



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

ORDER P-510

Appeal P-9200730

Ontario Human Rights Commission



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ORDER

BACKGROUND:

The requester, acting on behalf of his client, and in response to a civil action brought against his client's company, sought access to the materials contained in an Ontario Human Rights Commission (the OHRC) file under the Freedom of Information and Protection of Privacy Act (the Act). This information was compiled when an employee of the client's company (the affected person) contacted the OHRC with respect to possibly filing a complaint against the company under the Ontario Human Rights Code (the Code). Such a complaint was, however, never launched.

The OHRC located seven responsive records and released five of them to the requester. The OHRC refused, however, to disclose the "Record of Intake" as well as a series of handwritten notes authored by a Human Rights Officer (HRO) based on the exemptions set out in sections 14(2)(a) and 49(b) of the Act. The requester appealed the decision.

Mediation was not successful and notice that an inquiry was being conducted was sent to the appellant, the affected person, and to the OHRC. Written representations were received from the appellant and the OHRC only. Counsel for the affected person also provided the Commissioner's Office with a written consent to release any of his client's personal information to the requester.

ISSUES:

The issues arising in this appeal are:

- A. Whether any of the information contained in the records qualifies as "personal information" as defined by section 2(1) of the Act.
- B. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to the two records.
- C. Whether the discretionary exemption provided by section 49(a) of the Act applies to the two records.
- D. Whether the discretionary exemption provided by section 49(b) of the Act applies to the two records.

SUBMISSIONS/CONCLUSIONS:

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

Section 2(1) of the Act states, in part, that:

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

...

I have reviewed the Record of Intake and find that this document contains the personal information of the appellant and the affected person only. While the name of one other individual appears in this record, the references relate to this person's professional responsibilities and, consequently, do not qualify as her personal information (Orders P-270, P-326, P-427 and P-492).

The handwritten notes prepared by the HRO, on the other hand, contain the personal information of the appellant, the affected person and several other identifiable individuals.

ISSUE B: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to the two records.

The OHRC claims that section 14(2)(a) of the Act applies to both the Record of Intake and to the handwritten notes. This provision reads as follows:

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) of the Act, 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]

In this order, Commissioner Tom Wright also described the type of record which would satisfy the first part of the section 14(2)(a) test:

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.

Both the Record of Intake and the HRO's handwritten notes of his discussions with the affected person were produced as part of the OHRC's Early Settlement Initiative program.

In its written representations, the OHRC states:

The [Early Settlement Initiative] takes place without a formal complaint being written up. A preliminary investigation is conducted and the officer documents all contacts with both parties.

...

In this particular case, the [affected person's] complaint went through this first stage known as an [Early Settlement Initiative]. As stated earlier, the complaint did not settle. The next logical stage would have been the extended investigation. However, the Complainant did not pursue the matter beyond [this] stage.

The appellant, for his part, maintains that the documents arose out of an informal inquiry and, because there was no formal registered complaint, there was no actual investigation.

In Order P-449, I was also called upon to determine whether a Record of Intake produced by the OHRC fell within the definition of a report for the purposes of section 14(2)(a) of the Act. I approached the analysis in the following way:

... the "Record of Intake" outlines the appellant's complaint and the documentation provided to the OHRC by the appellant at the time he filed his complaint. Given that this record contains information pertaining to the preliminary stage of the OHRC's handling of the appellant's complaint, it cannot be considered to contain a formal statement or account of the results of the collation and consideration of information. Accordingly, I find that [the Record of Intake] does not qualify for exemption under section 14(2)(a).

The conclusion reached in Order P-449 that the Record of Intake is not a report under section 14(2)(a) applies equally to the document at issue in the present appeal.

Similarly, I find that the two-page handwritten account of the HRO's conversation with the affected person does not contain "a formal statement or account of the results of the collation and consideration of information". Consequently, this record is also not a report for the purposes of section 14(2)(a) of the Act.

In summary, I find that the OHRC cannot rely on section 14(2)(a) of the Act to withhold the two records.

ISSUE C: Whether the discretionary exemption provided by section 49(a) of the Act applies to the two records.

I have found under Issue B that section 14(2)(a) of the Act does not apply to the records at issue. As a result, it is not necessary for me to consider Issue C.

ISSUE D: Whether the discretionary exemption provided by section 49(b) of the Act applies to the two records.

Under Issue B, I found that the Record of Intake contains the personal information of the appellant and the affected person only. I also found that the handwritten notes contain the personal information of the appellant, the affected person and other identifiable individuals.

Section 47(1) of the Act gives individuals a general right of access to 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 of the Act provides a number of exceptions to this general right of access, one of which is found in section 49(b) of the statute. This provision states 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;

As has been stated in previous orders, section 49(b) introduces a balancing principle. The OHRC must look at the information and weigh the appellant's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the OHRC determines that release of the information would constitute an unjustified

invasion of the other individual's personal privacy, section 49(b) gives the OHRC discretion to deny access to the personal information of the requester.

Section 21 of the Act provides guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy of the individual to whom the information relates. Section 21(1) of the Act prohibits an institution from releasing such information except in certain situations. One such exception is found in section 21(1)(a) of the Act which, when read in conjunction with section 49(b), allows an institution to release personal information "upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access".

As indicated previously, counsel for the affected person has provided the Commissioner's Office with written consent to disclose to the appellant any personal information respecting his client, which was disclosed during the early settlement phase of the OHRC process.

Based on this consideration, I find that the release of the "Record of Intake" and those parts of the handwritten notes which contain the personal information of the affected person would not constitute an unjustified invasion of the personal privacy of that individual.

In his representations, the appellant states:

There is no personal information of third parties in the records of the inquiry.
[The affected person] is the complainant, not a third party and she consents to its release.

I do not agree. Under Issue A, I found that the handwritten notes also contain the personal information of other identifiable individuals. That information consists of several names and telephone numbers.

The OHRC states that disclosure of this information would constitute an unjustified invasion of the personal privacy of these individuals under section 21(1) of the Act. The OHRC also submits that the exception contained in section 21(1)(f) of the Act does not apply to the personal information at issue. Section 21(1)(f) reads as follows:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,

if the disclosure does not constitute an unjustified invasion of personal privacy.

Because section 21(1)(f) is an exception to the mandatory exemption which prohibits the disclosure of personal information, in order for me to conclude that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy (Orders P-432 and P-467).

In his representations, the appellant states that his client is involved in litigation and that "without disclosure, [this individual] will be unable to conduct a proper defence in the civil action between the parties". Implicitly, therefore, the appellant has raised the applicability of section 21(2)(d) of the Act. This provision specifies that, in determining whether the release of personal information would constitute an unjustified invasion of personal privacy, an institution must consider "whether the personal information is relevant to a fair determination of rights affecting the person who made the request".

In Order P-312, former Assistant Commissioner Tom Mitchinson established a four part test which must be met for section 21(2)(d) to apply to the personal information that an appellant wishes to obtain. The third and fourth criteria set out in this test are that the personal information must have some bearing on, or be significant to, the determination of the legal right being advanced, and that the information is required in order to prepare for the proceeding or to ensure an impartial hearing. Based on the very general nature of the representations which the appellant has provided to me, I am unable to find that these two criteria have been met. On this basis, I conclude that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

The result is that the section 21(1)(f) exception is not applicable and that the mandatory exemption provided by section 21(1) of the Act applies to the personal information in question. The names and addresses of the other identifiable individuals are, therefore, exempt from disclosure.

Section 49(b) of the Act is a discretionary exemption. I have reviewed the representations provided by the OHRC regarding its exercise of discretion. I find nothing improper in the manner in which this discretion has been exercised and would not alter this determination on appeal.

I have, along with this order, provided the OHRC with a copy of the handwritten notes and highlighted those portions which should **not** be disclosed.

ORDER:

1. I order the OHRC to disclose to the appellant the "Record of Intake" in its entirety, as well as those portions of the handwritten notes which have **not** been highlighted on the copy of the records which I have provided to the OHRC, within 15 days of the date of this order.

2. In order to verify compliance with the order, I order the OHRC 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: _____
Irwin Glasberg
Assistant Commissioner

_____ August 4, 1993