



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

# **ORDER P-527**

**Appeal P-9300052**

**Management Board Secretariat**



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# ORDER

## BACKGROUND:

The Ministry of Government Services, now the Management Board Secretariat (the Secretariat), received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to complaints of sexual harassment against the requester. Specifically, the requester sought access to "the names of the persons [who filed the complaints], and the dates of these mentioned complaints, also the complaint and the date of such incident." The Secretariat denied access to the requested information pursuant to section 49(b) of the Act, on the grounds that "releasing this information would constitute an unjustified invasion of other individuals' personal privacy." The requester appealed this decision.

It was not possible to resolve the appeal through mediation and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry, the appellant, and four individuals who submitted the letters of complaint (the affected persons). Representations were received from all of the affected persons and the Secretariat.

## RECORDS AT ISSUE:

The records identified by the Secretariat as containing the information responsive to the request consist of four letters submitted to it by the affected persons and an internal memorandum to file which contains a summary of the statements of the affected persons interviewed by Secretariat officials and an outline of the investigation to be conducted. The Secretariat has withheld all of the information contained in these records.

Based on the representations of the Secretariat and documents submitted during the course of the inquiry, the background to the filing of the request may be summarized as follows:

The appellant held the contract for plumbing and heating maintenance services for a housing development owned by the Secretariat, from July 1, 1989 to November 30, 1991. He was unsuccessful in the bid for the period of December 1, 1991 to November 30, 1992 and the contract was held by another contractor. However, for the period commencing December 1, 1992, the appellant was the lowest bidder on the tender, but prior to the award of this tender, the Secretariat received four complaints of sexual harassment against the appellant, referring to the time period when he had previously held the contract. The four complainants and the appellant were interviewed. During the interview, the appellant was advised of the nature of the complaints in general. He denied the allegations, and requested to know the identities of the complainants, which he was refused. Subsequently, the Secretariat decided that the allegations were substantiated; the appellant was disqualified from the tender process and the contract was awarded to the next lowest bidder.

## ISSUES:

The issues arising in this appeal are:

[IPC Order P-527/September 2, 1993]

- A. Whether the records contain "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and if the personal information relates to both the appellant and affected persons, whether the discretionary exemption provided by section 49(b) of the Act applies.

## **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,

...

- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (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 records contain the names, as well as the details of the complaints of the affected persons against the conduct of the appellant. In my view, this information 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.

In some cases, the records contain the addresses and telephone numbers of the affected persons. As the appellant is not seeking access to the addresses or telephone numbers of the affected persons, this information is outside the scope of the appeal and should not be disclosed.

**ISSUE B: If the answer to Issue A is yes, and if the personal information relates to both the appellant and affected persons, whether the discretionary exemption provided by section 49(b) of the Act applies.**

I have found under Issue A that the records contain the personal information of the appellant and the affected persons. 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 provincial institutions covered by the Act. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access. One such exception 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;

Section 49(b) introduces a balancing principle. The Secretariat 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 Secretariat 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 Secretariat the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of the personal privacy of the individual to whom the information relates. I have carefully reviewed the contents of the records and find that neither section 21(3) nor 21(4) apply to the personal information at issue.

Section 21(2) of the Act provides some circumstances for the Secretariat to consider in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy.

In its representations, the Secretariat submits that sections 21(2)(f) and (h) are relevant in the circumstances of this appeal.

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,

- (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

In its representations, the Secretariat states that it received the complaints, investigated them and took action in furtherance of "the obligation of the institution to protect employees and tenants from harassment as specified in the Ontario Human Rights Code and Ontario Government Workplace Discrimination and Workplace Harassment Prevention guidelines."

The Workplace Discrimination and Harassment Prevention Directive of the Government of Ontario, which the Secretariat states was in effect at the time of its investigation of the complaints, sets out the procedure for the investigation of complaints of workplace harassment lodged by members of the Ontario Public Service against both employees of government institutions and persons outside of the government, such as clients, contractors, consultants or delivery persons. The Directive provides that once a formal written complaint has been filed, and a determination has been made to conduct an investigation, the investigator should provide the alleged offender with a copy of the complaint. It seems to me that an important purpose of this policy is to ensure the fairness and integrity of the process of investigating the complaint.

In the circumstances of this appeal, it appears that the investigation of the complaints was conducted and a conclusion that the appellant has committed the alleged wrongdoing was reached without providing him with a copy of the written complaints or disclosing to him the identities of the complainants, the specific nature of the allegations or the time and place of the alleged incidents. It appears that the Secretariat's reasons for withholding this information is because the information is "highly sensitive" [section 21(2)(f)], and because it was "supplied in confidence [section 21(2)(h)].

With regard to section 21(2)(f), the Secretariat states that the records at issue contain sensitive personal information of individuals who were subject to sexual harassment from the appellant. Even though the appellant no longer has the contract, the Secretariat fears that because he knows all four individuals and where they live "there is reasonable ground to conclude that if the records are released that the complainants may be subject to further harassment and as such, the records in their entirety, can be considered sensitive information." The affected persons also make similar representations.

When an allegation of sexual harassment is made and investigated, it is reasonable for the parties involved to find the experience distressing and to restrict discussion of the subject with others. However, in my opinion, this would not be the case as between the complainant and the respondent (in this case the affected persons and the appellant). Owing to the nature of the complaint of sexual harassment itself, it is neither possible nor practical for the investigation of the complaint to proceed in circumstances where the identity of the complainant and the substance of the complaint are withheld from the respondent.

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

In so far as section 21(2)(h) is concerned, both the affected persons and the Secretariat state that the personal information was supplied to the Secretariat in confidence. The Secretariat submits that this confidentiality "is explicitly and implicitly expressed in the very nature of the complaints, the tone of the letters" and assurances it gave to the complainants that "every effort to keep their names confidential would be made." The Secretariat states that the "complainants would not have communicated so freely and openly with ministry representatives in their letters and during interviews if assurance of confidentiality had not been provided to them."

The affected persons state that they submitted their complaints in confidence; however, it should be noted that there is nothing in the complaint letters themselves, or other correspondence, in which the affected persons expressly request that their identities and complaints be not disclosed to the appellant.

In Order M-82, Inquiry Officer Holly Big Canoe stated:

... 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 adopt it for the purposes of this appeal.

Once a formal complaint of sexual harassment has been filed and a decision is made to investigate the complaint, confidentiality of information received during this process must be maintained to protect the personal privacy of the individual's involved; however, in my view, this protection does not extend to withholding from the respondent such vital information as the identity of the complainant and the substance of the complaint. In my view, given the nature of the complaint of sexual harassment, it is not reasonable for the complainants to expect that such information would not be disclosed to the respondent, nor is it possible or even practical for the investigating institution to guarantee that the information would not be disclosed to the very person whose response to the complaint is being sought.

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

As Commissioner Tom Wright stated in Order 182, 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. The potential consequences of such an investigation are serious for both the person making the allegation as well as the person against whom the allegation is made.

Having considered the representations of the parties, the provisions of the Act and the contents of the records, I find that there are no considerations that would support the conclusion that disclosure of the requested information to the appellant would be an unjustified invasion of the privacy of the affected persons, in the circumstances of this appeal. In reaching this decision, I acknowledge that disclosure of the information at issue may invade the personal privacy of the affected persons to a certain degree. However, section 49(b) allows the withholding of personal information that relates to the appellant only when its disclosure would constitute an "unjustified invasion of another individual's personal privacy." (emphasis added)

Accordingly, I find that section 49(b) of the Act does not apply in the circumstances of this appeal.

**ORDER:**

1. I order the Secretariat to disclose to the appellant the records at issue in this appeal, after severing the addresses and telephone numbers of the affected persons, within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with the provisions of this order, I order the Secretariat to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: \_\_\_\_\_  
Asfaw Seife  
Inquiry Officer

\_\_\_\_\_ September 2, 1993