



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-816

Appeal P-9400180

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 detailed ten-part request from counsel for the respondents in a complaint which had been brought before the OHRC. The respondents are both a corporate body and two individual officers of the corporation who have been named in their personal capacities. Where necessary, I will refer to the respondents as "individual" or "corporate". The various parts of the request are directed at information which would set out or reveal the reasons for the transfer of the complaint investigation out of the OHRC's routine complaint processing to a special task force.

The OHRC located records responsive to the request and relies on the following exemptions in denying access to them:

- invasion of privacy - section 21
- advice or recommendations - section 13(1)
- law enforcement - sections 14(1)(a) and (b)

Counsel filed an appeal on behalf of the corporate and individual respondents. For ease of reference, I will refer to counsel as the appellant.

A Notice of Inquiry was provided to the OHRC and the appellant. Representations were received from both parties. As it was possible that some information might pertain to the individual respondents, the parties were asked to address the possible application of section 49 to the records at issue.

Just prior to, and during the inquiry stage of this appeal, a considerable amount of mediation took place with respect to narrowing of the records at issue. In order to facilitate discussion, I have set out in Appendix "A", only those records which have been addressed in this order. The page numbers correspond to the pages in the OHRC file. I have added sequential record numbers to these pages. All record numbers referred to in this order correspond to those identified in Appendix "A".

During the inquiry stage of the appeal, the OHRC agreed to disclose specified portions of Records 1, 2 and 12 to the appellant and indicated that Records 3-7 and Record 13 were not responsive to the request as worded.

I have reviewed the portions of Records 1, 2 and 12 identified by the OHRC and agree that they should be disclosed.

The appellant was contacted regarding the responsiveness of Records 3-7 and Record 13 and provided additional representations concerning this issue. She agrees that Record 13 is not responsive. This record is, therefore, not at issue in this appeal. However, the appellant submits that, as she does not know the contents of Records 3-7, she is not in a position to determine whether they might or might not be responsive. Records 3-7, therefore, remain at issue.

## **PRELIMINARY MATTERS: CLARIFICATION OF THE REQUEST**

In her representations, the appellant states that throughout the processing of her request and during the appeal process, the OHRC was aware of the specific information that she was seeking. She maintains that if her request was unclear, or if the OHRC was not certain that a record might have been responsive to her request, the OHRC was obligated under section 24(2) of the Act to assist her in clarifying her request.

Section 24(2) states:

If the request does **not sufficiently describe** the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1). [emphasis added]

In my view, the obligations of an institution to assist a requester in reformulating a request only arise in situations where the request is unclear or broadly worded. In reviewing the request, I find that it was extremely detailed and clearly identified the records that the appellant was seeking. The OHRC's obligation under these circumstances is to consider the request, locate the records and determine whether or not they are responsive to the specific parameters of the request.

The OHRC indicates that, initially, the decision to include certain records as responsive was made so as not to interpret the request too narrowly. However, upon closer examination of the records and the request, the OHRC determined that some of the records were not responsive because of the specificity of the request.

In my view, although it might have been preferable to make this determination at the request stage, this is not a situation in which the OHRC was obligated to seek clarification under section 24(2) of the Act.

## **RESPONSIVE RECORDS**

As I indicated above, the OHRC claims that Records 3-7 are not responsive to the request as worded. In particular, the OHRC submits that the records all fall outside the timeframe that was established in the separate parts of the request.

In her representations, the appellant reiterated that she is seeking any information which would relate in any way to the reasons for referral of the investigation to the special task force team. She indicates that despite the specific wording of her request, the actual information she sought was known to the OHRC and the request should have been interpreted as including any information which would reveal or relate to the reasons for this decision. She submits that if the records contain information relating to this issue, they should be considered as responsive to her request.

I have considered the representations of both parties and have carefully reviewed the contents of Records 3-7. Record 3 is a letter, dated March 8, 1991, from the complainant's counsel to the OHRC relating to the early stages of the task force investigation. Records 4, 5 and 6 are draft and final acknowledgment

letters from the OHRC relating to Record 3. Record 7 is a letter from the OHRC in further response to Record 3.

In my view, none of these records contain information which is responsive to the appellant's request. Records 3-7 are, therefore, outside the scope of this appeal.

Accordingly, there are seven records remaining at issue in this appeal. They consist of correspondence, internal OHRC transfer memos, a case disposition sheet and the record of investigation. These records are described in greater detail in Appendix "A" to this order. For greater clarity, Appendix "A" also includes the records which were ultimately determined to be non-responsive to the request. Appendix "A" sets out the disposition regarding each record.

## **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, 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.

In reviewing the records or portions of records at issue, I am of the view that, with the exception of Record 8, all of the records or parts of records contain personal information of the complainant and/or other individuals. None of the information in these records pertains to the appellant or her individual clients.

In particular, Records 1, 10 and 11 are correspondence between the complainant or her counsel and the OHRC. The information at issue in them relates to the complainant in the context of her complaint.

Records 2 and 9 are internal OHRC transfer memos, and Record 12 is the Record of Investigation. The OHRC has agreed to release the majority of the information in Records 2 and 12. The remaining information in Record 2 falls under the heading "Why to the Task Force". The second and third sentences in this section contain the personal information of the complainant. In my view, however, the first sentence does not contain personal information.

With respect to Record 12, the only portions remaining at issue consist of the name of an individual who had been interviewed by the investigating officer (the officer), under the December 20, 1992 entry, which I find to be that individual's personal information, and comments about the officer's preparation of the case summary, under the April 12 and August 9, 1993 entries. These comments reflect the writer's view of the quality of work done. Although the officer who prepared the case summary is not identified, he is identifiable as a result of his involvement in the preparation of the document. Record 9 contains an expansion of comments made about the officer's preparation of the case summary.

Previous orders have held that information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an evaluation of the employee's performance or an investigation into his or her conduct, these references are considered to be the individual's personal information.

In reviewing the information identified above, I am of the view that the comments made in these two records essentially amount to an assessment of the employee's performance and, therefore, contain his personal information.

Record 8 is the Case Disposition sheet. Although the record does not identify the parties by name, I am of the view that it is sufficiently connected to all of the individual parties to the complaint to qualify as their personal information.

In summary, with the exception of the first sentence under the heading "Why to the Task Force" in Record 2, the information at issue in the remaining records or parts of records qualifies as personal information. With the exception of Record 8, this information relates only to individuals other than the appellant or her individual clients.

Although Record 8 contains the personal information of both the individual respondents and the complainant, and may be considered under section 49(b), the OHRC has also claimed section 13(1) as a basis for exemption. In my view, it would be appropriate to consider this record under the latter exemption.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information except in certain circumstances.

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 personal privacy. Where one of the presumptions 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 if 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 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 circumstances that are relevant in the circumstances of the case.

The OHRC submits that the records or parts of records for which it claimed section 21 are exempt because they were compiled, and are identifiable, as part of an investigation of a possible violation of law. Therefore, the OHRC submits, the presumed unjustified invasion of personal privacy found in section 21(3)(b) applies. The OHRC suggests in its representations that the information relating to the performance of the employee is highly sensitive and, therefore, the factor in section 21(2)(f) is relevant.

The appellant provides considerable factual background relating to the complaint and subsequent investigation which ultimately led to the production of two case summaries which came to different

conclusions. She indicates further that during the investigation of the complaint by the OHRC, the file was transferred from the originating office to a special task force in order to expedite completion of the investigation.

The appellant argues that the OHRC's actions raise questions of abuse of process and bias. In my view, the appellant has implicitly raised section 21(2)(a) (public scrutiny). She also submits that the information she obtains through her access request will be used in preparing legal arguments before the Board of Inquiry, which implicitly raises section 21(2)(d) (fair determination of rights).

Finally, the appellant submits that there is a compelling public interest which clearly outweighs the purpose of the section 21 exemption. This submission relates to section 23 of the Act, and is based on the same considerations referred to above with respect to section 21(2)(a).

I have reviewed the representations and the records, and I find as follows:

- (1) The personal information of the complainant in Records 1, 2, 10 and 11, and that of another individual in Record 12, was compiled and is identifiable as part of an investigation into possible violations of the Ontario Human Rights Code (the Code), and the presumed unjustified invasion of personal privacy under section 21(3)(b) applies.
- (2) The personal information of the employee was not compiled nor is it identifiable as part of an investigation into a possible violation of the Code, but is rather an assessment of his performance in the investigation of the matter. Disclosure of this information would likely cause the employee excessive personal distress and embarrassment. Section 21(2)(f) is, therefore, a relevant consideration with respect to the employee's personal information which is contained in Records 9 and 12.
- (3) The appellant has not provided sufficient evidence to demonstrate that, in the circumstances of this appeal, disclosure would be for the purpose of subjecting the OHRC's activities to public scrutiny. The evidence indicates, rather, that disclosure is desired for the purpose of argument at the Board of Inquiry. Section 21(2)(a) is, therefore, not a relevant consideration.
- (4) Although it is clear that a Board of Inquiry has been established, the appellant has not provided sufficient evidence to show that the information contained in the records at issue is required to prepare for the hearing, nor to ensure that the hearing is impartial (Order P-312). Accordingly, I find that the relevance of section 21(2)(d) has not been established.
- (5) Section 21(4) does not apply to any information in the records.
- (6) Because I have found that disclosure of most of the information in the records would constitute a presumed unjustified invasion of personal privacy under sections 21(3)(b), and because no factors favouring disclosure of the remaining information have been established, I find that the disclosure of

any part of the records would constitute an unjustified invasion of personal privacy. Accordingly, the exemption in section 21(1) applies to the records in their entirety.

- (7) I find that section 23 does not apply in the circumstances of this appeal, since I am not persuaded that there is a compelling public interest in disclosure which outweighs the purpose of the section 21 exemption.

### **ADVICE AND RECOMMENDATIONS**

The OHRC has claimed section 13 for Records 1, 2 and 8-11.

I have already found that the parts of Records 1 and 9-11 at issue are fully exempt under section 21. I have also found that with the exception of the first sentence under the heading "Why to the Task Force", the remaining portion of Record 2 is exempt under section 21. Accordingly, I will limit my discussion of section 13 to the portion of Record 2 remaining at issue, and Record 8.

Section 13(1) of the Act states:

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 many previous orders that advice and recommendations for the purpose of section 13(1) must contain more than just 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.

As I indicated above, Record 2 is an internal transfer memo. The memo was placed on the file at the time of its transfer to the task force. The OHRC submits that the reasons for transfer reflect internal opinions of staff and staff recommendations relating to the handling of the file. The OHRC states further that the recommendations were acted upon and a decision was made to transfer the file to the task force team.

I have carefully considered the OHRC's representations in conjunction with the record at issue. I find that when the memo was placed on the file, the decision to transfer had already been made. Although the decision to transfer the file may have been preceded by recommendations of staff, the record is a transmittal memo which is purely factual in nature.

The result is that the OHRC cannot apply the advice or recommendations exemption to withhold this portion of Record 2 from disclosure.

Record 8 is the Case Disposition sheet. The OHRC submits that the record contains the advice of the investigating officer with respect to whether or not the evidence warrants the appointment of a Board of

Inquiry. The OHRC states further that the recommendations of the officer go directly to the deliberative process of the OHRC and that they can be accepted or disregarded. The OHRC submits that disclosure of this information would inhibit the officer's full and frank input into this process.

The appellant does not specifically address the section 13(1) claim with respect to this record, but submits generally that the seriousness of the concerns raised regarding abuse of process and bias should be factored into the OHRC's exercise of discretion in determining whether or not access should be granted to it.

I have carefully examined Record 8 and have considered all of the representations. In my view, the disclosure of the information contained in Record 8 would reveal the advice or recommendations of a public servant. Accordingly, I find that all of Record 8 properly falls within the exemption provided by section 13(1) of the Act and should not be disclosed.

I further find that none of the exceptions to the section 13(1) exemption which are described in section 13(2) of the Act are applicable to Record 8.

As I indicated above, Record 8 contains the personal information of both the individual respondents and the complainant. 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(a) of the Act, the OHRC has the discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 13, would otherwise apply to that information.

Accordingly, I find that Record 8 is exempt under section 49(a).

In her representations, the appellant submits that there is a compelling public interest in disclosure which clearly outweighs the purpose of the section 13 exemption. As I indicated in the previous section, this submission relates to section 23 of the Act, and is based on the same considerations referred to above with respect to section 21(2)(a).

Similar to my disposition of this issue with respect to section 21, I find that section 23 does not apply in the circumstances of this appeal, since I am not persuaded that there is a compelling public interest in disclosure which outweighs the purpose of the section 13 exemption.

## **LAW ENFORCEMENT**

The OHRC claims that sections 14(1)(a) and (b) of the Act apply to all the records at issue. As I have found that either section 21 or 13 applies to most of the records, I will limit my discussion of the exemption to the portion of Record 2 which remains at issue.



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

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

"Law enforcement" is defined in section 2(1) of the Act as:

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

It is clear that the records at issue in this appeal were generated in the course of or as a result of the OHRC's investigation of a complaint under the Code, which ultimately led to the appointment of a Board of Inquiry.

Past orders of the Commissioner's office have determined that investigations conducted by the OHRC into complaints made under the Code are properly considered law enforcement matters.

Accordingly, I conclude that the "law enforcement" component of sections 14(1)(a) and (b) of the Act has been satisfied.

In my view, the exceptions to access set out in sections 14(1)(a) and (b) of the Act require that there exists a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the OHRC must establish a "clear and direct linkage between disclosure of the information and the harm alleged" (Orders M-202 and P-557).

The OHRC objects to the appellant's use of the access provisions of the Act to obtain information that should, it argues, be properly obtained through the Board of Inquiry disclosure process. The OHRC submits that disclosure of the records in response to the access request would enable the appellant to circumvent the disclosure procedures of the OHRC.

Further, the OHRC indicates that all relevant issues would be canvassed before the Board of Inquiry, and argues that premature disclosure of the records through this Act would usurp the jurisdiction of the Board of

Inquiry. The OHRC submits that this circumvention of the Board of Inquiry process would interfere with a law enforcement matter.

In Order P-616, Inquiry Officer Anita Fineberg addressed similar arguments put forth by the OHRC in that appeal. She stated:

The OHRC is an institution which is subject to the provisions of the Act. Accordingly, in situations in which it has denied access to a record it clearly bears the burden of proving that the record or part thereof falls within the exemptions claimed (section 53).

There is no provision contained in the Act which relieves an institution from complying with the provisions of the Act simply because it has in place alternative disclosure mechanisms.

Moreover, sections 14(1)(a) and (b) of the Act are **discretionary** exemptions. Accordingly, the OHRC must exercise its discretion with respect to the disclosure of **each** record requested and consider whether the disclosure of the information contained in that document could result in the harms enumerated in sections 14(1)(a) and/or (b).

I agree with this analysis and adopt it for the purposes of this appeal. In my view, the access scheme of this Act is separate from and independent of the disclosure provisions required at the Board of Inquiry. The only consideration in this appeal is whether or not the proper application of the exemptions claimed allows for the non-disclosure of the records at issue.

In reviewing the portion of Record 2 which remains at issue, I find that the information relates to a purely administrative decision which does not go to the substance of the complaint or the results of the investigation. Other than the submission that the fact of disclosure of any information would allow the appellant to circumvent the Board of Inquiry process and usurp the jurisdiction of the Board of Inquiry, the OHRC has not presented any evidence to support its position that disclosure of the information in Record 2 would interfere with the Board of Inquiry's law enforcement activities.

Given the nature of the record, it is my view that the representations of the OHRC fail to establish a clear and direct linkage between the disclosure of the information contained in it and the alleged harms. I, therefore, find that neither section 14(1)(a) or (b) applies to the information at issue in Record 2.

## **ORDER:**

1. I uphold the OHRC's decision to deny access to the personal information contained in portions of Records 1, 2 and 12, and in Records 9-11 under section 21(1) of the Act.
2. I uphold the OHRC's decision to deny access to Record 8 under section 13(1) of the Act.
3. I order the OHRC to disclose to the appellant the first sentence under the heading "Why to the Task Force" in Record 2, within fifteen (15) days of the date of this order.

4. I have highlighted **in yellow** on the copy of the records which is being sent to the OHRC's Freedom of Information and Privacy Co-ordinator with a copy of this order, the portions of Records 1, 2 and 12 which **should not** be disclosed pursuant to Provision 1. The remaining portions of these records should be disclosed to the appellant within fifteen (15) days of the date of this order.
5. I find that Records 3-7 are not responsive to the request.
6. In order to verify compliance with this order, I reserve the right to require the OHRC to provide me with a copy of the record which is disclosed to the appellant pursuant to Provisions 3 and 4.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ December 15, 1994

## APPENDIX "A"

### INDEX OF RECORDS AT ISSUE

RECORD NUMBER	PAGE NUMBER(S)	DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART	EXEMPTIONS OR OTHER SECTION(S) CLAIMED	DECISION ON RECORD
1	284	Letter from Human Rights Officer to Complainant's counsel dated November 26, 1990	14(1)(a)(b) 21(1) (in part) 13(1) (in part)	upheld section 21(1)
2	289	Internal OHRC transfer memo dated December 10, 1990	14(1)(a)(b) 21(1) (in part) 13(1) (in part)	upheld in part section 21(1)
3	354-361	Letter from Complainant's counsel to the OHRC dated March 8, 1991	non-responsive	non-responsive
4 & 6	365 & 367	Draft letters from the OHRC to Complainant's counsel dated March 22, 1991	non-responsive	non-responsive
5	366	Final letter from the OHRC to Complainant's counsel dated April 9, 1991	non-responsive	non-responsive
7	383-384	Letter from the Legal Services Unit of the OHRC to Complainant's counsel dated May 17, 1991	non-responsive	non-responsive
8	472	Case Disposition dated March 17, 1993	14(1)(a)(b), 21(1), 13(1)	upheld section 13(1)
9	493	Internal OHRC transfer memo dated August 9, 1993	14(1)(a)(b), 21(1), 13(1)	upheld section 21(1)
10	504-505	Letter from Human Rights Officer to Complainant dated September 17, 1993	14(1)(a)(b), 21(1), 13(1)	upheld section 21(1)
11	513	Letter from Complainant to Human Rights Officer dated September 28, 1993	14(1)(a)(b), 21(1), 13(1)	upheld section 21(1)
12	539 (a-e)	Record of Investigation	14(1)(a)(b) 21(1) (in part)	upheld section 21(1)
13	552-553	Letter from the Special Task Force to Complainant's counsel dated September 25, 1992	non-responsive	appellant agreed that record was

<b>RECORD NUMBER</b>	<b>PAGE NUMBER(S)</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTIONS OR OTHER SECTION(S) CLAIMED</b>	<b>DECISION ON RECORD</b>
				non-responsive