



Information and Privacy
Commissioner/Ontario

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

ORDER P-962

Appeal P-9400617

Ministry of Community and Social Services **ES**



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NATURE OF THE APPEAL:

The Ministry of Community and Social Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to "all information, documentation and supporting evidence" collected about the requester, who was the respondent in an investigation under its Workplace Discrimination and Harassment Policy (WDHP). The Ministry located records responsive to the request and disclosed some of them, denying access to 35 records located in the WDHP Investigation File, claiming the application of the following exemptions contained in the Act:

- invasion of privacy - sections 21(1) and 49(b)
- third party information - sections 17(1) and 49(a)
- law enforcement - sections 14(1)(d) and 49(a)

The requester appealed the Ministry's decision. During mediation, the appellant and the Ministry clarified that certain records were previously disclosed and, therefore, were no longer at issue in this appeal. A Notice of Inquiry was sent to the Ministry, the appellant and to ten individuals whose rights may be affected by the disclosure of the records at issue. Representations were received from the Ministry and seven of the affected persons, one of whom consented to the disclosure of his own personal information which may be contained in the records. Another individual consented to the disclosure of portions of her witness statement. In addition, the Ministry agreed to disclose Record F26 and portions of Records F28 to F35. In the order provisions which follow, I have ordered the Ministry to disclose this information to the appellant.

The records which remain at issue consist of a list of the parties involved in the investigation, typewritten versions of ten interview statements and the undisclosed portions of five letters sent by the Ministry to each of the complainants to the investigation. The appellant was granted access to the interim and final investigation reports. He had also received copies of his own statements and other documents relating to the investigation.

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. I have reviewed the records and I find that all of them contain personal information which relates to the appellant and to 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.

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 Ministry 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 records contain information which indicates the racial or ethnic origin of an individual (section 21(3)(h)). In addition, it argues that the records contain information which is highly sensitive and which was supplied in confidence by the affected persons, which are considerations listed in section 21(2) favouring the non-disclosure of personal information.

The affected persons submit that the following factors listed in section 21(2) are relevant in the circumstances of this appeal:

- the individual to whom the information relates will be unfairly exposed to harm (section 21(2)(e)),
- the information contained in the records is highly sensitive (section 21(2)(f)),
- the information was supplied in confidence (section 21(2)(h)) and,
- the disclosure of the information may unfairly damage the reputation of the individual referred to in the record (section 21(2)(i)).

I have reviewed the records at issue in this appeal and make the following findings:

- (1) The last two paragraphs of page 6 of Record F-22 contain information about an individual's racial origin. I find that the disclosure of this information would constitute a presumed unjustified invasion of privacy pursuant to sections 21(3)(h).
- (2) Based on my review of the records and the representations of the parties, the disclosure of certain portions of the records would unfairly expose the individuals who are mentioned in them to harm (section 21(2)(e)).
- (3) Other portions of the records contain information which may be characterized as "highly sensitive" within the meaning of section 21(2)(f). I find this to be a relevant consideration favouring the non-disclosure of those portions of the records.

- (4) Much of the information contained in the witness statements taken by the WDHP investigator was supplied in confidence by the parties to the complaint as contemplated by section 21(2)(h). I am satisfied that at the time the statements were made there was a reasonably-held expectation of confidentiality on the part of the individuals who provided the statements.

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. Accordingly, in my view, section 14(2)(h) is a relevant consideration, but only in respect of the information provided by individuals other than the appellant, and not in respect of information provided by the affected persons in direct response to the complaint.

- (5) I have also considered the fact that the appellant has received access to the interim and final investigation reports in which each of the witness statements and the specific allegations contained in the complaint are outlined in great detail. I find that the appellant has received sufficient information about the substance of the complaint, the parties to the complaint and the case made against him to enable him to respond fully to the allegations. As a result, the fact that extensive disclosure has already been made to the appellant is also a relevant consideration when balancing his access rights against the privacy rights of the affected persons under section 21(2).
- (6) I am not satisfied that disclosure of the information contained in the records would unfairly damage the reputation of the individuals who are referred to therein, and, accordingly, section 21(2)(i) is not a relevant consideration.
- (7) Section 21(4) does not pertain to any of the information in the records. The appellant has not raised the application of section 23 to the records at issue.

I have not been provided with any evidence that any of the factors favouring disclosure are applicable in this appeal. Having considered and balanced all of the circumstances in this appeal, I find that it would not be an unjustified invasion of the personal privacy of the affected persons to disclose those portions of the records which directly address the subject matter of the complaint, such as to allow the appellant to respond to the allegations made against him. Therefore, I find that section 49(b) does not apply to exempt these portions of the records at issue from disclosure. I find that the disclosure of the remaining portions of the records **would** constitute an unjustified invasion of the personal privacy of the affected persons and I uphold the Ministry's decision to deny access to them.

I have highlighted in yellow on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator those portions of the records whose disclosure would result in an unjustified

invasion of the personal privacy of the affected persons. This information should **not** be disclosed.

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the Ministry and/or the affected persons must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

I find that none of the information contained in the records may be characterized as information which is a trade secret or scientific, commercial, financial or labour relations information within the meaning of the Act. Accordingly, section 17(1) has no application to the circumstances of this appeal.

LAW ENFORCEMENT

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.

Previous orders have held that an investigation into an allegation of workplace harassment undertaken by an institution under the WDHP is not a "law enforcement" investigation for the purposes of the Act. Accordingly, section 14(1)(d) is not applicable.

ORDER:

1. I uphold the Ministry's decision to deny access to those portions of the records which I have highlighted on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator.
2. I order the Ministry to disclose to the appellant Record F26 in its entirety and those portions of the remaining records which are **not** highlighted on the copy of the records provided to the Ministry's Freedom of Information and Privacy Co-ordinator within thirty-five (35) days of the date of this order, but not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with 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 2.

Original signed by: _____

Donald Hale
Inquiry Officer

_____ July 25, 1995