



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

# **ORDER P-694**

**Appeal P-9300408**

**Ministry of Natural Resources**



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# ORDER

## BACKGROUND:

The Ministry of Natural Resources (the Ministry) received a request pursuant to the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to an investigation conducted under the Workplace Discrimination and Harassment Prevention Program (WDHP) with respect to a harassment complaint made against the requester.

In the course of making its decision regarding the request, the Ministry notified the person who initiated the harassment complaint (the complainant) pursuant to section 28 of the Act. The complainant informed the Ministry that she was opposed to disclosure of the requested records.

The Ministry granted partial access to some responsive records, but withheld the remaining records and parts of records pursuant to the exemptions in sections 13(1) and 21 of the Act. The requester appealed the denial of access.

During mediation the requester agreed that the only record at issue was the WDHP investigation report (the record), to which access was denied in full. Further mediation was not successful, and accordingly, notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry, the appellant and the complainant. Since the record appeared to contain the appellant's own personal information, the Notice of Inquiry raised the possible application of sections 49(a) and (b) of the Act. Representations were received from all three parties.

## PRELIMINARY ISSUE:

The complainant submits that section 20 of the Act applies to the record. This is a discretionary exemption which the Ministry has not raised.

In Order P-257, former Assistant Commissioner Tom Mitchinson considered whether an affected person could raise a discretionary exemption not claimed by an institution, and stated as follows:

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that

an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with former Assistant Commissioner Mitchinson's view. In the circumstances of this appeal, I find that a consideration of the proper application of sections 13, 49(a) and 49(b) to the record will address the interests of all parties, and that it is not necessary or appropriate for me to consider the complainant's arguments with respect to section 20 of the Act.

## **ISSUES:**

The issues arising in this appeal are:

- A. Whether the record contains "personal information" as defined in section 2(1) of the Act.
- B. Whether the record qualifies for exemption under section 13(1) of the Act.
- C. If the answer to Issues A and B is yes, and the personal information relates to the appellant, whether the exemption provided by section 49(a) of the Act applies.
- D. If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the exemption provided by section 49(b) of the Act applies.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the record 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, ...

Having reviewed the record, I find that it contains information which satisfies the definition of personal information under section 2(1) of the Act. In my view, this personal information relates to the appellant, the complainant, and three other individuals (the witnesses) who gave statements to the investigator. A fourth individual also made a statement to the investigator, but he did so as part of his employment responsibilities, and in my view, neither his identity, the fact of his involvement in the investigation, nor his comments to the investigator qualify as his personal information.

**ISSUE B: Whether the record qualifies for exemption under section 13(1) of the Act.**

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.

While the Ministry initially claimed section 13 to exempt the record from disclosure, its representations do not address this exemption. However, since the complainant's representations mention section 13, I will consider its possible application.

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. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders 118 and P-628).

In my view, the record does not set out a recommended course of action to be accepted or rejected by its recipient. Accordingly, it does not contain "advice" or "recommendations" within the meaning of section 13(1) of the Act and therefore does not qualify for exemption under that section.

Because of the way in which I have resolved this issue, it is not necessary for me to consider Issue C.

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

Under Issue A, I found that the record contains the personal information of the appellant, the complainant and the witnesses.

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 Ministry must look at the information and weigh the requester's right of access to her own personal information against the rights of other

individuals to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, 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(2) provides some criteria for the head to consider in making this determination. 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)**

In its representations, the Ministry submits that the presumptions under section 21(3)(d) and section 21(3)(g) apply to the record. The complainant also refers to section 21(3)(g). 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;

The record contains information concerning employment related incidents involving the appellant and the complainant. However, in my view, the information in the record cannot accurately be characterized as the employment history of any of the individuals to whom it relates, and I find that section 21(3)(d) does not apply.

In a broad sense, it could be argued that some of the comments contained in the record are "evaluations" of the complainant. However, in my view, it is not possible to characterize these comments as "personal evaluations" or "personnel evaluations". The record was created during an investigation to determine whether workplace harassment under the WDHP had taken place. The conclusions reached as a result of the investigation are based on whether this policy has been complied with, and have no "personal" or "personnel" component, as required by section 21(3)(g) (Order M-82). Accordingly, in my view, section 21(3)(g) does not apply to the information contained in the record.

### **Section 21(2)**

The Ministry submits that the considerations under sections 21(2)(e) and (f), which favour non\_disclosure of personal information, are relevant in the circumstances of this appeal. The complainant's representations refer to sections 21(2)(e), (h) and (i) as factors favouring non\_disclosure.

These sections state 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,

- (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; and
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In support of their reliance on section 21(2)(e), both the Ministry's representations and those submitted by the complainant take the position that disclosure of this record could set off a new round of harassment. In my view, these representations do not provide any substantial basis for this assertion, and accordingly, section 21(2)(e) is not a relevant factor in the circumstances of this appeal.

With regard to section 21(2)(f), it is my view that when an allegation of workplace harassment is made and investigated, it is reasonable for the parties directly involved (the complainant and the respondent) to find the experience distressing and to restrict discussion of the subject with others. Accordingly, with one exception, I find that section 21(2)(f) is a relevant factor with respect to personal information communicated by the complainant and the witnesses to the investigator.

The exception to this finding arises from the fact that the appellant was the respondent in the complaint. In this situation, I find that section 21(2)(f) is not a relevant consideration with regard to personal information which relates to the identity of the complainant (which is, in any case, already known to the appellant), the substance of the complaint, the status or outcome of the investigation and other similar information which is essential to the proper and fair investigation/resolution of the complaint (Order P-552).

I will now discuss the possible relevance of section 21(2)(h). In Order M-82, Inquiry Officer Holly Big Canoe made the following comments regarding section 14(2)(h) of the Municipal Freedom of Information and Protection of Privacy Act, which is identical to section 21(2)(h) of the provincial Act:

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.

I agree with these comments and adopt them for the purposes of this appeal. In addition, where the investigation of the complaint has been completed, fairness demands that the parties to the complaint (including the appellant) be advised of how the complaint was resolved and why.

Accordingly, in the circumstances of this appeal, I find that section 21(2)(h) is a relevant consideration with respect to personal information communicated by the complainant and the witnesses to the investigator, except information which reveals the identity of the complainant, the substance of the complaint, and the status or outcome of the investigation and other similar information which is essential to the proper and fair investigation/resolution of the complaint.

The complainant's representations also refer to section 21(2)(i) as a factor favouring non\_disclosure. However, in my view, these representations do not contain sufficiently detailed information to establish section 21(2)(i) as a relevant factor.

I find that the information which must be disclosed in order to provide adequate information to the appellant concerning the handling of the complaint, as outlined above, does not include any personal information of the witnesses, and accordingly, its disclosure would not constitute an unjustified invasion of their personal privacy. Further, in my view, disclosure of the complainant's personal information which reveals her identity, the substance of the complaint, and the status or outcome of the investigation and other similar information which is essential to the proper and fair investigation/resolution of the complaint, would not constitute an unjustified invasion of the personal privacy of another individual. Therefore, I find that section 49(b) does not apply to those parts of the record.

Based on the relevant factors which favour non-disclosure, however, I find that disclosure of the personal information in the remainder of the record which relates to individuals other than the appellant (including the identities and all other personal information of the witnesses) **would** constitute an unjustified invasion of their personal privacy and I uphold the Ministry's decision to deny access to those portions. I have highlighted the exempt portions of the record on the copy which will be sent to the Ministry's Freedom of Information and Protection of Privacy Co\_ordinator with a copy of this order.

In reviewing the Ministry's exercise of discretion in favour of refusing to disclose the parts of the record for which I have found section 49(b) to apply, I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

**ORDER:**

1. I uphold the Ministry's decision to withhold the portions of the record which are highlighted on the copy of the record which is being sent to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator with a copy of this order.
2. I order the Ministry to disclose the remainder of the record to the appellant within thirty\_five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: \_\_\_\_\_  
John Higgins  
Inquiry Officer

\_\_\_\_\_ May 27, 1994