



Information and Privacy
Commissioner/Ontario

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

ORDER P-848

Appeal P-9400265

Ontario Human Rights Commission



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ontario Human Rights Commission (the OHRC) received a request from the appellant, by his counsel, for access to the following information:

- (1) all documentation in the OHRC's files concerning two complaints filed by the appellant with the OHRC, both of which were identified by OHRC file number, and in particular the status of the appellant's request for reconsideration in these complaints, and
- (2) copies of all documentation concerning a third complaint filed by the appellant with the OHRC, including the status of this complaint.

Partial access was granted to records identified as responsive to part 1 of the request. Access was denied to the records which remain at issue on the basis of the following exemptions:

- law enforcement - sections 14(1)(a) and (b) and section 14(2)(a)
- advice or recommendations - section 13(1).

With respect to part 2 of the request, the appellant did not provide a file number for the complaint, and the OHRC's response indicated that it was unable to locate this file through its computer data base.

The appellant, by his counsel, filed an appeal of this decision. The issues in this appeal are whether the exemptions which have been claimed apply to the records at issue, and whether the OHRC conducted a reasonable search for records.

A Notice of Inquiry was sent to the appellant and the OHRC. Because the records appeared to contain the appellant's own personal information, and some records also appeared to contain the personal information of other individuals, the Notice of Inquiry raised the possible application of sections 49(a) and (b) of the Act. In response to the Notice of Inquiry, representations were received from the OHRC. While the appellant did not submit representations per se, his counsel provided copies of correspondence and previous submissions made to the OHRC, and I have considered these materials in reaching my decision.

In its representations, the OHRC indicated that it had partially amended its original decision and that access to a number of the records at issue would be granted. Subsequently, in a telephone conversation with the Appeals Officer, the OHRC clarified that several other records would be disclosed. Accordingly, none of the records which the OHRC has agreed to disclose is at issue in this appeal.

The OHRC's representations also included suggestions for possible disclosure of parts of several records. It indicated that it would disclose these portions "on the instructions of the Appeals Officer". In my view, this does not constitute a new decision with respect to these records, since the OHRC sought the concurrence of the Appeals Officer. Because the suggested disclosure has not taken place, I must decide

the issue of access to these records in their entirety. In my view, however, these suggestions are part of the OHRC's representations, and I have considered them in reaching my decision concerning the records to which they relate.

The records which remain at issue are listed in Appendix "A" to this order. They include administration forms, letters, meeting notes, intake materials and other records found in the OHRC complaint files. For ease of reference, Appendix "A" assigns consecutive numbers to the records at issue. The second column of Appendix "A" provides a cross-reference to the page numbers assigned by the OHRC.

The Notice of Inquiry identified that a number of pages did not pertain to the appellant's OHRC complaints, but to unrelated complaints filed by others. For this reason, the Notice of Inquiry indicated that these pages are not at issue in this appeal. No representations were received on this point. Having reviewed these pages, I agree that they are not responsive to the appellant's request, and therefore they fall outside the scope of this appeal. Accordingly, these pages are not listed in Appendix "A".

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

I have reviewed the records at issue. I find that each of them contains the appellant's personal information. Most of the records contain the appellant's name and other personal information about him. Several records do not include the appellant's name, but do contain his file number and other personal information. In my view this information relates to an identifiable individual (the appellant) by virtue of the file numbers, and thus qualifies as the appellant's personal information.

In addition, I find that Records 3, 4 and 6 contain the personal information of individuals other than the appellant.

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.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Under section 49(a) of the Act, the OHRC has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include both of the exemptions claimed with respect to the records at issue, namely law enforcement (section 14) and advice or recommendations (section 13). In the discussion which follows, I will consider whether the records qualify for exemption under these sections as a preliminary step in determining whether the exemption in section 49(a) applies.

LAW ENFORCEMENT

Sections 14(1)(a) and (b)

The OHRC initially claimed these exemptions for all the records at issue.

In order for a record to qualify for exemption under either of these sections, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act (Order P-324). It has been previously established that OHRC investigations meet this definition (in Order 89 and many subsequent orders) and I adopt this finding for the purposes of this order.

The purpose of sections 14(1)(a) and (b) is to provide the institution with the discretion to preclude access to records in circumstances where disclosure would interfere with an **ongoing** law enforcement matter or investigation (Order P-403).

It is clear that one of the investigations to which some of the records refer has been completed and cannot be seen as "ongoing". For this reason, I find that Records 7, 8, 9, 10, 11 and 12, which relate to this completed investigation, do not qualify for exemption under these sections. Moreover, although the OHRC originally claimed these sections with respect to these records, it did not refer to them in its representations.

With respect to the remaining documents for which the OHRC relies on sections 14(1)(a) and (b), previous orders have found that in order to qualify for exemption under these sections, the OHRC must establish "a clear and direct linkage" between the disclosure of the specific information at issue and the harm mentioned in the exemption (Order M-202). In my view, the representations submitted by the OHRC fail to meet this standard, and for this reason, none of the remaining documents qualifies for exemption under these sections.

Section 14(2)(a)

In order for a record to qualify for exemption under this section, the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the Act.

In addition, for a record to qualify for exemption under section 14(2)(a) of the Act, the institution must satisfy each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

The OHRC initially relied on section 14(2)(a) for all of the records at issue. However, its representations only mention this section with respect to Record 5. Based upon the evidence provided, I find that none of the other records qualifies as a "report", and for that reason, they cannot qualify for exemption under section 14(2)(a).

Record 5 (Case Disposition Form) is similar to a document considered in another appeal involving the OHRC. That case was decided by Assistant Commissioner Irwin Glasberg in Order P-449. In that order, the Assistant Commissioner found that the record qualified for exemption under section 14(2)(a). In reaching this decision, the Assistant Commissioner found that the record did represent a formal statement or account of the results of the collation and consideration of information, and thus qualified as a "report" (Order 200).

I agree with these conclusions and in my view they also apply to Record 5. Moreover, it is clear that Record 5 was prepared in the course of law enforcement (pertaining to the Ontario Human Rights Code) by the agency which has the responsibility for enforcing that statute.

Accordingly, I find that Record 5 qualifies for exemption under section 14(2)(a), and for this reason, it is exempt from disclosure under section 49(a).

ADVICE OR RECOMMENDATIONS

Section 13(1) of the Act states that:

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.

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 records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making."

The OHRC relies on this exemption with respect to Records 1, 2, 4, 5, 7, 8, 9, 10, 11 and 12. I have already found that Record 5 is exempt under section 49(a), in the discussion of "Law Enforcement", above, and accordingly, I will not consider it in this discussion.

I find that the following records qualify for exemption under this section because they set out a suggested course of action with respect to the OHRC's decision-making mandate as established in the Ontario Human Rights Code: Records 2, 12 and part of Records 1 and 9.

Although Record 7 sets out recommendations, they are the OHRC's recommendations to an employer. As indicated above, Order 94 states that this exemption is intended to protect advice or recommendations **within the deliberative process of government decision-making and policy-making**. I agree with this interpretation. For this reason, I am of the view that this exemption is not intended to protect advice given by an institution to outside bodies such as a party to an OHRC complaint, and I find that this record does not qualify for exemption under section 13(1).

In my view, Records 4 and 11 simply state conclusions, rather than offering advice or recommendations. Record 8 appears to contain instructions rather than a suggested course of action to be accepted or rejected. Record 10 does not contain advice or recommendations. Accordingly, I find that these records do not qualify for exemption under section 13(1).

To summarize, I have found that Records 2, 12 and part of Records 1 and 9 qualify for exemption under section 13(1), and are therefore exempt under section 49(a) of the Act.

INVASION OF PRIVACY

I have previously found that Records 3, 4 and 6 contain the personal information of the appellant and other individuals. While the OHRC has argued that Records 3 and 6 should be exempt under section 21(1), because disclosure would constitute an unjustified invasion of personal privacy, it is my view that this question should be considered under section 49(b), which provides a similar exemption for records which contain the appellant's personal information (Order M-352). In order to ensure that personal privacy is protected, I will also consider the application of section 49(b) to Record 4.

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

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. 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 OHRC 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 my view, the presumption in section 21(3)(b), which pertains to information compiled and identifiable as part of an investigation into a possible violation of law, applies to the parts of Records 3, 4 and 6 which pertain to other individuals. As no factors favouring disclosure have been established with respect to this information, I find that its disclosure would be an unjustified invasion of personal privacy, and it is exempt under section 49(b).

I have highlighted the parts of Records 3, 4 and 6 which are exempt on the copy of these records which is being sent to the OHRC's Freedom of Information and Privacy Co-ordinator with a copy of this order.

REASONABLENESS OF SEARCH

Where the requester provides sufficient details about the records which he is seeking and the OHRC indicates that such records do not exist, it is my responsibility to ensure that the OHRC has made a reasonable search to identify any records which are responsive to the request. The Act does not require the OHRC to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the OHRC must provide me with sufficient evidence to show that they have made a **reasonable** effort to identify and locate records responsive to the request.

With its representations, the OHRC included an affidavit sworn by its Freedom of Information and Privacy Co-ordinator with respect to the efforts made to locate responsive records. The evidence shows that a large number of records were located with respect to the two complaints for which the appellant provided OHRC file numbers. With respect to the third complaint, for which the appellant did not have an OHRC file number, the affidavit explains that such files should be accessible under either the name of the appellant or the employer. Numerous searches were conducted using both names, and no files were located.

Based upon the evidence and representations submitted, I find that the actions of the OHRC in searching for responsive records were reasonable in the circumstances of this appeal.

ORDER:

1. I order the OHRC to disclose the following records to the appellant within fifteen (15) days after the date of this order: Records 7, 8, 10 and 11, and the parts of Records 1, 3, 4, 6 and 9 which are **not** highlighted on the copy of these records which is being sent to the OHRC's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. In all other respects, I uphold the OHRC's decision.
3. In order to verify compliance with Provision 1 of this order, I reserve the right to require the OHRC 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

_____ January 27, 1995

APPENDIX "A"

LIST OF RECORDS AT ISSUE

RECORD NUMBER	OHRC PAGE NUMBERS	DESCRIPTION	EXEMPTIONS	DISPOSITION
1	34	Record of Intake re appellant	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Disclose in part
2	86	Triage Administration Form, November 11, 1991	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Do not disclose
3	104	Letter from respondent's counsel to Human Rights Officer, February 27, 1992	14(1)(a) and (b), 14(2)(a), 21(1), 49(a) and (b)	Disclose in part
4	125-126	Panel Meeting Notes	13(1), 14(1)(a) and (b), 14(2)(a), 49(a) and (b)	Disclose in part
5	136	Case Disposition Form, April 29, 1992	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Do not disclose
6	158	Letter from respondent's counsel to OHRC, February 11, 1994	14(1)(a) and (b), 14(2)(a), 21(1), 49(a) and (b)	Disclose in part
7	101	Letter from OHRC to respondent, August 24, 1992	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Disclose
8	129	Part of Triage Working Group Form	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Disclose
9	130-131	Case summary re appellant, December 4, 1991	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Disclose in part
10	134-135	Meeting minutes - meeting between Human Rights Officer and appellant, February 6, 1992	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Disclose
11	186	Record of Investigation re appellant	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Disclose
12	188	Triage Administration Form, October 28, 1991	13(1), 14(1)(a) and (b), 14(2)(a), 49(a)	Do not disclose