marks of individuals other than the appellant). I have attached a highlighted version of the records with the copy of this order sent to the OHRC. The parts of the records which are highlighted should **not** be disclosed.
3. I order the OHRC to disclose the records referred to in Provision 2 of this order within 15 days of the date of this order.
4. In order to verify compliance with the provisions of this order, I order the OHRC to provide me with a copy of the records disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ June 10, 1993

APPENDIX A

1. Notes from OHRC officer dated May 5, 1989 respecting a telephone conversation with an official from Laurentian University.
2. Notes from OHRC officer dated May 4, 1989 respecting telephone conversations with the appellant and with an official from Laurentian University.
3. Notes from OHRC officer dated April 24, 1989 respecting a telephone conversation with an official from Laurentian University.
4. Letter from an official at Laurentian University to OHRC officer dated April 27, 1989.
5. Attachment to April 27, 1989 letter (see document 4 above). This attachment is an internal memo from Laurentian University dated November 11, 1988.
6. Attachment to April 27, 1989 letter (see document 4 above). This attachment is a list of marks for Chemistry 4416.
7. Attachment to April 27, 1989 letter (see document 4 above). This attachment is a Laurentian University academic change form respecting a certain individual dated January 15, 1988.