

ORDER P-656

Appeal P-9300527

Ministry of Housing



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ORDER

BACKGROUND:

The Ministry of Housing (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of records relating to the investigation of sexual and workplace harassment complaints brought by the requester. In particular, the requester wished to obtain the responses provided by the respondents in the case as well as any witness statements pertaining to the claims. The complaints were made under the Ministry's Workplace Discrimination and Harassment Prevention Policy Directive ("WDHP").

The Ministry denied access to the records in their entirety pursuant to section 49(b) of the Act, with reference to the considerations outlined in section 21(2)(f) of the Act.

The requester appealed the Ministry's decision to the Commissioner's office.

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 12 individuals whose interests might be affected by the disclosure of the records (the affected persons). Representations were received from the appellant, the Ministry, and seven of the affected persons.

THE RECORDS:

The records consist of 146 pages of interview notes and typed statements taken by a Management Board Secretariat investigator from the witnesses and respondents to the harassment investigation.

An additional 26 pages were supplied to the Commissioner's office consisting of various memos to file and covering memos from solicitors for the parties. In my view, these pages are not responsive to the request and fall outside the scope of this appeal.

ISSUES:

The issues arising in this appeal are:

- 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 appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

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

Section 2(1) of the Act states, in part, that "personal information" means "recorded information about an identifiable individual, ...".

In my view, each of the records contain recorded information about the appellant and one or more of the affected persons.

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 records contain the personal information of the appellant and the affected persons.

Section 47(1) of the Act gives individuals a general right of access to personal information in the custody or control of institutions. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access. Specifically, section 49(b) provides:

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/her own personal information against another individual's right to the protection of his/her personal privacy. If the Ministry 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 Ministry 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.

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.

I have considered sections 21(3) and (4) and find that none of the personal information at issue in this appeal falls within the ambit of either of these provisions.

The Ministry submits that the considerations under sections 21(2)(f) and (h) of the Act, which favour non-disclosure, are relevant in the circumstances of this appeal.

Sections 21(2)(f) and (h) 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,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;

In support of its contention that section 21(2)(f) applies to the record, the Ministry submits that:

... the information is highly sensitive because it is information voluntarily supplied in confidence during the course of a workplace discrimination and harassment prevention investigation, by the interviewees and respondents.

In Order M-82, Inquiry Officer Holly Big Canoe considered the issue of the sensitivity of information contained in records created in the context of workplace harassment complaints, and stated that:

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 ... 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.

This approach has been adopted in many subsequent orders. In applying these principles to the circumstances of this appeal, I conclude that section 21(2)(f) is not a relevant consideration with respect to the majority of the records containing information which was provided by the affected persons, including the respondents to the complaints.

I find, however, that portions of these records contain information which may be characterized as "highly sensitive". This information includes rather personal references to various individuals which are unrelated to the specifics of the appellant's complaints. The non-disclosure of this

information will not impair the ability of the appellant/complainant to discern the direct responses made by the respondents and the witnesses to her allegations. Only insofar as this information is concerned, I find that section 21(2)(f) of the Act is a relevant consideration.

In support of its claim that section 21(2)(h) of the Act applies to the records, the Ministry submits that releasing witness statements to the appellant would deter individuals from providing information about allegations concerning sexual harassment in the future. Therefore, the need to guarantee the confidentiality of witness statements is essential to the effective operation functioning of the Ministry's WDHP process.

In Order M-82, Inquiry Officer 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 equivalent to section 21(2)(h) of the 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 the approach taken by Inquiry Officer Big Canoe.

The affected parties concur with the position taken by the Ministry, and submit that section 21(2)(h) is a relevant consideration weighing in favour of privacy protection.

In its representations, the Ministry indicates that the Management Board Investigator who conducted the interviews from which witness statements were created told the interviewees that the information obtained would be held in confidence and for them to keep the discussion in confidence as well. The proviso was made, however, that the information provided by the respondents and witnesses is subject to the Act. In this respect, the WDHP Directive mandated by the Ministry states, in part:

The parties to a complaint and all witnesses must be advised about the application of the *Freedom of Information and Protection of Privacy Act* to any evidence gathered, and about potential disclosure of such evidence required according to law.

...

Throughout the complaint and investigation process all information must remain confidential, subject to the *Freedom of Information and Protection of Privacy Act* and the requirement to disclose information or give evidence as required by law, such as grievance arbitrations, Ontario Human Rights Commission proceedings and judicial proceedings. [see *FOI and the Discrimination/Harassment*

Complaint Process booklet, Workplace Discrimination/Harassment Prevention Unit, MBS for more information]

The WDHP Directive applied by the Ministry clearly outlines the application of the Act to the information provided during the course of an investigation.

In my view, section 21(2)(h) is not a relevant consideration in the circumstances of this appeal with respect to that portion of the information provided by the affected persons which directly addresses the substance of the complaints. The section is a relevant consideration, however, with respect to information contained in the records which does not address the specific allegations contained in the appellant's complaints.

The Ministry further submits that in this case, the entire investigative report which fully summarizes the evidence contained in the witness statements was released to the requester, and that this report is sufficient to enable the requester to ensure that the allegations were adequately investigated.

I note that the investigation has concluded and the allegations were found not to be substantiated.

In their representations, several of the affected persons submit that they have not been given the opportunity to review and sign the typed statements as promised by the investigator, and that these statements contain inaccuracies, are incomplete and could be misleading. For this reason, the affected persons also claim that section 21(2)(g) is a relevant consideration.

Some of the affected persons have also submitted that their careers could be adversely affected if their statements are released. As result, they claim that section 21(2)(e) is a relevant consideration in the circumstances of this appeal.

Sections 21(2)(e) and (g) of the Act 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,

- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (g) the personal information is unlikely to be accurate or reliable;

With respect to the consideration under section 21(2)(e), in my view, the affected persons have not presented sufficient evidence to establish a connection between the disclosure of the records and the possible pecuniary or other harm which they might suffer. The content of the records also do not establish this connection. Accordingly, I find that section 21(2)(e) is not a relevant consideration in the circumstances of this appeal.

I will now turn to section 21(2)(g) of the Act. Although two of the affected persons question the accuracy of the information contained in their statements, I have not been provided with

sufficient evidence to suggest that the information is "unlikely to be accurate or reliable", as required by section 21(2)(g). Consequently, I find that section 21(2)(g) is not a relevant consideration.

The appellant submits:

I believe that the allegations in "my claim" were not adequately investigated, and I did not receive a fair and equitable investigation. For the "victim" to so easily become the "accused", it is not unrealistic of me to believe that my claim was not taken seriously nor was it properly investigated.

The appellant further submits:

In response to my claim, serious allegations were brought against me by the respondents. Without my knowledge, I was accused of, investigated for, and found guilty of three Code offences.

The appellant also submits that she should be granted access to the respondents' statements as, pursuant to the WDHP, the respondents received a full copy of her complaints, but she was not allowed reciprocal access to the respondents' written responses.

I have carefully reviewed the record, taking into consideration all of the circumstances of this appeal. I find that sections 21(2)(f) and (h) of the Act are relevant factors which weigh in favour of privacy protection for only a very small portion of the respondents' responses and the statements given by the affected persons in reply to the appellant's complaints. In my view, the disclosure of these parts of the records, outlined in a highlighted copy of the records which I have provided to the Ministry's Freedom of Information and Protection of Privacy Co-ordinator, would constitute an unjustified invasion of the personal privacy of the affected persons and, accordingly, section 49(b) applies to exempt these portions of the records from disclosure.

Further, I find that it would not be an unjustified invasion of the personal privacy of the affected persons to disclose the balance of the records to the appellant.

Section 49(b) is a discretionary exemption. The Ministry has provided representations regarding its exercise of discretion in favour of not providing the appellant with access to portions of the record. I have found nothing improper in the manner in which this determination was made, and would not alter it on appeal.

ORDER:

1. I order the Ministry to disclose the records to the appellant in accordance with the highlighted copy of the records which I have provided to the Freedom of Information and Protection of Privacy Co-ordinator of the Ministry with a copy of this order. The highlighted portions identify those portions of the records which should **not** be disclosed.
2. I order the Ministry to disclose those portions of the records referred to in Provision 1 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.

3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the portions of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ April 15, 1994