



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

ORDER P-685

Appeal P-9300159

Management Board Secretariat



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ORDER

BACKGROUND:

Management Board Secretariat (the Secretariat) received a request from two individuals under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to complaints made against them under the Workplace Discrimination and Harassment Prevention Policy (WDHP).

The Secretariat identified 45 records as being responsive to the request. The requesters received full access to some records. Access was denied, in full or in part, to the balance of the records on the basis of sections 19, 21 and 49(b) of the Act. The requesters appealed the decision of the Secretariat.

During the course of mediation, the appellants agreed to limit the scope of this appeal to the records described below. Further mediation was not successful and notice that an inquiry was being conducted to review the Secretariat's decision was sent to the appellants, the Secretariat, the individual who complained about the appellants (the complainant) and nine individuals who were interviewed during the course of the investigation (the witnesses). Section 19 of the Act was not claimed by the Secretariat in relation to the remaining records, and will not be considered in this order.

Representations were received from the Secretariat, the appellants, the complainant and six of the witnesses. Three witnesses consented to the disclosure of their personal information to the appellants. Two of these consents related to particular records or information concerning these individuals.

THE RECORDS:

The appellants have limited the scope of their appeal to the following records:

- | | |
|-------------|---|
| Record 6: | Memorandum to file summarizing the career history of the complainant (entire document) |
| Record 11C: | Investigator's handwritten notes of witness interview dated November 30, 1992 (entire document) |
| Record 11E: | Investigator's handwritten notes of meeting with complainant dated October 8, 1992 (the names of two individuals) |
| Record 11J: | Investigator's handwritten notes of complainant interview dated June 10, 1992 (a portion of page 3) |

- Record 12A: Letter from the complainant's solicitor to the Ministry of the Environment
- Record 12C: Memorandum to the complainant from Ministry of the Environment dated July 23, 1992
- Record 21: List of witnesses provided by the complainant
- Records 14-20
and 22: Investigator's handwritten notes of witness interviews.

Records 12A and 12C refer solely to administrative matters relating to a grievance. The information contained on page 3 of Record 11J describes advice given to the complainant about grieving particular matters. In my opinion, the information at issue contained in these records is not directly related to the WDHP investigation into allegations against the appellants. Accordingly, I find that this information is not responsive to the appellants' request. Records 12A, 12C and 11J (page 3) have, therefore, been eliminated from the scope of this appeal.

ISSUES:

- 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 appellants and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.
- C. If the answer to Issue A is yes, and the personal information relates to individuals other than the appellants, whether the mandatory exemption provided by section 21 of the Act applies to Records 6 and 21.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records 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 ...".

The interview notes in Records 11C, 11E, 14-20 and 22 were created during the Secretariat's investigation of complaints made against the appellants under the WDHP policy. In my view, these records contain the personal information of the appellants, the complainant, the witnesses and other identifiable individuals.

Record 6 describes the career history of the complainant and, in my opinion, is exclusively her personal information. Record 21 is a list of witnesses supplied by the complainant to the investigator, and constitutes the personal information of individuals other than the appellants.

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

Under Issue A, I found that Records 11C, 11E, 14-20 and 22 contain the personal information of both the appellants and other identifiable individuals.

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 of the Act provides a number of exceptions to this general right of access, one of which is found in section 49(b).

Under this section, where a record contains the personal information of both the appellants and other individuals and the Secretariat determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Secretariat has the discretion to deny the requesters access to the 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.

Three of the witnesses have consented to the disclosure of some of their personal information. Accordingly, it is my view that the disclosure of information for which consent was obtained would not constitute an unjustified invasion of the personal privacy of these individuals. Therefore, section 49(b) does not apply to this information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of the balance of the 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.

Section 21(3)

The Secretariat and the complainant submit that the presumptions in sections 21(3)(d), (g) and (h) of the Act apply to the personal information of individuals other than the appellants contained in the records. These sections state:

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;
- (g) consists of personal recommendations or evaluations, character references or personnel evaluations; or
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

Records 14-20 and 22 (Witness statements)

I agree with the position of the Secretariat and the complainant that certain information in the witness statements falls within these presumptions. Information related to individuals' past service records, including positions with the government, constitutes employment history within the meaning of section 21(3)(d). References to racial or ethnic origin clearly fall within the meaning of section 21(3)(h). It has also been established that performance appraisals and information related to performance appraisals falls within section 21(3)(g).

In my view, the remaining parts of the witness statements do not contain any of the types of information listed in section 21(3).

Records 11C and 11E

The complainant submits that parts of section 21(3) apply to each of these records.

Record 11C consists of notes of a meeting held between the WDHP policy investigator, the complainant, a witness and the Chairman of a grievance committee. The complainant submits that sections 21(3)(d), (g) and (h) apply to this record. I agree that parts of this record satisfy the presumptions contained in these sections of the Act.

The complainant submits, with respect to Record 11E, that the information not disclosed is part of a personal evaluation, thereby satisfying section 21(3)(g) of the Act. She states that the first piece of information withheld from Record 11E is a part of a personal evaluation made by her about another individual. It has been established that section 21(3)(g) raises a presumption concerning recommendations, evaluations or references **about** the individual rather than evaluations **by** that individual (Order 171).

The remaining portion of Record 11E consists of a name which identifies the individual mentioned in the information contained in the record which was disclosed to the appellants. In my view, the information is very general in nature, and does not qualify as a personal evaluation. Thus, in my view, the remaining undisclosed information does not qualify for exemption under section 21(3)(g).

The only way in which a section 21(3) presumption may 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 section 21 exemption (Order M-170).

I have considered section 21(4) and find that none of the personal information at issue in this appeal falls within the ambit of this provision. In addition, the appellants have not raised the application of section 23.

Section 21(2)

Section 21(2) of the Act provides some criteria to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The Secretariat, the complainant and the witnesses submit that the following parts of section 21(2) are relevant factors which weigh in favour of privacy protection:

- the individual to whom the information relates will be exposed unfairly to pecuniary or other harm (section 21(2)(e));
- the personal information is highly sensitive (section 21(2)(f));
- the personal information has been supplied by the individual to whom the information relates in confidence (section 21(2)(h)); and
- the disclosure may unfairly damage the reputation of any person referred to in the record (section 21(2)(i)).

The appellants maintain that disclosure of additional personal information to them is relevant to a fair determination of their rights (section 21(2)(d)).

For the purposes of this appeal, it will be sufficient for me to consider the application of sections 21(2)(d), (f) and (h) of the Act to the balance of the personal information found in the records.

I will first examine those factors which favour privacy protection.

The complainant states that the information contained in Records 11C, 11E, 14-20 and 22 is of a highly sensitive nature. In order for section 21(2)(f) to be considered a relevant factor in this appeal, I must find that disclosure of the personal information would cause excessive personal distress to those individuals to whom the information relates (Order P-434).

In Order M-82, Inquiry Officer Holly Big Canoe made the following comments with respect to section 14(2)(f) of the Municipal Freedom of Information and Protection of Privacy Act (the equivalent to section 21(2)(f) of the provincial Act):

In my opinion, information pertaining 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.

A very detailed "Investigation Summary" was provided to the appellants and the complainant upon completion of the WDHP investigation. This document describes and analyzes all of the evidence relevant to the complaint which was collected by the investigator. It summarizes relevant parts of the witness statements, interviews with the complainant and the appellants, and concludes with particular findings as to whether each part of the complaint was found to be substantiated.

In my view, section 21(2)(f) is relevant in the circumstances of this appeal, but **only** with respect to the personal information of persons other than the appellants who have not consented to its disclosure; and not to that information which directly addresses the substance of the complaint and the findings.

Neither the Secretariat nor any of the parties to this appeal have provided any evidence of the circumstances in which the personal information contained in the records was provided to the Secretariat. Accordingly, I do not find that section 21(2)(h) is a relevant factor in the circumstances of this appeal.

The appellants submit that the consideration outlined in section 21(2)(d) of the Act (fair determination of the appellants' rights) supports the disclosure of the records. In order for section 21(2)(d) to apply to the facts of a case, the party relying on this provision 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]

The appellants submit that the information is relevant to a fair determination of their rights to natural justice which would:

... entitle us to be cognizant of all information and evidence used in making findings and taking action about allegations made against us under the Ontario Public Service Workplace Discrimination and Harassment Prevention (WD&HP) Directive and Guideline.

They indicate that this right is related to an existing proceeding, namely the complaint filed against them under the WDHP. In my view, the complaint and the subsequent investigation cannot be said to constitute a "proceeding" related to a "legal right" for the purposes of the first and second parts of the section 21(2)(d) test. Moreover, I find that the appellants have not provided any evidence to support their submissions that the "proceeding" is still subject to a grievance and judicial review. Therefore, I cannot conclude that these are legal proceedings as contemplated by section 21(2)(d) of the Act. Accordingly, I find that section 21(2)(d) is not a relevant consideration in the circumstances of this appeal.

To summarize, therefore, I have found that one consideration in section 21(2) of the Act (highly sensitive personal information) favours protecting the privacy interests of the complainant, the witnesses and other individuals with respect to the personal information of persons, other than the appellants, who have not consented to disclosure. However, this factor does not apply to that information which directly addresses the substance of the complaint and the findings. I do not find that there exist any factors under this section which weigh in favour of releasing the personal information in the records.

Having considered all of the circumstances of this case, and being mindful of the extensive investigation summary provided to the parties to the complaint under the WDHP policy, I find that the disclosure of the majority of the personal information in Records 11C, 14-20 and 22 **would** constitute an unjustified invasion of the personal privacy of the complainant, the witnesses and other individuals and that the exemption provided by section 49(b) of the Act applies to portions of these records.

More specifically, it is my view that section 49(b) applies to the identities and personal information of individuals who have not consented to the disclosure of their personal information. This information includes the personal information which qualifies for exemption under sections 21(3)(d) and (h) of the Act.

In addition, I find that disclosure of the personal information of the affected persons which is sensitive (section 21(2)(f)) and which does not directly relate to the substance of the investigation, would constitute an unjustified invasion of their privacy, and that section 49(b) applies. I am also of the view that section 49(b) applies to the name of one individual in Record 11E, given the context in which the name is presented in this record.

I have highlighted the personal information which should **not** be disclosed on the highlighted copy of the record provided to the Freedom of Information and Protection of Privacy Co_ordinator of the Secretariat with a copy of this order.

Section 49(b) is a discretionary exemption. I have reviewed the representations of the Secretariat on this point and would not alter it on appeal.

ISSUE C: If the answer to Issue A is yes, and the personal information relates to individuals other than the appellants, whether the mandatory exemption provided by section 21 of the Act applies to Records 6 and 21.

I have previously established that Records 6 and 21 contain solely the personal information of individuals other than the appellants. Record 6 is a summary of the work history of the complainant and falls under the presumption in section 21(3)(d). There are no factors under section 21(4) which rebut this presumption and, as I have indicated, the appellants have not claimed that the public interest override in section 23 of the Act

applies. Accordingly, the mandatory exemption in section 21 applies to exempt Record 6 from disclosure.

Record 21 is a list of witnesses provided by the complainant to the investigator during the WDHP investigation.

In my view, none of the presumptions in section 21(3) apply to this record. However, having regard to listed factors in section 21(2), as well as to the general circumstances of this appeal, I am of the view that Record 21 is properly exempt under section 21 of the Act.

ORDER:

1. I uphold the decision of the Secretariat not to disclose Records 6, 11E and 21.
2. I order the Secretariat to disclose Records 11C, 14-20 and 22 to the appellants in accordance with the highlighted copy of these records which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order. The highlighted portions should **not** be disclosed.
3. I order the Secretariat to disclose the records referred to in Provision 2 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.
4. In order to verify compliance with the provisions of this order, I order the Secretariat to provide me with a copy of the records which are disclosed to the appellants pursuant to Provision 2, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ May 19, 1994