



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

ORDER P-550

Appeal P-9200603

Ministry of Health



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ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records relating to the investigation of a complaint that the requester had sexually harassed a co-worker.

The Ministry located 47 records in response to the request for information, in regards to which it issued two decision letters. The Ministry's first letter dealt with 32 records; 18 were provided to the requester in whole, 11 were provided in part, and three were denied in full. The Ministry's denied access on the basis of the exemptions found in sections 13(1), 19 and 21 of the Act.

The Ministry's second letter indicated that partial disclosure of an additional 15 records had been granted, with severances pursuant to section 21 of the Act, but was not provided at that time to provide for appeals by other individuals. One appeal was filed involving one record. Although the third party appeal involved only one record, the Ministry did not disclose any portion of the additional 15 records to the requester.

During mediation, the requester agreed that four records were no longer at issue, but maintained that more records responsive to his request should exist. Further mediation 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 13 individuals named in the records (the affected persons). Written representations were received from the appellant, the Ministry, and one affected person. The affected person who provided representations consented to the disclosure of her interview as originally severed by the Ministry.

The records which remain at issue in this appeal are described together with the exemption(s) claimed for each in Appendix "A" to this order.

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 records qualify for exemption under section 19 of the Act.
- C. If the answer to Issues A and B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.
- D. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.

E. Whether the Ministry's search for responsive records 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.

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

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

The records consist of notes, letters and memoranda created during the Ministry's investigation of a complaint that the appellant had sexually harassed a co-worker. I have reviewed all of the records and, in my view, all of the records consist of recorded information about the appellant, and parts of the records consist of recorded information about the affected persons. In my view, this information, where it appears, qualifies as the personal information of the individual to whom it relates.

ISSUE B: Whether the records qualify for exemption under section 19 of the Act.

The Ministry claims that section 19 of the Act applies to pages 3-6 of Record 14 and all of Record 15. Section 19 of the Act states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

1. A record that is subject to the common law solicitor-client privilege (Branch 1); and
2. A record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the institution must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication; **and**
 - (b) the communication must be of a confidential nature; **and**
 - (c) the communication must be between a client (or his agent) and a legal adviser; **and**
 - (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

The Ministry submits that pages 3-6 of Record 14 were provided to the Deputy Director of the Legal Branch of the Ministry, specifically requesting her legal expertise and guidance on this matter, and as such fall under Branch 1 of the exemption. The Ministry states that Record 15 was prepared by the Deputy Director of the Legal Branch of the Ministry to provide legal advice in response to the advice requested in Record 14, and that the last two paragraphs of this record therefore also fall under Branch 1 of the exemption.

In my view, pages 3-6 and the last two paragraphs of Record 15 involve confidential written communications between a client and a legal advisor, which are directly related to seeking or giving legal advice. I find that the first test under Branch 1 has been met, and these parts of the record qualify for exemption under section 19 of the Act.

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

Under Issue A, I found that all of the records contain the personal information of the appellant, and parts of the records contain the personal information of other identifiable individuals (affected persons). In Issue B, I found that pages 3-6 of Record 14 and the last two paragraphs of Record 15 qualify for exemption under section 19 of the Act.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of an institution under the Act. However, this right to access is not absolute. Section 49 provides a number of exemptions to this general right of access, including section 49(a) of the Act, which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, **19**, 20, or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) is a discretionary exemption which allows the Ministry to grant or deny a requester access to information that relates to him/her. In reviewing the Ministry's exercise of discretion in favour of denying access to pages 3-6 of Record 14 and the last two paragraphs of Record 15, I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

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

The Ministry claims that section 21(1) of the Act applies to Records 20, 25, 26, 27 and 29-46. As I have found under Issue A that these records contain the personal information of both the appellant and the affected persons, section 49(b) is the exemption I must consider.

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 provides a number of exceptions to this general right of access. Specifically, section 49(b) provides:

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 disclosure 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).

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 personal privacy.

Sections 21(2), (3) and (4) 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. The Ministry has not claimed that any of the presumptions in section 21(3) are relevant in the circumstances of this appeal, and the appellant has not raised the application of section 21(4) of the Act. I have considered sections 21(3) and (4) and find that none of the personal information at issue in this appeal falls within the ambit of either of these provisions.

The Ministry submits that section 49 is a discretionary exemption, and that it considered the factors contained in section 21 of the Act. The Ministry's submits that it has concerns regarding confidentiality, relevant to section 21(2)(h). The appellant raises the considerations contained in section 21(2)(d). The one affected person who provided representations also does not refer to any provision under section 21(2).

Sections 21(2)(d) and (h) 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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (h) the personal information has been supplied by the individual to whom it relates in confidence;

Section 21(2)(d)

In the appellant's earlier representations he had advised that his client was the respondent to a complaint under the Management Board Workplace Discrimination and Harassment Prevention Policy. He stated that the request for information was made so that his client could become aware of the details of the allegations being made against him. He advised that his client had not received this information and notwithstanding this fact, the investigation had been completed, without his client ever having been properly advised of the true nature and substance of the allegations. He also noted that some legal action may be taken.

In Order P-312, former Assistant Commissioner Tom Mitchinson made the following comments regarding section 21(2)(d) of the Act:

In my view, 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 apposed 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.

Although the appellant implies that some legal action may be contemplated, there is no evidence provided regarding any appeal proceeding that is either existing or contemplated; nor is it explained how the individual records have any bearing on or are significant to the determination of the rights in question; nor is it identified why the individual records are required in order to prepare for any proceeding or to ensure an impartial hearing. Therefore, I am not satisfied that section 21(2)(d) is a relevant factor in the circumstances of this appeal.

Section 21(2)(h)

The Ministry states that the severances made to the records consist of the personal information of individuals who came forward and provided information regarding the sexual harassment allegations, or were the names of individuals who were allegedly involved or could offer additional evidence.

The Ministry submits that the information contained in Records 28-41 and 47 was releasable, except for severances, and that it made the appropriate decision by requesting third party representation prior to releasing the records. Although the Ministry did not disclose any of these records, it advises that it does agree to provide the third party records to the appellant with severances. The Ministry states that the onus is on the third party to establish that the records are exempt where the Ministry decides to disclose a record.

The Ministry advises that it does not want to discourage individuals from coming forward with evidence when they are investigating allegations of sexual harassment. By revealing names, the Ministry believes similar information may no longer be supplied to investigators, which would

impede their ability to conduct proper investigations. The Ministry believes that on balance it is releasing as much information as possible without causing harm to the privacy of individuals supplying the information, and therefore, is balancing the right of access with the protection of privacy.

The Ministry notified all third parties regarding the records, and received one objection which is the subject of Appeal P-9200748. This office also notified all third parties and did not receive any objections to the disclosure of the records with severances. Only one third party contacted this office to advise that they were agreeable to their personal information being disclosed subject to the proposed severances which would remove information that would identify individuals. In my view, disclosure of the personal information of the third parties, subject to the proposed severances, would not constitute an unjustified invasion of their personal privacy.

In Order M-82, I stated:

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. Equally, complainants must be given enough information to enable them to ensure that their allegations were adequately investigated.

In the circumstances of this appeal, the severances made to the records at issue include only the names and personal information of affected persons. The disclosure of the balance of the records at issue, as well as the other records which have already been disclosed to the appellant, are sufficient to enable the appellant's client to ascertain what he is accused of and by whom. Accordingly, I find that section 21(2)(h) is a relevant consideration with respect to the names and personal information of affected persons severed from the records.

In summary, I have found that only section 21(2)(h) is a relevant factor in the circumstances of this appeal. This factor weighs in favour of privacy protection, and in my view, disclosure of the parts of the records which remain at issue would constitute an unjustified invasion of personal privacy of the affected persons, and, therefore, section 49(b) applies.

Section 49(b) is a discretionary exemption. The Ministry has provided me with representations regarding its exercise of discretion in favour of withholding the severed information. I have found nothing improper, and would not alter it on appeal.

ISSUE E: Whether the Ministry's search for responsive records was reasonable in the circumstances.

The appellant believes additional records which are responsive to his request exist, which the Ministry had not provided to the appellant or this office.

In its representations the Ministry provides details of the steps taken to locate records responsive to the request. The Ministry advises that all records in this case were held centrally by the Workplace Discrimination and Harassment Prevention Co-ordinator. It states that since, at the time of the request, the investigation was still ongoing, the possibility does not exist that additional responsive records were destroyed. In addition, all files were held centrally by the investigator, and were easily located.

Having reviewed the representations submitted to me, I am satisfied that the search conducted by the Ministry for records responsive to the appellant's request was reasonable in the circumstances.

ORDER:

1. I uphold the Ministry's decision, and find that the search conducted by the Ministry for records responsive to the appellant's request was reasonable in the circumstances.
2. I order the Ministry to disclose the records with severances as referred to in its second decision letter 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 2, **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ October 13, 1993

APPENDIX A

RECORD	DESCRIPTION	EXEMPTION
14	August 11 memos to and from Investigator and WHDP Co-ordinator and a fax cover sheet (pages 3-6 only)	s.19
15	August 14 memo to WHDP Co-ordinator from Investigator (last two paragraphs only)	s.19
20	August 20 letter from Investigator	Part s.21
25	17-page record entitled "WDH - Investigation Series of Events - 04-92"	Part s.21
26	Witness code key	Part s.21
27	June 2 - July 16 interview notes - Complainant	Part s.21
29	Interview notes Witness A	Part s.21
30	Interview notes Witness B	Part s.21
31	Interview notes Witness N	Part s.21
32	Interview notes Witness C	Part s.21
33	Interview notes Witness R	Part s.21
34	Interview notes Witness F	Part s.21
35	Interview notes Witness L	Part s.21
36	Interview notes Witness D	Part s.21
37	Interview notes Witness G	Part s.21
38	Interview notes for Witness	Part s.21
39	Interview notes Witness M	Part s.21
40	Interview notes Witness H	Part s.21
41	Interview notes Witness E	Part s.21
42	Interview questions for Witness P	Part s.21
43	Interview questions for Witness Q	Part s.21
44	Interview questions for Witness	Part s.21
45	Interview questions for witness and excerpt from Record 25	Part s.21
46	August 21 fax cover sheet and letter from Investigator	Part s.21
47	August 28 draft investigation report	Part s.21