



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

ORDER P-651

Appeal P-9300295

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 copy of an investigation report by the Independent Investigation Unit done in January, 1993, examining allegations of workplace harassment made against the requester. The Ministry identified a 17-page "Final Investigation Report" as the record responsive to the request.

Pursuant to section 28(1) of the Act, the Ministry notified the complainant as an individual whose interests may be affected by disclosure of personal information contained in the record (the primary affected person). Because the Ministry declined to forward a copy of his personal information to him, the primary affected person declined to consent to the disclosure of his personal information.

The Ministry then issued a decision granting access to part of page 1, pages 14 and 15 in their entirety, and to part of page 16 of the report. It denied access to the remainder of the report, pursuant to sections 20, 21 and 49(b) of the Act. The requester appealed the decision.

During the course of mediation, it was determined that 12 attachments, comprising 78 pages, formed part of the record. Twenty-seven of these pages are communications either from or to the appellant. The Ministry has indicated that it has no objections to the disclosure of these pages to the appellant. In these circumstances, and given the fact that I am satisfied that no mandatory exemptions apply, the Ministry should do so. For greater certainty, these records are listed in Appendix A to this order.

The Ministry has indicated that the same exemptions as above apply to the remaining 51 pages of attachments.

Further mediation was not possible, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant, the Ministry, the primary affected person and 13 other individuals identified as "witnesses" in the record (the other affected persons). Representations were received from the Ministry, the appellant, the primary affected person and four of the other affected persons. One of the other affected persons consented to the disclosure of her personal information.

ISSUES:

- A. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the information relates to the appellant and the affected persons, whether the discretionary exemption provided by section 49(b) of the Act applies.

- C. Whether the discretionary exemption provided by section 20 of the Act applies to the record.
- D. If the answer to Issues A and C is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.

"Personal information" is defined in section 2(1) of the Act, in part, as "recorded information about an identifiable individual ...". I agree with the position of the Ministry that the record contains the personal information of the appellant, the primary affected person and the other affected persons. Although the other affected persons are identified in the report by witness number only, in my view, they are readily identifiable by those individuals, including the appellant, who are familiar with the circumstances surrounding the incidents described in the records.

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

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 exceptions to this general right of access. One such exception is found in section 49(b) of the Act, which reads as follows:

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;

As has been stated in a number of previous orders, section 49(b) introduces a balancing principle. The head must look at the information and weigh the requester's right of access to his or her own personal information against the rights of other individuals to the protection of their privacy. If the head 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 head 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 personal privacy.

One of the other affected persons has provided written consent to the disclosure of her personal information. Therefore, I find that disclosure of this information to the appellant would not constitute an unjustified invasion of the personal privacy of this individual. I have highlighted the personal information to be disclosed on the copy of the page of the record provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with this order.

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. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. I have considered the presumptions contained in section 21(3) and find that none are applicable in the present appeal, nor does any of the personal information at issue fall within the ambit of the provisions of section 21(4) of the Act.

Section 21(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. The Ministry submits that the considerations under sections 21(2)(f) and (h), which favour non-disclosure of personal information, are relevant in the circumstances of this appeal. The primary affected person and the other affected persons have implicitly raised the application of section 21(2)(e) of the Act. These sections state:

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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

The affected persons have expressed concerns that disclosure of their personal information would result in their being "... exposed unfairly to ... other harm" (section 21(2)(e)).

Having reviewed the records and the representations provided to me, I am satisfied that there is a sufficient connection between disclosure of the personal information contained in the records and the possible harms alleged. Therefore, section 21(2)(e) is a relevant consideration in the circumstances of this appeal as it applies to the information related to the affected persons.

Many past orders of the Commissioner's office have considered the application of sections 21(2)(f) and (h) of the Act in the context of personal information generated as a result of workplace and/or sexual harassment investigations. Certain general principles have been articulated in these orders.

With respect to the issue of the sensitivity of such information, in Order M-82, Inquiry Officer Holly Big Canoe commented on section 14(2)(f) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent to section 21(2)(f) of the Act, as follows:

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, as the affected persons have indicated here. 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.

She considered the confidentiality of such information from a similar perspective:

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.

This approach is taken to ensure that when, as in this appeal, the respondent in a harassment complaint seeks information, he/she is advised of the substance of the accusations and the identity of the complainant. Therefore, he/she needs access to information which he or she has provided to the investigator as well as information provided by the complainant and information from other witnesses directly related to the complaint.

While the above principles are valuable guidelines to determine the degree of disclosure of personal information in harassment cases, the circumstances of each case must be considered to ascertain if such disclosure would result in an unjustified invasion of the personal privacy of individuals other than the requester.

In this instance the appellant is aware of the identity of the complainant, the general nature of the complaint and the results of the harassment investigation. Given the unique circumstances of

this case, I believe that sections 21(2)(f) and (h) are factors which weigh in favour of non-disclosure of any additional personal information.

The appellant maintains that she requires access to the record for a number of reasons which, in my view, may be characterized as being relevant to a fair determination of her rights (section 21(2)(d) of the Act).

In order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[Order P-312]

As a result of the findings of the investigator, the appellant was disciplined for workplace harassment by way of a "letter of counsel" being placed in her personnel file. While the appellant refers to this as "part of the disciplinary process" it is not related to any proceeding so as to satisfy the second criterion noted above. The only proceeding referred to by the appellant is a matter which has already been resolved by the Grievance Settlement Board. Therefore, I find that section 21(2)(d) is not a relevant consideration in this appeal.

To summarize, given the unique circumstances of this appeal, I find that sections 21(2)(e), (f) and (h) are relevant considerations weighing in favour of privacy protection of the personal information of the primary and other affected persons. Disclosure of their personal information would result in an unjustified invasion of their personal privacy and section 49(b) applies.

In reviewing the Ministry's exercise of discretion in favour of refusing to disclose the records, I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

Because of the manner in which I have disposed of Issues A and B, it is not necessary for me to consider Issues C and D.

ORDER:

[IPC Order P-651/April 6, 1994]

1. I order the Ministry to disclose to the appellant the pages of the appendices to the record described in Appendix A to this order.
2. I order the Ministry to disclose to the appellant the highlighted portions of the page of the record I have provided the Freedom of Information and Protection of Privacy Co_ordinator with a copy of this order.
3. I uphold the decision of the Ministry to deny access to the balance of the record.
4. I order the Ministry to disclose those portions of the record referred to in Provisions 1 and 2 within fifteen (15) days 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 those portions of the record which are to be disclosed to the appellant pursuant to Provisions 1 and 2, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ April 6, 1994

APPENDIX A

PAGES OF THE APPENDICES TO BE DISCLOSED TO THE APPELLANT	
DESCRIPTION	
1.	Memorandum dated August 23, 1991 from Chief Psychologist to Appellant (2 copies - 2 pages)
2.	Memorandum dated September 12, 1991 from Chief Psychologist to Appellant (1 page)
3.	Memorandum dated November 12, 1991 from Chief Psychologist to Appellant (1 page)
4.	Memorandum dated November 17, 1991 from Chief Psychologist to Appellant (1 page)
5.	Letter dated November 19, 1991 from Chief Psychologist to Appellant (1 page)
6.	Letter dated November 26, 1991 from Appellant to Chief Psychologist (1 page)
7.	Memorandum dated October 19, 1992 from Chief Psychologist to Appellant (1 page)
8.	Memorandum dated October 21, 1992 from Appellant to Chief Psychologist (1 page)
9.	Letter dated December 23, 1992 from Investigator to Appellant (1 page)
10.	Response dated January 4, 1993 from Appellant to Investigators (17 pages)