



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

ORDER P-615

Appeal P-9300345

Ministry of the Solicitor General and Correctional Services



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ORDER

BACKGROUND:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a report relating to the investigation of the requester's complaint that she had been sexually harassed by a co-worker (the affected person).

The Ministry granted partial access to the record, claiming the application of section 49(b) of the Act, supported by sections 21(2)(f) and (h) to deny access to the remainder. In addition, the Ministry withheld portions of the report on the basis that these portions are not responsive to this request.

The requester appealed the Ministry's decision.

During the course of mediation, the appellant narrowed the scope of her request to include only the information in the report which was provided by the affected person in response to the appellant's complaint.

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 the affected person. Representations were received from all parties.

THE RECORD:

The record is a thirteen-page report containing four main headings: SUMMARY OF COMPLAINT PROCESS, SUMMARY OF ALLEGATIONS, SUMMARY OF INVESTIGATION TO DATE and FINDINGS AND CONCLUSIONS. The report deals with two separate complaints by two complainants. Both complaints were dealt with in the same document because the respondent (the affected person) is the same in both cases. Each complaint was assigned a separate reference number in the report.

In my view, the following portions of the record remaining at issue are responsive to this request:

- the first two paragraphs under the sub-heading **The Respondent** on page seven,
- the second sentence in the first paragraph and the first two and last three sentences in the first full paragraph on page eight,

- the two paragraphs under the sub-heading **Other Issues and Evidence** on page eight, and
- the paragraph beginning at the bottom of page nine and continuing on the top of page ten.

For greater certainty, I have identified the non-responsive portions of the report on the copy of the record provided to the Freedom of Information and Protection of Privacy Co-ordinator of the Ministry with 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. 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.

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, ...

In my view, the portions of the record which respond to the request contain recorded information about the appellant and individuals other than the appellant, including the affected person.

ISSUE B: 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.

Under Issue A, I found that the record contains the personal information of the appellant, the affected person and other individuals.

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.

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 another individual's personal privacy.

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.

In his representations, the affected person states that he refuses to give his permission to the disclosure of any of his personal information.

The Ministry submits that the considerations under sections 21(2)(f) and (h) which favour non-disclosure, are relevant in the circumstances of this appeal.

Sections 21(2)(f) 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,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

In support of its application of section 21(2)(f) to the record, the Ministry submits:

Incidents of alleged workplace harassment are by their very nature highly sensitive matters. In the case at hand, the allegation against [the affected person] was substantiated and, as a result, his employment contract with the ministry was terminated. The finding that the allegation was substantiated is not akin to a criminal conviction that follows an individual throughout his/her life. [The affected person] has been disciplined by the employer and should not have to worry about facing additional repercussions in the community should the appellants choose to, for example, go public with a copy of the investigation report.

In Order M-82, Inquiry Officer Holly Big Canoe considered the issue of sensitivity in the context of workplace harassment complaints, and stated the following:

In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to restrict discussion of workplace relationships and conduct and to find such information distressing in nature ... Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant.

I agree with Inquiry Officer Big Canoe. In applying these principles to the circumstances of this appeal, I conclude that section 21(2)(f) is not a relevant consideration with respect to the major

portion of those pages or parts of pages containing information provided by the respondent (the affected person).

In support of its claim that section 21(2)(h) applies to the record, the Ministry submits:

It is the view of the ministry that the severed information was submitted in confidence to the individual who investigated the appellant's complaint pursuant to the Workplace Discrimination and Harassment Prevention (WDHP) Directive. As per the attached copy of the WDHP Directive, confidentiality is implicit in the process. Release of this type of information has the potential to hamper the ministry's ability to investigate workplace harassment as employees, fearing reprisals, will be reluctant to cooperate with investigators.

I am in partial agreement with the Ministry's view of the confidential nature of information submitted during the course of a harassment investigation. I note, however, that the WDHP Directive provided by the Ministry states, in part:

The parties to a complaint and all witnesses must be advised about the application of the *Freedom of Information and Protection of Privacy Act* to any evidence gathered, and about potential disclosure of such evidence required according to law.

...

Throughout the complaint and investigation process all information must remain confidential, subject to the *Freedom of Information and Protection of Privacy Act* and the requirement to disclose information or give evidence as required by law, such as grievance arbitrations, Ontario Human Rights Commission proceedings and judicial proceedings. [see *FOI and the Discrimination/Harassment Complaint Process* booklet, Workplace Discrimination/Harassment Prevention Unit, MBS for more information]

The WDHP Directive applied by the Ministry in cases such as the one relating to this appeal, clearly outlines the application of the Act to that process, particularly as it relates to the confidentiality of information provided during the course of an investigation.

In Order M-82, Inquiry Officer Big Canoe discussed the issue of confidentiality in the context of workplace harassment and made the following comments regarding section 14(2)(h) of the Municipal Freedom of Information and Protection of Privacy Act which is equivalent to section 21(2)(h) of the Act:

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. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to a policy the purpose of which is to promote a fair and safe workplace.

I agree with Inquiry Officer Big Canoe. In my view, section 21(2)(h) is not a relevant consideration in the circumstances of this appeal with respect to the major portion of the information provided by the respondent which directly addresses the substance of the complaint.

I note that the investigation has concluded, the allegation was substantiated and, as a result, the affected person's employment was terminated. While it is true that this result goes some way toward satisfying the appellant that her allegations were adequately investigated, given the fact that the Ministry's actions may be reviewed by the affected person, I am of the view that it is necessary that the appellant be granted the same degree of access as described by Inquiry Officer Big Canoe in Order M-82.

Furthermore, the appellant submits that she does not doubt that the allegations were adequately investigated, but indicates that the respondent to the complaint was granted access to a complete copy of the report, whereas she has not. She states:

... since the respondent has a complete copy of the final report, I feel I deserve the same consideration ... I feel penalized as the complainant because the respondent has more information ... The respondent has access to everything I have said and I have no access to anything the respondent has said about me.

Having reviewed the record and with consideration to the circumstances of this appeal, I find that sections 21(2)(f) and (h) are relevant factors which weigh in favour of privacy protection of only a very small portion of the statements given by the affected person in response to the appellant's complaint. In my view, disclosure of these parts of the record would constitute an unjustified invasion of personal privacy of individuals other than the appellant 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 not providing the appellant with access to portions of the record. I have found nothing improper and would not alter it on appeal.

Based on the considerations noted above, the Ministry should disclose to the appellant those portions of the pages of the record that are highlighted on the copies of the record I have provided to the Ministry with a copy of this order.

ORDER:

1. I order the Ministry to disclose the record to the appellant in accordance with the highlighted copy of the record which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator of the Ministry. The highlighted portions identify the parts of the record which **should** be disclosed.
2. I order the Ministry to disclose the portions of the record referred to in Provision 1 within thirty-five (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 portions of the record which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

January 24, 1994