



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

ORDER P-551

Appeals P-9300063 and P-9300109

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 the requester's complaint that she had been sexually harassed by a co-worker.

The Ministry located 93 records responsive to the request, in regards to which it issued two decision letters. The Ministry's first letter dealt with 43 records, providing the requester with access to 10 records, partial access to 19 records, and denying access to 14 records. The Ministry 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 access had been granted to an additional 50 records, 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 by the respondent in the complaint, involving 25 records. Although the respondent's appeal involved only 25 records, the Ministry did not disclose any portion of the additional 50 records to the requester.

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 the respondent in the complaint (the affected person). Written representations were received from all parties.

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:

This 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. Whether the records qualify for exemption under section 13 of the Act.
- D. If the answer to Issues A and B or C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.
- E. If the answer to Issue A is yes and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.

- F. If the answer to Issue B is yes and the personal information relates to individuals other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies.

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 been sexually harassed by a co-worker.

Having reviewed the records, it is my view that Records 2, 13, 15, 16, 19, 48-50, 58-61, 65-67, 71-77, 79, 80 and 83-89 contain recorded information about the affected person and/or individuals other than the appellant. Records 5-8, 10-12, 14, 18, 20, 21, 23, 25, 26, 28-47, 51_56, 62-64, 68, 70, 78, 81, 82 and 90-93 contain recorded information about the appellant, the affected person and/or other individuals.

The affected person is appealing the Ministry's decision to disclose Records 5-7, 10, 18, 20, 21, 23, 28, 49-53, 59, 61, 62, 65, 70, 74, 75, 78, 80, 81 and 86. Having reviewed these records, it is apparent that the Ministry's decision was not to disclose any information relating to the affected person on the first page of Records 10, 21 and 70, and all of Records 50, 61, 74 and 80. Accordingly, in my view, it is not necessary for me to include these records or parts of records within the scope of the affected person's appeal.

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

This Ministry submits that section 19 of the Act applies to Records 11, 13, 14, 15, 48, 60, 66, 67, 71 and 76. 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 the Ministry 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]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

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Other than for Record 14, the Ministry has not indicated which branch of the section 19 exemption it is relying on. The Ministry has not addressed its submissions to any of the components of the tests for either branch of the exemption, which were provided to it by this office.

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The purpose for the creation of the record is an essential part of both the second test under Branch 1 and the second part of the Branch 2 test. The purposes which are described in these parts of the tests are not always readily discernable on the face of a record. The Ministry has not provided submissions which indicate that the records were created for any of the described purposes, and I find that the second test under Branch 1 and the second part of the Branch 2 test have not been met.

In my view, only the last sentence of the second last paragraph of page 2 of Record 13, the last paragraph of the first page and all of pages 3-6 of Record 14, the last two paragraphs of Record 15, Record 60, the last paragraph of Record 66, the first paragraph of Record 67, the third paragraph of Record 71, and the second paragraph of Record 76 involve confidential written communications between a client and a legal advisor, which are directly related to seeking, formulating or giving legal advice. For these parts of the record, I find that the first test under Branch 1 has been met, and these parts of the records qualify for exemption under section 19 of the Act.

There is no evidence on the face of Record 11 nor is there any suggestion in the Ministry's representations that this record is a communication between a client and a legal advisor. Record 48, while it is such a communication, is not directly related to seeking, formulating or giving legal advice. I find that these two records, and the remaining parts of the records described above, do not qualify for exemption under section 19 of the Act.

ISSUE C: Whether the records qualify for exemption under section 13 of the Act.

The Ministry submits that Records 11, 12, 72, 87 and 89 qualify for exemption under section 13 of the Act. Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

The Ministry's entire submission on the application of this exemption reads:

The records contain correspondence between public servants for the purpose of providing advice. The records contain specific recommended courses of action in the form of direction on how to deal with an issue.

All five records are typewritten draft letters with hand written, marginal notes.

It has been established in previous orders that "advice" and "recommendations", for the purposes of section 13(1) of the Act, pertain to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process, and that in

order to qualify as "advice" or "recommendations", there must be evidence of some type of communication of information from one person to another (Orders 58 and 118).

The representations provided by the Ministry are not sufficiently detailed and convincing to satisfy me that section 13(1) applies and, in my view, the evidence required to establish the application of section 13(1) is not discernable from the face of the record. Accordingly, I am not satisfied that these records qualify for exemption under section 13 of the Act.

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

Under Issue A, I found that Record 14 contains the personal information of the appellant. In Issue B, I found that the last paragraph of the first page and all of pages 3-6 of Record 14 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 the last paragraph of the first page and all of pages 3-6 of Record 14, I have found nothing to indicate that the exercise of discretion was improper, and would not alter it on appeal.

ISSUE E: If the answer to Issue A is yes and the information relates to the appellant and other individuals, 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 the records. As I have found under Issue A that Records 5-8, 10-12, 14, 18, 20, 21, 23, 25, 26, 28-47, 51-56, 62-64, 68, 70, 78, 81, 82 and 90-93 contain the personal information of both the appellant, the affected person and other individuals, 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/her own personal information against another individual's right to the protection of his/her privacy. If the Ministry 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 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.

Where the Ministry has decided to grant access to the personal information contained in the records, all potentially affected persons have been properly notified and have not objected to disclosure by filing an appeal of the Ministry's decision with this office, the personal information should be disclosed to the appellant.

Where the Ministry has decided to grant access to the personal information contained in the records and a person objects to the disclosure, the onus is on the party resisting disclosure (the only such party in this appeal is referred to in this order as the affected person) to demonstrate that disclosure of the records would constitute an unjustified invasion of his or her privacy. However, even if the affected person is successful in establishing that the appellant could be denied access to the information pursuant to section 49(b), section 49(b) gives the Ministry the discretion to grant or deny access to the appellant.

Where the Ministry has decided not to disclose the personal information contained in the records, 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, the appellant and the affected person make no reference to the relevance of any of these sections to the circumstances of this appeal. 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.

Having reviewed the record and with consideration to the circumstances of this appeal, I find that only section 21(2)(h) is a relevant factor. This factor weighs in favour of privacy protection and, in my view, disclosure of the parts of the records which the Ministry has decided to withhold from the appellant would constitute an unjustified invasion of personal privacy of other individuals and, therefore, section 49(b) applies.

Section 49(b) is a discretionary exemption. The Ministry has provided me with representations regarding its consideration of the application of this section and its exercise of discretion in favour of providing the appellant with partial access to the records. I have found nothing improper, and would not alter it on appeal.

ISSUE F: If the answer to Issue B is yes and the personal information relates to individuals other than the appellant, whether the mandatory exemption provided by section 21 of the Act applies.

In Issue A, I found that Records 2, 13, 15, 16, 19, 48-50, 58-61, 65-67, 71-77, 79, 80 and 83_89 contain recorded information about individuals other than the appellant.

Section 21(1) of the Act prohibits the disclosure of personal information to any person other than to the individual to whom the information relates, except in certain circumstances listed under the section.

In my view, the only exception to the section 21(1) mandatory exemption which has potential application in the circumstances of this appeal is section 21(1)(f), which 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 find that section 21(1)(f) applies, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the Act provide guidance in determining whether or not disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists factors which must be considered in determining whether or not the disclosure of personal information would constitute an unjustified invasion of personal privacy.

The Ministry decided to grant access to parts of Records 2, 13, 15, 16, 19, 48, 58, 60, 66, 67, 71, 72, 73, 76, 77, 79, 83, 84, 85, 87, 88 and 89, and this decision has not been appealed by any of the individuals whose personal information is contained in the records. Having reviewed the

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records, I am satisfied that the severed information is personal information which is properly exempt under section 21 of the Act.

The affected party has appealed the Ministry's decision to grant access to parts of Records 49, 50, 59, 61, 65, 74, 75, 80 and 86. Having reviewed the records, I am satisfied that the Ministry has withheld all information relating to the affected person on pages 50, 61, 74 and 80, and I uphold the Ministry's decision with respect to these pages.

In the absence of any evidence or argument weighing in favour of finding that disclosure of the personal information in Records 49, 59, 65, 75 and 86 would **not** constitute an unjustified invasion of personal privacy, I find that, in the circumstances of this appeal the exception under section 21(1)(f) does not apply. Accordingly, I find that the records are properly exempt under section 21(1) of the Act.

ORDER:

1. I uphold the Ministry's decision with respect to the disclosure of parts of Records 2, 5-8, 10, 15, 16, 18-21, 23, 25, 26, 28-47, 50-56, 58, 60-64, 68, 70, 73, 74, 77-85, 88 and 90_93.
2. I order the Ministry to disclose parts of Records 11-14, 48, 66, 67, 71, 72, 76, 87 and 89 to the appellant. I have provided the Ministry with a highlighted copy of these records. The information which is **not** to be disclosed to the appellant has been highlighted.
3. I order the Ministry not to disclose Records 49, 59, 65, 75 and 86 to the appellant.
4. I order the Ministry to disclose the records referred to in Provisions 1 and 2 of this order to the appellant within 35 days of the date of this order and not before the thirtieth (30th) day following the date of this order.
5. 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 Provisions 1 and 2, **only** upon request.

Original signed by:
Holly Big Canoe
Inquiry Officer

October 13, 1993

Appendix A

RECORD	DESCRIPTION	EXEMPTION
2	May 8, 1992 memo to WHDP Co-ordinator from Employment Equity Consultant attaching complaint	Part s.21
5	July 7, 1992 letter to Investigator	Part s.21
6	July 23, 1992 letter from Investigator	Part s.21
7	July 29 letter to Deputy Minister	Part s.21
8	July 30 cover note to WHDP Co-ordinator (mailing label)	Part s.21
10	August 7 fax cover sheets, August 7 letter to Deputy Minister (3 copies) and MOH mail action document	Part s.21
11	August 10 draft letter from Deputy Minister	s.13(1) s.19 Part s.21
12	August 10 2nd draft letter from Deputy Minister	s.13(1) Part s.21
13	August 11 memos to and from Ministry counsel and the Deputy Minister's Executive Assistant	Part s.19 Part s.21
14	August 11 memos to and from Investigator and WHDP Co_ordinator and a fax cover sheet	s.19
15	August 14 memo to Deputy Minister's Executive Assistant from Investigator	Part s.19 Part s.21
16	August 17 memo to Deputy Minister's Executive Assistant from Investigator	Part s.21
18	August 19 letter from Deputy Minister	Part s.21
19	August 19 memo to Deputy Minister's Executive Assistant from Investigator	Part s.21
20	August 20 letter from Investigator	Part s.21
21	Fax cover sheet and August 21 letter to Deputy Minister	Part s.21
23	August 20 letter from Investigator (fax of Record 20)	Part s.21
25	17-page record entitled "WDH - Investigation Series of Events - 04-92"	Part s.21

RECORD	DESCRIPTION	EXEMPTION
26	Witness code key	Part s.21
28	Interview notes and statement of respondent	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
48	August 25 memo to Deputy Minister from Deputy Director of Legal Services	s.19 Part s.21
49	August 25 letter from Deputy Director of Legal Services	Part s.21
50	August 21 fax cover sheet to Deputy Minister	Part s.21
51	August 21 letter to Deputy Minister	Part s.21
52	September 2 letter from WHDP Co-ordinator	Part s.21
53	September 3 notes of phone conversation with respondent	Part s.21

RECORD	DESCRIPTION	EXEMPTION
54	Interview notes Witness V	Part s.21
55	Interview notes Witness T	Part s.21
56	Interview notes Witness U	Part s.21
58	Courier slip dated September 8	Part s.21
59	September 8 letter from Investigator	Part s.21
60	September 4 memo to Ministry counsel	s.19 Part s.21
61	August 28 fax cover sheet to Investigator	Part s.21
62	September 4 letter to Investigator (two copies)	Part s.21
63	Interview notes Witness W	Part s.21
64	Interview notes Witness X	Part s.21
65	September 9 notes of phone conversation	Part s.21
66	September 10 memo to Ministry counsel from WHDP Co_ordinator	s.19 Part s.21
67	September 10 memo to Investigator from Ministry counsel	s.19 Part s.21
68	Interview notes Witness B	Part s.21
70	September 10 fax cover sheet and two copies of September 10 letter to Investigator	Part s.21
71	September 15 memo to WHDP Co-ordinator from Investigator	s.19 Part s.21
72	September 15 letter from Investigator	s.13(1) Part s.21
73	September 15 memo to WHDP Co-ordinator from Investigator	Part s.21
74	September 15 fax cover sheet to Investigator	Part s.21
75	September 15 letter to Investigator (two copies)	Part s.21
76	September 16 memo to WHDP Co-ordinator from Investigator	s.19 Part s.21
77	Courier slip dated September 17	Part s.21
78	September 17 letter from Investigator	Part s.21

RECORD	DESCRIPTION	EXEMPTION
79	September 21 memo to WHDP Co-ordinator from Investigator	Part s.21
80	September 21 fax cover sheet to Investigator	Part s.21
81	September 21 letter to Investigator (two copies)	Part s.21
82	October 5 memo to WHDP Co-ordinator from Investigator	Part s.21
83	October 8 courier slip (fax copy)	Part s.21
84	October 8 courier slip	Part s.21
85	Address label	Part s.21
86	October 7 letter from Investigator	Part s.21
87	October 5 draft letter from Investigator	s.13(1) Part s.21
88	September 23 memo to WHDP Co-ordinator from Investigator	Part s.21
89	September 23 letter from Investigator	s.13(1) Part s.21
90	Witness code	Part s.21
91	35-page record entitled "WDH - Investigation Series of Events - 04/92" (see record 25)	Part s.21
92	Draft investigation report	Part s.21
93	November 13 memo to WHDP Co-ordinator and investigation report	Part s.21