



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-712**

**Appeal P-9400089**

**Ministry of Environment and Energy**



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## **BACKGROUND:**

The Ministry of Environment and Energy (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a complete copy of a report produced as a result of an internal investigation into a workplace-related incident in which the requester threatened harm to her co-workers.

The Ministry located the responsive record and denied the requester access to it in full pursuant to sections 13(1), 20, 21, 49(a) and (b) of the Act.

The requester then narrowed her request to exclude the statements of the other individuals involved in the incident. The Ministry again denied access to the document and the requester appealed this decision to the Commissioner's office.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry, the appellant and four individuals mentioned in the record (the affected persons). Representations were received from the Ministry, the appellant and all of the affected persons.

The record at issue in this appeal consists of the report which is comprised of "Summary", "Conclusion", and "Recommendations" sections.

## **ISSUES:**

- A. Whether any of the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the information relates to the requester and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to the personal information contained in the record.
- C. Whether the discretionary exemption provided by section 13(1) of the Act applies to the record.
- D. Whether the discretionary exemption provided by section 20 of the Act applies to the record.
- E. If the answer to Issue A is yes, whether the discretionary exemption provided by section 49(a) of the Act applies to the personal information contained in the record.

**ISSUE A: Whether any of the information contained in the record 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, ...

I have reviewed the report and find that it contains the personal information of the appellant and the four affected persons within the meaning of section 2(1) of the Act.

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

Under Issue A, I have found that the record contains the personal information of the appellant and the four affected persons.

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. 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.

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 whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Ministry has not claimed the application of any of the presumptions contained in section 21(3). Rather, it submits that the considerations set forth in sections 21(2)(f), (h) and (i) of the Act, which favour the non-disclosure of personal information, are relevant in the circumstances of this appeal. In her representations, the appellant raises section 21(2)(d) of the Act, which favours the disclosure of personal information.

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,

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

- (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.

I will first consider the factor raised by the appellant which favours the disclosure of the personal information contained in the record.

### **Section 21(2)(d) - Fair Determination of Rights**

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.

[Order P-312]

In her representations, the appellant submits that the disclosure of the personal information contained in the record is necessary to properly "defend herself" in an arbitration proceeding which is pending. Based on the evidence provided to me, I am not convinced, however, that the personal information is **significant** to the determination of the right in question or that it is **required** in order to prepare for the proceeding or to ensure an impartial hearing.

Accordingly, I find that the consideration described in section 21(2)(d) of the Act is not a relevant factor in the determination of whether the disclosure of the personal information contained in the record would result in an unjustified invasion of another individual's personal privacy.

I will now consider those factors raised by the parties which favour privacy protection.

### **Section 21(2)(f) - Highly Sensitive Information**

In their representations, the Ministry and the affected persons indicate that the consideration described in section 21(2)(f) of the Act is a relevant factor in the circumstances of the appeal.

In my view, in order to properly be considered "highly sensitive", the Ministry and/or the affected persons resisting disclosure must establish that the release of the personal information in question would cause excessive personal distress to the affected persons [Order P-434].

The report which forms the record at issue in this appeal contains a detailed description of the workplace environment of the appellant and the affected persons. Much of the information deals with the difficult interpersonal problems experienced by the parties. Their views concerning each other are candidly discussed. It should be noted that the information contained in the record provided by the affected persons does not pertain to the incident which gave rise to the discipline of the appellant by her employer. Rather, the events leading up to this occasion provide the subject matter of the record.

I find that, in the circumstances of this appeal, the information contained in the record may be characterized as "highly sensitive" within the meaning of section 21(2)(f) of the Act. Further, I find that its disclosure could reasonably be expected to cause excessive personal distress to the affected persons.

#### **Section 21(2)(h) - Supplied in Confidence**

The report was prepared by an employee of the Ministry of Transportation at the request of the Ministry of Environment and Energy's Northern Ontario Regional Director following allegations of threats by the appellant against several of the affected persons. The interviews of the affected persons were conducted by the author of the report less than two months after the incident which is the subject of the report. I find that the author of the report explicitly stated to the affected persons that any information which they provided would be treated confidentially and would not be disclosed to the appellant.

The affected parties refer to an expectation of confidentiality in their representations and their concern should the information which they provided to the author of the report be disclosed to the appellant. I find the expectation of confidentiality on the part of the affected persons to be a reasonable one.

Accordingly, in my view, the consideration described in section 21(2)(h) of the Act is a relevant factor in determining whether the disclosure of the information contained in the record would result in an unjustified invasion of an individual's personal privacy.

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

In its representations, the Ministry indicates that the disclosure of the information contained in the record would unfairly damage the reputation of one of the individuals who is referred to in it.

The applicability of section 21(2)(i) is not dependent on whether the damage or harm envisioned by this clause is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Order 256).

I am unable to agree that this consideration has any application in the circumstances of this appeal. Any harm which may occur to the reputation of the parties whose personal information is contained in the record cannot be categorized as "unfair" within the meaning of section 21(2)(i).

In conclusion, I have found that the considerations described in sections 21(2)(f) and (h), both of which favour privacy protection, are the only relevant factors listed in section 21(2) in the circumstances of this appeal. Accordingly, as no factors favouring disclosure have been found to be relevant, I find that the disclosure of the personal information contained in the record would constitute an unjustified invasion of the personal privacy of the affected persons. The record should not, therefore, be disclosed to the appellant.

I have reviewed the Ministry's exercise of discretion in favour of refusing to disclose the record under section 49(b) of the Act. I have found nothing to indicate that the exercise of discretion was improper and would not alter this determination on appeal.

Because of the manner in which I have disposed of Issue B, it is unnecessary for me to address Issues C, D and E.

**ORDER:**

I uphold the decision of the Ministry.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ June 24, 1994