



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-492

Appeal P-9200434

Ontario Human Rights Commission



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ORDER

BACKGROUND:

The requester in this case originally filed a complaint with the Ontario Human Rights Commission (the OHRC) alleging that his employer had discriminated against him on the basis of creed, contrary to the Ontario Human Rights Code (the Code). Following an investigation, the OHRC decided that the evidence did not warrant the appointment of a Board of Inquiry to hear the complaint.

The requester sought access to the OHRC's file on his case under the provisions of the Freedom of Information and Protection of Privacy Act (the Act). The OHRC identified a number of records which were responsive to the request. The institution then made the decision to grant access to some documentation but refused to release other records, in full or in part, based on the exemptions found in sections 13, 14(2)(a), 19, 21 and 49(a) and (b) of the Act. The requester appealed the OHRC's decision.

During mediation, the OHRC provided the appellant with additional records after two third parties had consented to the release of information relating to them. Further mediation was not successful and notice that an inquiry was being conducted to review the OHRC's decision was sent to the appellant and the OHRC. Representations were received from both parties.

The records at issue in this appeal, together with the corresponding exemptions claimed by the OHRC, are listed below:

- | | | | |
|----|-------------------------|---|---|
| 1. | Record of Intake | - | Sections 14(2)(a) and 49(a) of the <u>Act</u> . |
| 2. | Record of Conciliation | - | Sections 14(2)(a) and 49(a) of the <u>Act</u> . |
| 3. | Record of Investigation | - | Sections 14(2)(a) and 21(3) of the <u>Act</u> . |
| 4. | Case Disposition | - | Sections 13, 14(2)(a) and 49(a) and (b) of the <u>Act</u> . |
| 5. | Case Disposition | - | Sections 13, 14(2)(a) and 49(a) of the <u>Act</u> . |
| 6. | Case Disposition | - | Sections 13, 14(2)(a) and 49(a) of the <u>Act</u> . |
| 7. | Legal Memorandum | - | Sections 13, 14(2)(a), 19 and 49(a) of the <u>Act</u> . |

8. Inter-staff Memo - Sections 13(1) and 49(a) of the Act.

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 in section 19 of the Act applies to Record 7.
- C. Whether the discretionary exemption in section 14(2)(a) of the Act applies to Records 1, 2, 3, 4, 5, 6 and 7.
- D. Whether the discretionary exemption in section 13(1) of the Act applies to Records 4, 5, 6, 7 and 8.
- E. Whether the discretionary exemption in section 49(a) of the Act applies to Records 1, 2, 4, 5, 6, 7 and 8.
- F. Whether the discretionary exemption in section 49(b) of the Act applies to Record 3.

SUBMISSION/CONCLUSIONS:

ISSUE A: Whether any of 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, that:

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

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- ...
- (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 OHRC submits that Records 1, 2, 4, 5, 6, 7 and 8 contain the personal information of the appellant only and that Record 3 contains the personal information of both the appellant and other identifiable individuals.

Following my review of these records, I am satisfied that each of these documents contains information which qualifies as the personal information of the appellant. I must now determine whether Record 3 also contains the personal information of other identifiable individuals.

It has been held in a number of previous orders that the views and opinions expressed by an individual in his or her professional or employment capacity do not constitute the "personal" opinions or views of that individual. Similarly, the names and professional titles or affiliations of individuals do not fall within the ambit of "personal information" as defined in section 2(1) of the Act (Orders P-270, P-326 and P-427).

In this case, Record 3 contains the names of various individuals contacted by OHRC staff in their professional or employment capacities for the purpose of obtaining information about the theological basis for the complaint. Because this information was provided in a professional context and for an employment related purpose, I find that the materials do not qualify as the personal information of the individuals in question.

Because I have determined that the records in this appeal do not contain the personal information of individuals other than the appellant, it is not necessary for me to consider Issue F.

ISSUE B: Whether the discretionary exemption in section 19 of the Act applies to Record 7.

The OHRC has claimed that section 19 of the Act applies to Record 7 which consists of a legal memorandum and an attached index.

Section 19 of the Act reads as follows:

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 advisor; **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]

Record 7 was authored by the OHRC's legal counsel and a student-at-law for the Chief Commissioner of the OHRC. Having reviewed this record and the representations of the OHRC, I am satisfied that the memorandum can be categorized as a confidential written communication between a client and a legal advisor and that the document relates directly to the provision of legal advice. Accordingly, I find that Record 7 qualifies for exemption under section 19 of the Act.

ISSUE C: Whether the discretionary exemption in section 14(2)(a) of the Act applies to Records 1, 2, 3, 4, 5, 6 and 7.

Under Issue B, I found that the section 19 exemption may be applied to withhold Record 7 from disclosure. Therefore, I will confine my discussion of section 14(2)(a) of the Act to Records 1 through 6.

Section 14(2)(a) 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, the institution must satisfy each part of the following three-part test:

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]

It has been determined in a number of previous orders that investigations into complaints made under the Code are properly considered law enforcement matters and may lead to proceedings before a Board of Inquiry which are properly considered law enforcement proceedings (Orders 89, 178 and 200).

The word "report" is not defined in the Act. In order to constitute 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 (Order 200).

In its representations, the OHRC submits that, in determining whether a document fits the definition of "report", consideration should be given not just to the appearance and form of the document but, more importantly, to the historical purpose for which the document was created and the policy considerations attached to it.

I have reviewed the records for which the OHRC has relied upon section 14(2)(a) of the Act and, in my view, only Records 4, 5 and 6 can accurately be described as "reports". These documents all discuss the background of the complaint, the grounds for the allegation of discrimination and the section of the Code upon which the complaint was based. The three records also contain an analysis of the results of the OHRC's investigation of the appellant's complaint and the staff recommendation with respect to the appointment of a Board of Inquiry along with the accompanying reasons.

On this basis, the documents can accurately be described as formal statements which contain the results of the collation and consideration of information. In addition, these records were prepared in the course of law enforcement by an agency which has the function of enforcing and regulating compliance with the law. For these reasons, I find that Records 4, 5 and 6 all qualify for exemption under section 14(2)(a) of the Act.

I will now address Records 1, 2 and 3. Record 1 is identified as a Record of Intake form completed by the Human Rights Officer at an early stage in the investigation process. The document consists solely of a recording of facts relating to the complaint.

Record 2, which is labelled a Record of Conciliation, includes a list of the various stages of the complaint process arranged by date. Record 3 is called a Record of Investigation and sets out the telephone calls and conversations conducted between the Human Rights Officer assigned to the case and other individuals from whom information was sought.

I have carefully reviewed these three records and find that none of them can be characterized as reports for the purposes of the legislation. On this basis, the OHRC cannot rely on section 14(2)(a) of the Act to exempt these records from disclosure.

In summary, I find that only Records 4, 5 and 6 qualify for exemption under section 14(2)(a) of the Act.

ISSUE D: Whether the discretionary exemption in section 13(1) of the Act applies to Records 4, 5, 6, 7 and 8.

Because I have found that Records 4, 5, 6 and 7 are exempt from disclosure under Issues B and C, it is not necessary for me to consider these documents in my analysis of section 13(1) of the Act. Thus, my review will be restricted to a consideration of Record 8.

Record 8 contains seven pages numbered 8 and 8.1 to 8.6. Pages 8 to 8.5 contain the following types of information. Page 8 is a record of a conversation with the appellant; page 8.1 contains two telephone "action memos" which record incoming calls; page 8.2 is a note to file which gives details of the strategy employed to process the file; page 8.3 is a note which comments on the nature of the case; pages 8.4 and 8.5 consist of a two memos from a supervisor to a director regarding the timing of the staff submission to the OHRC. Page 8.6, on the other hand, is a memorandum from the OHRC's Office of Reconsideration which contains a recommendation on how to treat the appellant's request that his case be reconsidered.

Section 13(1) of the Act reads as follows:

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.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process (Orders 118, P-304, P-348, P-356 and P-402). "Recommendations" should be viewed in the same vein (Orders 161, P-402, P-428, P-348 and P-356).

The OHRC submits that all the documents which make up Record 8 consist of the advice of staff regarding the treatment of the evidence gathered during the investigation. That advice includes the specification of a particular course of action which the OHRC should take regarding the appellant's complaint.

The appellant, on the other hand, argues that, as a public body which is publicly financed, the OHRC has no right to keep its deliberations secret.

Having reviewed the documents in question, I find that pages 8 and 8.1, 8.3 and 8.5 and parts of pages 8.2 and 8.4 consist of factual information only which does not make reference to any suggested course of action. Thus, these parts of Record 8 cannot be characterized as documents containing "advice or recommendations" under section 13(1) of the Act. I find, however, that page 8.6 and the highlighted parts of pages 8.2 and 8.4 of Record 8 consist of the advice or recommendations of public servants and, therefore, falls within the ambit of section 13(1) of the Act.

To summarize, therefore, the OHRC may only rely on section 13(1) of the Act to exempt page 8.6 and the highlighted parts of pages 8.2 and 8.4 of Record 8.

ISSUE E: Whether the discretionary exemption in section 49(a) of the Act applies to Records 1, 2, 4, 5, 6, 7 and 8.

Under Issue A, I found that all of the records at issue contain the personal information of the appellant only. Under Issues B, C and D, I found that Records 4, 5, 6, 7, Page 8.6 and parts of pages 8.2 and 8.4 of Record 8 qualify for exemption under either sections 19, 14(2)(a) or 13(1) of the Act. On this basis, it is now necessary for me to consider the wording of section 49(a) of the Act. This provision states:

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;

In his representations, the appellant states that he is entitled to see the written material on his case because it is not of a confidential nature in that it is only about him.

It has been held in a number of previous orders that section 49(a) provides an exception to the rule that a requester has a general right of access to his or her own personal information in the custody or control of a government institution. In this case, section 49 (a) provides the OHRC with the discretion to disclose or to refuse to disclose the appellant's own personal information if sections 13, 14 or 19 apply to the information.

I have reviewed the OHRC's exercise of discretion in favour of refusing to disclose Records 4, 5, 6, 7, page 8.6 and parts of pages 8.2 and 8.4 of Record 8. I find nothing improper in the manner in which this discretion was exercised in the circumstances of this case.

ORDER:

1. I uphold the OHRC's decision not to disclose Records 4, 5, 6 and 7 as well as page 8.6 and the highlighted parts of pages 8.2 and 8.4 of Record 8 which will accompany this order.
2. I order the OHRC to disclose to the appellant Records 1, 2 and 3 and pages 8, 8.1, 8.3, 8.5 of Record 8 in their entirety along with the parts of pages 8.2 and 8.4 of Record 8 which have **not** been highlighted. (For greater certainty, Record 1 consists of page 1 and pages 1.1 to 1.5 and Record 3 consists of page 3 and pages 3.1 to 3.6).
3. In order to verify compliance with this order, I order the head to provide me with a copy of the records which are disclosed to the appellant, **only** upon my request.

Original signed by: _____
Irwin Glasberg

July 8, 1993

Assistant Commissioner