



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

# **ORDER P-549**

**Appeals P-9200748 and P-9300108**

**Ministry of Health**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# ORDER

## BACKGROUND:

The Ministry of Health (the Ministry) received two requests under the Freedom of Information and Protection of Privacy Act (the Act) from the same individual, for access to all records relating to the investigation of an allegation that the requester had sexually harassed a co-worker.

The Ministry notified the person who filed the sexual harassment complaint of each request and invited her to submit her views regarding disclosure of the records. The complainant objected to disclosure of the records claiming the exemptions in sections 17(1)(d), 19 and 21 of the Act to the record identified as responsive to the first request, and sections 17(1)(d) and 21 of the Act in respect of the records identified as responsive to the second request. In response to each request, the Ministry decided to grant partial access to the records. The complainant appealed each decision.

Mediation of the appeals was not successful, and notice that inquiries were being conducted to review the Ministry's decisions were sent to the appellant, the Ministry and the requester. Representations were received from all parties.

## RECORDS AT ISSUE:

The records which remain at issue consist of notes of interviews with the appellant dated June 2, June 24 and September 4, 1992, and notes of a telephone conversation with the appellant dated July 16, 1992.

## PRELIMINARY ISSUE:

The appellant submits that section 19 applies to the records identified as responsive to the first request. In her representations, the appellant did not address the issue of whether she could claim a discretionary exemption when the Ministry did not.

In Order P-257, former Assistant Commissioner Tom Mitchinson considered this question as follows:

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular

section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with Assistant Commissioner Mitchinson's view. I find that a consideration of the proper application of section 49(b) to the record will address the interests of all parties, and that it is not necessary or appropriate for me to consider the appellant's arguments with respect to section 19 of the Act.

The appellant has also claimed that section 17(1)(d) should be applied to the record. As this is a mandatory exemption, I will consider the application of this exemption to the record even though it was not claimed by the Ministry.

## **ISSUES:**

The issues arising in this appeal are:

- A. Whether the mandatory exemption provided by section 17(1)(d) of the Act applies.
- 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 B is yes, and the information relates to the appellant and the requester, whether the discretionary exemption provided by section 49(b) of the Act applies.
- D. If the answer to Issue B is yes, and the information relates solely to the appellant, whether the mandatory exemption provided by section 21 of the Act applies.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the mandatory exemption provided by section 17(1)(d) of the Act applies.**

Section 17(1)(d) of the Act states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

The appellant states that the Ministry's sexual harassment grievance procedure gives rise to a labour dispute and that the information she provided, which constitutes the records, was given to the investigator appointed by the Ministry to resolve that labour relations dispute.

In Order M-82, I made the following comments regarding section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act which corresponds to section 17(1)(d) of the Freedom of Information and Protection of Privacy Act:

The introductory wording of section 10(1) requires that the information must have been supplied to the City, the "institution", by a third party which, by definition, is not part of the institution. The City's employees are part of the institution, and do not qualify as third parties for the purposes of section 10.

The appellant is an employee of the Ministry and therefore does not qualify as a third party supplying information to the Ministry. The investigator is also an employee of the Ministry and therefore, does not qualify as a third party supplying information to the Ministry. Accordingly, in my view, section 17(1)(d) does not apply to the records.

**ISSUE B: 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 were compiled during an investigation into an allegation of sexual harassment. I have reviewed the records and, in my view, both records contain recorded information about the appellant and the original requester which, in my view, qualifies as the personal information of both individuals. Accordingly, it is not necessary for me to consider Issue D.

**ISSUE C: If the answer to Issue B is yes, and the information relates to the appellant and the requester, whether the discretionary exemption provided by section 49(b) of the Act applies.**

The appellant submits that section 21 of the Act applies, and the records should not be disclosed. As I have found under Issue B that the records contain the personal information of the appellant and the original requester, 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(b) provides an exception to this general right of disclosure of personal information to the person to whom the information relates. Specifically, section 49(b) provides 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;

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 privacy. Accordingly, in the circumstances of this appeal, the onus is on the appellant to demonstrate that disclosure of the information would constitute an unjustified invasion of her personal privacy.

However, even if the appellant is successful in establishing that the requester could be denied access to the information pursuant to section 49(b), this section gives the Ministry the discretion to grant or deny access to the requester.

The Ministry acknowledges that section 49(b) of the Act was available. The Ministry has provided representations regarding their consideration of factors under section 21(2), and exercise of discretion to disclose the information at issue. Having reviewed these

representations, I find nothing to indicate that the exercise of discretion was improper and would not alter it on appeal.

**ORDER:**

1. I uphold the Ministry's decision to disclose the records to the requester, and I order the Ministry to disclose the records 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 Ministry to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 1, **only** upon request.

Original signed by: \_\_\_\_\_  
Holly Big Canoe  
Inquiry Officer

\_\_\_\_\_ October 13, 1993