



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

ORDER P-606

Appeal P-9300436

Liquor Control Board of Ontario



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ORDER

BACKGROUND:

The Liquor Control Board of Ontario (the Board) received a request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to a "letter dated approximately July or August 1992 [by a named individual]" in which the requester was named. The Board responded that no such record existed. The requester appealed this decision.

During mediation, the Board conducted a further search and located the responsive record. The Board issued a new decision in which access to the letter was denied pursuant to section 21(1) of the Act. The appellant advised the Appeals Officer that she was limiting the scope of her request to those portions of the letter in which specific reference was made to her.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Board was sent to the Board, the appellant, and the author of the letter (the affected person). In the Notice of Inquiry sent to the parties, the Appeals Officer solicited representations on the application of section 49(b) of the Act as the information at issue appeared to relate to both the appellant and other individuals.

Representations were received from the Board and the appellant. Accompanying the appellant's representations was a document signed by another individual (the other named individual) consenting to the disclosure to the appellant of any information contained in the record which related to her.

The record at issue consists of those portions of the letter in which reference is made to the appellant. The letter was provided to the Board by the affected person as his response to a Notice of Intended Discipline which he had received from the Board.

ISSUES:

The issues arising in this appeal are:

- A. Whether the record at issue contains "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 record at issue contains "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, ...

I have reviewed the information at issue and I find that it satisfies the definition of "personal information" as set out above. In my view, the personal information is about the appellant, the other named individual and 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 information at issue consists of the personal information of the appellant, the other named individual and the affected person.

Section 47(1) of the Act gives individuals a general right of access to personal information about themselves 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:

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 Board must look at the information and weigh the requester's right of access to his/her own personal information against the rights of other individuals to the protection of their personal privacy. If the Board determines that the disclosure of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 49(b) gives the Board the discretion to deny the requester access to the personal information.

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 her own personal information, the only situation under section 49(b) in which 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 an individual's personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

In its representations, the Board submits that the presumptions under sections 21(3)(d) and (h) apply to the record at issue. These sections read:

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

- (d) relates to employment or educational history;
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Board submits that the information contained in the record constitutes the affected person's employment history with the Board and also contains specific references to the affected person's racial or ethnic origin.

While I agree that there are certain portions of the letter which contain information which might satisfy the presumptions under sections 21(3)(d) and (h) of the Act, this information is contained in parts of the letter which are **not** at issue in this appeal. The parts of the letter in which specific reference is made to the appellant do not contain any information relating to employment history or to racial or ethnic origin. Therefore, I find that sections 21(3)(d) and (h) do not apply to the record at issue in the circumstances of this appeal.

I also find that the record at issue does not contain personal information which falls under the ambit of section 21(4) of the Act, the disclosure of which does not constitute an unjustified invasion of personal privacy.

The Board submits that the considerations under sections 21(2)(e), (f), (g), (h) and (i) which favour non-disclosure of personal information, are relevant in the circumstances of this appeal. The appellant submits that section 21(2)(d) weighs in favour of disclosure. These sections 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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

I will deal with each section separately.

Section 21(2)(e)

The Board submits that should the record be disclosed to the appellant, she would be free to show this information to members of the public which could be harmful to the reputation of the affected person.

The Board, however, has not presented the necessary evidence to establish a sufficient causal connection between the disclosure of the record at issue and the harm envisaged. In the absence of such evidence, and based on my own evaluation of the record at issue, I find that section 21(2)(e) is not a relevant consideration in determining whether or not to disclose the personal information.

Section 21(2)(f)

The Board submits that the personal information contained in the record at issue is "highly sensitive in that it contains the personal views and opinions of [the affected person]" and that:

these views were provided in the context of disciplinary proceedings involving [the affected person] ... and would likely have not been provided in their present form had [the affected person] been aware that the Record would be released to [the appellant].

In order for personal information to be considered "highly sensitive", the party relying on this proposition must establish that disclosure of the information would cause excessive personal distress to the affected person (Order P-434). I have considered the representations provided, along with the record at issue, and, in my view, the disclosure of the information could

reasonably be expected to produce the excessive personal distress required for section 21(2)(f) to apply.

When the discipline against the affected person was removed the Board agreed to, and, in fact, did remove any reference to the discipline including copies of the record at issue from his personnel file. The affected person would, therefore, not even expect that management of the Board would have access to the record. Accordingly, to grant access to the appellant would, in my view, cause excessive personal distress to the affected person.

Section 21(2)(g)

The Board raises the considerations of section 21(2)(g) by stating that it "cannot determine whether or not personal information contained in the Record is accurate or reliable, to the extent that it contains the personal views of [the affected person]".

No evidence has been provided, however, to support the fact that the personal information is "**unlikely** to be accurate or reliable" [emphasis added] as required by this section. In the absence of representations to his effect and, again, based on my review of the record at issue, I find that section 21(2)(g) is not a relevant consideration in the circumstances of this appeal.

Section 21(2)(h)

With regard to section 21(2)(h), the Board states that it is "clear that this Record was provided by [the affected person] in confidence in an attempt to defend himself against pending discipline".

There is nothing on the face of the record to indicate that it was submitted to the Board in confidence. Moreover, while the Board has provided me with a copy of its policies and procedures on "Human Rights/Workplace Harassment Prevention" which address the investigation into the allegations raised by the **appellant** in the context of her grievance, it has offered no evidence on the circumstances under which the **affected person** provided the record to the Board. In addition, section 21(2)(h) requires that the personal information be supplied by the person to whom it relates. In this case, the affected person supplied information relating to the appellant.

Therefore, I find that section 21(2)(h) is not a relevant consideration in the circumstances of this appeal.

Section 21(2)(i)

The Board also submits that section 21(2)(i) of the Act applies to the personal information contained in the record at issue in that its disclosure could damage the reputation of the affected person. While the Board expresses this concern, the evidence with which I have been provided is insufficient to demonstrate that the release of the information contained in the record at issue would unfairly damage the affected person's reputation given that it is his views and opinions which he has expressed about the appellant.

On this basis, I find that section 21(2)(i) is not a relevant consideration in determining whether the disclosure of the record at issue would constitute an unjustified invasion of the affected person's personal privacy.

Section 21(2)(d)

The appellant submits that she requires access to the requested record in satisfaction of 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 is already 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]

In her representations, the appellant appears to suggest that there is some connection between the personal information contained in the record at issue and the grievance she subsequently filed alleging discrimination and/or harassment on the basis of her gender. In my view, the personal information contained in the record does not have a bearing on, nor is it significant to the determination of the allegations raised in the grievance. Therefore, I am of the opinion that section 21(2)(d) of the Act has no application to the facts of this appeal.

Having considered all of the relevant circumstances of this appeal, I am of the view that section 21(2)(f) of the Act is a relevant factor which weighs in favour of privacy protection. Therefore, disclosure of the requested record would constitute an unjustified invasion of the personal privacy of the affected person.

Section 49(b) is a discretionary exemption. I have reviewed the Board's representations on its exercise of discretion in refusing to grant access to the appellant to her own personal information. I find nothing improper in this exercise of discretion and would not alter it on appeal.

ORDER:

I uphold the decision of the Board.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ January 12, 1994