



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

ORDER P-643

Appeal P-9300248

Ministry of Community and Social Services



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ORDER

BACKGROUND:

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for all files under the requester's name maintained by various departments and divisions of the Ministry.

The Ministry located 21 records which were responsive to the request in its Human Resources Branch and granted partial access to these documents. The Ministry determined, however, that portions of these records should be withheld from disclosure under the exemptions contained in sections 13(1), 17(1)(d), 21 and 49(b) of the Act. The requester appealed this decision to the Commissioner's office.

During the mediation stage of the appeal, the appellant agreed to limit the scope of his request to the responsive records held by the Human Resources Branch of the Ministry. Also during mediation, the Ministry reconsidered its original decision and disclosed some additional records to the appellant.

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 11 individuals whose interests might be affected should the records be disclosed to the appellant (the affected persons).

Representations were received from the appellant, the Ministry, and three of the affected persons. In its representations, the Ministry indicated that it is no longer relying on the exemption provided by section 17(1)(d) of the Act and agreed to release those records for which section 17(1)(d) has been exclusively claimed. In addition, the Ministry no longer claimed that section 21 applies to one part of Record 21.

The records at issue, along with the exemptions claimed for each, are described in Appendix A.

ISSUES:

- 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 exemptions provided by sections 13(1) and 49(a) of the Act apply to the records.
- C. 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 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.

The Ministry has claimed that Records 5, 6, 7, 15, 17, 18, 19 (Legends), 20 and 21 contain personal information.

Personal information is defined in section 2(1) of the Act, in part, as follows:

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

...

(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,

...

(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;

Having reviewed the records at issue, I am satisfied that Records 5 and 6 in their entirety, and parts of Records 15, 17, 18, 19, 20 and 21 contain information which satisfies the definition of personal information under section 2(1) of the Act. In my view, this information relates to the appellant and other identifiable individuals.

However, in my opinion, the addresses withheld from Record 7 cannot be characterized as personal information. The names, titles and addresses of the persons to whom the letters were addressed denote their professional, rather than personal status. As such, this information cannot be characterized as the personal information of these individuals.

I also find that the first passage withheld in Record 17 is not the personal information of the individual named as it is information which relates to him in his professional, rather than personal capacity.

ISSUE B: Whether the discretionary exemptions provided by sections 13(1) and 49(a) of the Act apply to the records.

The Ministry claims that section 13(1) of the Act applies to Records 3, 4, 5, 8, 9, 10, 11, 15 and 19.

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 just mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118, P-304, P-348, P-356, P-529 and P-597).

Records 3, 4 and 11 are internal correspondence transmitted by way of electronic mail. In its representations, the Ministry states that these documents involve "direction from the Deputy to management, a suggested course of action for management and the advice given regarding [a particular course of action]".

In my view, Record 3 does not contain advice and recommendations as contemplated by section 13(1) of the Act. The course of action set forth in this memorandum is not capable of being accepted or rejected by its recipient as it represents a specific course of action which the recipient is required to follow.

Further, I find that parts of Record 4 and all of Record 11 contain factual information which does not qualify for exemption under section 13(1) of the Act. However, in my opinion, there are portions of Record 4, as indicated in the highlighted copy provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator, which satisfy the requirements for exemption under this section.

Records 5, 8, 9 and 15 are drafts of correspondence prepared for the Deputy Minister. The appellant has been granted access to the body of the letters which comprise Record 9 and only the addressees of these letters has been withheld from disclosure. The names and addresses which were not disclosed clearly do not qualify as "advice to government" within the meaning of section 13(1), and should be disclosed to the appellant.

I find, however, that Records 5, 8 and 15 qualify as advice and recommendations pursuant to section 13(1) of the Act as they suggest a course of action which may be accepted or rejected by the public servant for whom they were prepared, in the context of the deliberative process within the Ministry.

Record 10 is a briefing note prepared by Ministry staff for the Deputy Minister. Only the "Recommendation" section remains at issue. In its representations, the Ministry claims that it is properly exempt under section 13(1) of the Act since it contains "advice" which was provided as part of the deliberative process. I agree that the "Recommendation" section of Record 10 falls within the ambit of the section 13(1) exemption.

I further find that the Index of Correspondence contained in Record 19 does not contain any advice and recommendations and, therefore, does not satisfy the requirements for exemption under section 13(1) of the Act.

In summary, I have found that Records 5, 8, 15 and portions of Records 4 and 10 qualify for exemption under section 13(1) of the Act. I have reviewed the Ministry's representations on the exercise of its discretion with regard to Record 8 and portions of Records 4 and 10 and find nothing improper in the manner in which that determination was made.

In Issues A and B, I found that Records 5 and 15 contain the personal information of the appellant and other individuals and qualify for exemption under section 13(1) of the Act.

Section 47(1) of the Act gives individuals a general right of access to any 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 right of access. One such exception is contained in section 49(a) of the Act which 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; [emphasis added]

Section 49(a) provides the head with the discretion to refuse to disclose to the appellant his own personal information where section 13 applies. In reviewing the head's exercise of discretion in favour of refusing to disclose Record 5 and those parts of Record 15 described above, I have found nothing to indicate that the exercise of discretion was improper and would not alter this determination on appeal.

ISSUE C: 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 to the records.

Under Issue B, I found that Records 5 and 6 and parts of Records 15, 17, 18, 19, 20 and 21 contain personal information which relate to the appellant and other individuals.

I will now consider the application of section 49(b) of the Act to Records 6, 17, 18, 19 (Legends), 20 and 21. As I found in my discussion of Issue A that Records 5 and 15 qualify for exemption under section 13(1) of the Act, I will not address them in this context.

Section 47(1) of the Act gives individuals a general right of access to any 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 Ministry must look at the information and weigh the requester's right of access to his or her personal information against the rights of other individuals to the protection of their privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the personal privacy of other individuals, then section 49(b) gives the Ministry 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 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 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 my view, none of the presumptions are relevant in the circumstances of this appeal. I have also 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.

Section 21(2) of the Act provides some criteria for the Ministry to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.

In his representations, the appellant alludes to the application of section 21(2)(d) of the Act which provides 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,

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

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.

[Orders P-312, P-375 and P-387]

Though the appellant makes no specific mention of a proceeding that is currently in process, in its representations the Ministry submits that the records at issue "are part of an investigation undertaken to resolve a claim of discrimination and harassment under the Workplace Discrimination and Harassment Prevention (WHDP) policy."

I have considered the appellant's representations and, in my opinion, he has not provided sufficient evidence that the disclosure of the personal information contained in the records at issue has any bearing on the determination of the right in question. Accordingly, I find that section 21(2)(d) of the Act is not a relevant consideration.

I will now address those considerations raised by the Ministry and the affected persons which favour the protection of the privacy of the affected persons.

Section 21(2)(e)

The personal information contained in the undisclosed portions of Record 6, 17, 19, 20 and 21 consists of the names and other personal identifiers about the respondents to a complaint filed by the appellant under the WHDP.

Section 21(2)(e) provides that:

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,

the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

Neither the affected person who raised this consideration in her representations, nor the Ministry have addressed how the disclosure of the information contained in the records would result in the affected persons being exposed to any pecuniary or other harm. Accordingly, I find that section 21(2)(e) is not a relevant consideration in the circumstances of this appeal.

Section 21(2)(h)

Section 21(2)(h) of the Act states that:

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,

the personal information has been supplied by the individual to whom the information relates in confidence;

In its representations, the Ministry submits:

This [M]inistry does not wish to discourage individuals from coming forth with allegations of discrimination/harassment or in giving evidence when those allegations are investigated. The [M]inistry believes similar information may no longer be supplied to investigators if it becomes common practice to release the identity of all the affected parties involved, ...

All of the respondents to the complaint which is the subject of the records at issue in this appeal were notified of this inquiry as affected persons and invited to submit representations on the issues described above. One of the affected persons submitted representations consenting to the release of her name to the appellant. Accordingly, those parts of Records 6, 19, and 20 which refer to this individual should be disclosed to the appellant.

One of the other affected persons states in her representations that the statements attributed to her which are contained in Record 6 were made in confidence to a Ministry investigator.

In Order M-82, Inquiry Officer Holly 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 the equivalent of section 21(2)(h):

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.

In Order P-443, former Assistant Commissioner Tom Mitchinson held, in an appeal involving similar workplace harassment complaint records, that:

It was neither practical nor possible to guarantee the affected persons complete confidentiality during the investigation which led to the creation of the records at issue in this appeal. The extent to which confidentiality can be afforded to the affected persons is directly related to the extent of disclosure provided to the appellant.

I find that the appellant has received substantial disclosure of the records relating to the complaint of workplace harassment made against him, sufficient to allow him to answer the complaint. The ability of the appellant to defend the complaint has not been, and will not be, impaired should he not be granted access to the remaining personal information still undisclosed to him. In the circumstances of this appeal, I find that the personal information withheld from disclosure was supplied to the Ministry with an expectation of confidentiality and that section 21(2)(h) is a relevant consideration when balancing the appellant's right to disclosure against the affected persons' right to privacy protection.

In summary, insofar as those portions of Records 6, 17, 19, 20 and 21 which remain undisclosed to the appellant are concerned, I have found that only section 21(2)(h) is a relevant consideration in the circumstances of this appeal. This factor weighs in favour of privacy protection, and in my view, disclosure of the withheld parts of those records would constitute an unjustified invasion of personal privacy of the affected persons and, therefore, section 49(b) applies.

Record 18 is an excerpt from the appellant's statement to the investigator which takes the form of questions and answers. In Order M-198, Inquiry Officer Anita Fineberg made the following comments regarding records supplied by an appellant containing the personal information of the appellant and others.

Among the records which the Police stated are responsive to the request is a four-page letter addressed to them written by the appellant. Although that letter contains personal information of the appellant and others, because the information in it was supplied by the appellant to the Police, in my view, there can be no unjustified invasion of personal privacy in releasing it to the appellant.

I agree with Inquiry Officer Fineberg's view and adopt it for the purposes of this appeal. Following the reasoning contained in Order M-198, there can be no unjustified invasion of personal privacy if Record 18 were to be disclosed to the appellant since it was supplied to the Ministry by the appellant.

I have reviewed the Ministry's exercise of discretion under section 49(b) in refusing to disclose the records. I find nothing improper in the manner in which this discretion was exercised in the circumstances of this appeal.

ORDER:

1. I uphold the Ministry's decision not to disclose Records 5, 6, 8, 9, 15, 21 and those parts of Records 4, 10, 17, 19 and 20 which are highlighted in the copy I have provided to the Ministry.
2. I order the Ministry to disclose Records 1, 2, 3, 7, 11, 12, 13, 14, 16, 18, 19 (Index of Correspondence only) in their entirety, and a severed version of Records 4, 10, 17, 19 (Legends) and 20 to the appellant in accordance with a highlighted copy which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator at the Ministry within thirty-five (35) days from the date of this order. Those parts of the records which should **not** be disclosed to the appellant are highlighted in yellow.
3. In order to verify compliance with this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: _____
Donald Hale
Inquiry Officer

March 3, 1994

APPENDIX A

RECORD NUMBER	RECORD DESCRIPTION	EXEMPTIONS CLAIMED	ORDER DISPOSITION
Record 3	Electronic mail dated March 5, 1993	13(1)	To be disclosed
Record 4	Electronic mail dated March 12, 1993	13(1)	To be partly disclosed
Record 5	Draft memo dated January 29, 1993	13(1), 21, 49(b)	Not to be disclosed
Record 6	Appendices 3, 7-12, 15, and a List of Appendices	21, 49(b)	Not to be disclosed
Record 7	Four letters dated April 20, 1993	21, 49(b)	To be disclosed
Record 8	Electronic mail dated April 7, 1993	13(1)	Not to be disclosed
Record 9	Four draft letters dated April 6, 1993	13(1)	Not to be disclosed
Record 10	Briefing note dated April 20, 1993	13(1)	To be partly disclosed
Record 11	Electronic mail dated March 16, 1993	13(1)	To be disclosed
Record 15	Draft letter dated January 29, 1993	13(1), 21, 49(b)	Not to be disclosed
Record 19	Legends	21, 49(b)	To be partly disclosed
	Index of Correspondence	13(1)	To be disclosed
Record 21	Memorandum dated January 22, 1993	21	Not to be disclosed