



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

ORDER P-738

Appeal P_9300491

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). In August, 1990, the appellant filed a complaint under the Ontario Public Service's Policy on Sexual Harassment which was then in force. She requested a copy of records relating to the investigation of the complaint from the Ministry of the Solicitor General and Correctional Services (the Ministry).

The request was included in the same letter with two other requests. The Ministry issued three separate decision letters in response to these requests. Each of these three decisions became the subject of a separate appeal file. The appeals relating to the other two parts of the request have been dealt with in previous orders.

There are a number of affected persons who were notified of this appeal. These individuals are the respondent in the investigation (the respondent) and 13 other witnesses who gave statements (the witnesses).

The records at issue consist of:

- the undisclosed portions of the investigation report (Record 1)
- the respondent's statement to the investigator (Record 1_3)
- statements by the 13 witnesses (Records 1-4 to 1-12, inclusive, and Records 1-14 to 1-16, inclusive)
- one letter from a witness (Record 1-13).

The Ministry relies on the following exemption to deny access to the information which has not been disclosed:

- invasion of privacy - section 49(b).

The appellant also maintains that more records exist that are responsive to her request.

A Notice of Inquiry was provided to the parties to the appeal including the respondent and the 13 witnesses. Representations were received from the Ministry, the appellant, and three witnesses.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records and I find that all of them contain personal information which relates to the appellant and other individuals.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the Ministry determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the Ministry has the discretion to deny the requester access to that information.

The appellant argues that the Ministry's process in applying the exemption under section 49(b) was flawed because the Ministry was obliged to contact the affected persons to inquire as to whether or not they would consent to disclosure, and it did not do so.

Where the subject of a request is personal information, the requirement for an institution to notify affected persons arises from section 28(1)(b) of the Act, which applies to requests under Part III of the Act by virtue of section 48(2). Section 28(1)(b) states as follows:

Before a head grants a request for access to a record,

that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f),

the head shall give written notice in accordance with subsection (2) to the person to whom the information relates.

In my view, section 28(1)(b) only requires notification where an institution is considering granting access to personal information, in circumstances where disclosure might constitute an unjustified invasion of personal privacy. If, after reviewing the record, an institution decides not to disclose the personal information, or if it decides that disclosure would not constitute an unjustified invasion of personal privacy, notification is not required.

In the circumstances of this appeal, the Ministry made partial disclosure of the requested information after determining that to do so would not be an unjustified invasion of personal privacy. It denied access to the remaining personal information. Accordingly, the Ministry was not **required** to notify the affected persons under section 28.

Moreover, all the affected persons were notified of this appeal in accordance with the provisions of section 50(3) of the Act. None of them consented to disclosure of their personal information.

Having disposed of this issue, I will now consider whether disclosure of the withheld information would constitute an unjustified invasion of personal privacy under section 49(b) of the Act. Sections 21(2), (3) and (4) of the Act provide guidance in making this determination under section 49(b).

Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the institution must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

In its representations, the Ministry states that the undisclosed portions of Record 1 (the Investigation Report) relate to the employment history of the respondent and the witnesses. If the personal information does in fact relate to employment history, section 21(3)(d) provides that disclosure would be a presumed unjustified invasion of personal privacy.

The Ministry further states that there are two factors under section 21(2) which favour non-disclosure of the personal information in all of the records, as follows:

- the information is highly sensitive - section 21(2)(f)
- the information was supplied in confidence - section 21(2)(h)

The three witnesses who made representations also submit that the information was supplied in confidence. In addition, one of the witnesses submits that the information is highly sensitive. This same witness also refers to the factor in section 21(1)(e), which applies where disclosure of the records will unfairly expose the individual to whom the information relates to pecuniary or other harm.

The appellant submits that disclosure of the information is necessary to ensure a fair determination of her rights (section 21(2)(d)). She has provided me with a copy of a Statement of Claim filed on her behalf, as plaintiff, in the Ontario Court (General Division) against the Crown. She has also provided a copy of the Crown's application to the Workers' Compensation Appeals Tribunal seeking a determination on whether the appellant's right to bring a civil action is overridden by the Workers' Compensation Act. The appellant's representations indicate that as a result of the Crown's application, she may be required to have some or all of her claims addressed by the Workers' Compensation Board rather than the court.

The appellant states as well that disclosure of the information in the records is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny (section 21(2)(a)). To substantiate the application of this section, the appellant alleges that the Ministry's conduct has been discriminatory and inconsistent with government policy in its response to her complaints, and that there has been previous public interest in the Ministry's handling of such matters. To substantiate the latter assertion, the appellant has provided a copy of the report by the Bell Cairns Enquiry, which addressed allegations of sexual harassment and assault at a training centre operated by the Ministry, the Ministry's response to the allegations, and related issues vis à vis the Ministry's work environment.

The appellant also submits that, because she is no longer in daily contact with any of the witnesses or the respondent, she can in no way be perceived as a threat to them, and therefore the information should not be considered as highly sensitive. According to the appellant, this means that the factor in section 21(2)(f) is not relevant. In addition, the appellant argues that the lack of contact between herself and these other parties is a circumstance favouring disclosure which ought to be considered under section 21(2).

Having reviewed the evidence before me, I have made the following findings:

- (1) Parts of several of the records (including, but not limited to the Investigation Report) contain information relating to the employment history of individuals other than the appellant, and disclosure of this information would constitute a presumed unjustified invasion of personal privacy under section 21(3)(d).
- (2) Section 21(4) does not pertain to any of the information to which section 21(3)(d) applies.
- (3) Many past orders have indicated that some information in connection with harassment investigations is highly sensitive within the meaning of section 21(2)(f), and that some information collected in the context of such investigations was provided in confidence within the meaning of section 21(2)(h). However, it has also been found that it is not possible for such an investigation to proceed if the complaint is not made known to the respondent and the direct response to the allegations made in the complaint is not made known to the complainant (Orders M-82 and P-685). In addition, where, as in this case, the investigation has been completed, it is essential that the parties (including the appellant) be advised of how the complaint was resolved and why (Order P-694).

In my view, sections 21(2)(f) and 21(2)(h) are relevant in the circumstances of this appeal, but **only** with respect to the personal information of persons other than the appellant and respondent, and not to information which directly addresses the substance of the complaint and the findings.

- (4) Section 21(2)(e) is not a relevant consideration. The witness relying on this provision has not provided sufficient evidence to establish the relevance of this section.
- (5) Section 21(2)(a) is not a relevant consideration. The appellant has not provided any evidence to demonstrate that, in the circumstances of this appeal, disclosure would be for the purpose of subjecting the Ministry's activities to public scrutiny.
- (6) The lack of ongoing contact between the appellant and the other parties is not relevant to the issue of whether disclosure would constitute an unjustified invasion of personal privacy, and accordingly, it is not a relevant factor in the circumstances of this appeal.
- (7) Section 21(2)(d) is a relevant consideration since, in my view, some of the personal information contained in the records has a bearing on the determination of the appellant's legal rights in the context of existing court and tribunal proceedings, and is required in order to prepare for the proceedings (Order P-312). This factor weighs in favour of disclosure.
- (8) The portions of the records which relate to employment history are exempt under section 49(b) by virtue of the presumed unjustified invasion of personal privacy established by section 21(3)(d). The names of witnesses, and other information in the records which could identify them (except information relating to the substance of the complaint and the findings) are also exempt under section 49(b) since, in my view, that information is highly sensitive (section 21(2)(f)), was provided in confidence (section 21(2)(h)), and is not relevant to a fair determination of the appellant's rights (section 21(2)(d)). Based on the same analysis, the names and other personal identifiers of inmates and several other individuals are also exempt under section 49(b). In the circumstances of this appeal,

disclosure of the remaining information in the records would not constitute an unjustified invasion of personal privacy, and the exemption in section 49(b) does not apply to it.

I have highlighted the portions of the records which are exempt under section 49(b) on the copies being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order.

The appellant submits that there is a compelling public interest in the disclosure of the records which outweighs the purpose of the section 49(b) exemption. This raises the possible application of section 23 of the Act, which states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 23 does not refer specifically to the exemption in section 49(b). This matter has been previously considered in Order P-541, where Inquiry Officer Anita Fineberg made the following comments:

In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21.

I agree, and accordingly, I will consider the possible application of section 23 to any portions of these records which are found to be exempt under section 49(b).

The appellant's representations in support of the application of section 23 are the same as those outlined above with respect to section 21(2)(a). Previous orders have held that in order for section 23 to apply, there must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question. In my view, there is no public (as opposed to private) interest in disclosure of any information which I have found to be exempt under section 49(b). Accordingly, section 23 has no application in the circumstances of this appeal.

REASONABLENESS OF SEARCH

The appellant contends that additional responsive records exist. This raises the question of whether the Ministry conducted a reasonable search for responsive records as required by the Act. In a letter to the Commissioner's office dated July 8, 1994, the Ministry indicates that it has conducted a further search and located additional responsive records in respect of which it will shortly issue an access decision to the appellant.

In my view, for the purposes of this appeal, this resolves the issue of whether additional responsive records exist. I will order the Ministry to issue an access decision in respect of the additional records.

Once the appellant receives this decision, she will be in a position to assess whether her concerns regarding additional records have been met. If, after reviewing the decision, the appellant is still

of the view that additional responsive records exist, she will be permitted to file a new appeal regarding the adequacy of the Ministry's searches.

ORDER:

1. I order the Ministry to disclose to the appellant the portions of the records which are **not** highlighted on the copy which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order. I uphold the Ministry's decision to deny access to the highlighted portions of these records.
2. I order the Ministry to disclose the portions of the records ordered to be disclosed in Provision 1 within thirty-five (35) days after the date of this order but not before the thirtieth (30th) day after the date of this order.
3. I order the Ministry to provide a decision letter to the appellant regarding access to the records referred to in its letter to the Commissioner's office dated July 8, 1994, in accordance with sections 26, 28 and 29 of the Act, considering the date of this order as the date of the request.
4. I order the Ministry to provide me with a copy of the decision letter referred to in Provision 3 within sixty (60) days of the date of this order. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
5. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
John Higgins
Inquiry Officer

August 8, 1994