



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

ORDER P-598

Appeal P-9300030

Ontario Human Rights Commission



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ORDER

BACKGROUND:

The Ontario Human Rights Commission (the Commission) received a request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to all information regarding a human rights complaint initiated by the requester. The Commission provided partial access to the records which were responsive to the request. Access was, however, denied to 119 pages pursuant to sections 13(1), 14(2)(a) and 21(3)(b) of the Act. The requester appealed the Commission's decision to deny access.

Mediation was not successful and notice that an inquiry was being conducted to review the Commission's decision was sent to the appellant and the Commission. Representations were received from the Commission only. In its representations, the Commission also claimed that the discretionary exemptions provided by sections 49(a) and (b) of the Act applied to the records at issue.

The records at issue in this appeal are listed, together with the corresponding exemptions claimed by the Commission, in Appendix A to this order.

ISSUES:

The issues arising in this appeal are:

- A. Whether any of the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to Records 1, 2, 5, 6, 7 and 8.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to Records 2, 3, 4, 5 and 6.
- D. If the answer to Issue A is yes, and the records contain the "personal information" of the appellant and other identifiable individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the records.

SUBMISSIONS/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.

Before determining whether any parts of the records qualify for exemption under section 21 or 49 of the Act, I must first determine whether the records contain personal information, and to whom the personal information relates.

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

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

In my view, all of the records at issue in this appeal contain information which relate to the appellant's complaint with the Commission. On this basis, the contents of these records qualify as the appellant's personal information. Further, Records 1, 5, 6, 7 and 8 also contain information which qualifies as the personal information of other identifiable individuals.

ISSUE B: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to Records 1, 2, 5, 6, 7 and 8.

Section 14(2)(a) of the Act states that:

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;

The Commission must satisfy each part of the following three-part test in order to properly exempt a record under section 14(2)(a):

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]

In addition, for a record to qualify as a report, the document 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).

I will now consider the application of section 14(2)(a) to the four records for which this exemption has been claimed.

Record 1

The Commission submits that this record, referred to as a "case closing statistical data report" is "a report on the administrative phase of the law enforcement process". I do not agree. As its title suggests, Record 1 provides the Commission with statistics which capture, among other things, the manner in which the case was resolved, the nature of the settlement and the hours spent working on the file. In my opinion, Record 1, although labelled as a "report", is not a report within the meaning of the Act and, therefore, does not qualify for exemption under section 14(2)(a) of the Act.

Record 2

Record 2 contains brief background information including the appellant's name, the nature of the alleged grounds for discrimination and the section of the Ontario Human Rights Code (the Code) upon which the complaint is based. It also includes the staff recommendation as to whether the evidence warrants the appointment of a Board of Inquiry, together with reasons for the particular recommendation and indicates the final disposition of the appellant's case. In Order P-449, Assistant Commissioner Irwin Glasberg held that a similar type of report prepared by the Commission fell within the definition of a report as established in Order 200. In my opinion, Record 2 contains an analysis of the results of the investigation and is a "report" prepared in the course of law enforcement as contemplated by section 14(2)(a) of the Act.

Records 5 and 6

Record 5 is a draft of Record 6 and each should, in my view, be considered in the same manner.

These documents consist of a memorandum from the Reconsideration Officer assigned to the appellant's case to the Executive Director of the Commission. Records 5 and 6 contain an overview of the complainant's allegations, and the Commission's findings and decision. The records also contain a summary of the submissions of both parties, the statements of the relevant witnesses, a conclusion and certain recommendations. In my view, Records 5 and 6 contain an account of the results of the collation and consideration of information and, therefore, qualify as "reports" prepared in the course of law enforcement as contemplated by section 14(2)(a) of the Act.

Records 7 and 8

Records 7 and 8 are described, respectively, as a report on interviews conducted with witnesses and a record of investigation with attachments.

In its representations, the Commission states that:

In our view, these records are not simply a recording of facts. One must see them not as separate documents but, together with the record of investigation form, as constitutive parts of an integrated law enforcement report. These notes are collated and attached to the record of investigation and the whole package would constitute staff's investigation to senior management.

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Considering Record 7 in conjunction with Record 8, I am of the view that both records fail to meet the definition of a "report". Records 7 and 8 contain neither an analysis of the collated information nor the results of the investigation. Rather, they consist of notes of telephone conversations and interviews with various individuals. Consequently, I find that neither Record 7 nor 8 qualify for exemption under section 14(2)(a) of the Act.

I have reviewed the Commission's representations on its exercise of discretion and I find nothing improper and would not alter this decision on appeal.

ISSUE C: Whether the discretionary exemption provided by section 13(1) of the Act applies to Records 2, 3, 4, 5 and 6.

In my discussion of Issue B, I found that Records 2, 5 and 6 are exempt from disclosure under section 14(2)(a) of the Act. Accordingly, I will not deal with section 13(1) in the context of these records and will limit my discussion of this exemption to Records 3 and 4.

Section 13(1) of the Act provides 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).

Record 3

Record 3 contains a set of draft reasons for a proposed decision to be issued by the Commission.

In its representations, the Commission states that:

Record 3 recommends to the OHRC that the original decision be upheld under section 36(3) [now 37(3)] of the Code and further recommends that the reasons drafted be adopted in making that decision.

In my view, the draft reasons not to appoint a Board of Inquiry to reconsider the appellant's complaint suggest a specific course of action which will ultimately be accepted or rejected by the Commissioner in the deliberative process. Accordingly, Record 3 qualifies for exemption under section 13(1) of the Act.

I have reviewed the Commission's representations on its exercise of discretion and I find nothing improper and would not alter this decision on appeal.

Record 4

Record 4 is a covering letter relating to the reconsideration request.

The Commission submits that:

Record 4 makes a reference to the reconsideration report recommendation to the OHRC to uphold the original decision and further advises the Executive Director to have the investigation file agendaed for deliberation by the Commissioners.

In my view, the contents of Record 4 do not suggest a specific course of action other than the routine act of placing the case file on the Commission's agenda.

On this basis, Record 4 does not meet the criteria for exemption under section 13(1) of the Act and should be disclosed to the appellant.

ISSUE D: If the answer to Issue A is yes, and the records contain the "personal information" of the appellant and other identifiable individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the records.

Under Issue A, I found that Records 1, 5, 6, 7 and 8 contain the personal information of both the appellant and other identifiable individuals. As I have found that Records 5 and 6 are exempt from disclosure under section 14(2)(a) of the Act, I will limit my comments with respect to section 49(b) to Records 1, 7 and 8.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves, which is in the custody or under the control of an institution. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is found in section 49(b) of the Act, which states 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 Commission must look at the information and weigh the appellant's right of access to his own personal information against another individual's right to the protection of his or her privacy. If the Commission determines that the release of the information would constitute an unjustified invasion of another individual's personal privacy, then section 49(b) gives the Commission the discretion to deny the appellant access to the personal information (Order 37).

Sections 21(2) and (3) 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. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Specifically, section 21(3)(b) states that:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In my view, the information at issue was compiled as part of an investigation into a possible violation of law, the Ontario Human Rights Code. Accordingly, I find that disclosure of the personal information of other individuals would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b).

The only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the exemption (Orders P-519 and M-170).

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellant has not argued that the public interest override set out in section 23 of the Act applies to the facts of this case. I am satisfied that the disclosure of Records 1, 7 and 8 would constitute an unjustified invasion of the personal privacy of another individual in the circumstances of this appeal.

Section 49(b) is a discretionary exemption. I have reviewed the Commission's representations and I find nothing which would indicate that its exercise of discretion was improper, and would not alter this determination on appeal.

[IPC Order P-598/December 8, 1993]

ORDER:

1. I uphold the Commission's decision to withhold Records 1, 2, 3, 5, 6, 7 and 8.
2. I order the Commission to disclose Record 4 to the appellant within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Commission to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ December 8, 1993

APPENDIX A

RECORD	DESCRIPTION	EXEMPTIONS CLAIMED
1	Case closing statistical data report (Page 1)	14(2)(a), 21(3)(b)
2	Case disposition reports (Pages 2 - 3)	14(2)(a), 13(1), 49(b)
3	Draft reasons for proposed decision (Page 4)	13(1), 49(b)
4	Covering letter on reconsideration request (Page 5)	13(1), 49(b)
5	Draft reconsideration report (Pages 8 - 28)	14(2)(a), 13(1), 21(3)(b), 49(b)
6	Draft reconsideration report (Pages 30 - 49)	14(2)(a), 13(1), 21(3)(b), 49(b)
7	Report on interview with witnesses (Pages 55 - 58)	14(2)(a), 21(3)(b), 49(b)
8	Record of investigation with attachments (Pages 59 - 119, excluding pages 62, 63, 74 and 112)	14(2)(a), 21(3)(b), 49(b)