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

ORDER P-1014

Appeal P-9400807

Ministry of the Attorney General

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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 appellant is an employee of the Ministry of the Attorney General (the Ministry). During his employment with the Ministry, a harassment complaint was made against him. As a result of the complaint, the Ministry conducted an investigation under the Ontario Public Service Workplace Discrimination and Harassment Prevention (WDHP) policy. The person who made the complaint (the complainant) made two allegations concerning workplace harassment, namely:

(1) that the appellant harassed him in the course of his employment over a period of approximately four years as a result of the complainant's sexual orientation, and

(2) that the appellant harassed him on a particular occasion by means of comments made by the appellant at that time.

In accordance with the WDHP policy, a report outlining the investigator's findings was submitted to the Deputy Attorney General. The report concluded that the first allegation had not been substantiated, but that the second allegation was substantiated. The Deputy Attorney General agreed with these findings and placed a letter of reprimand in the appellant's personnel file, with a three year sunset clause.

The appellant submitted a request to the Ministry under the Act for all information gathered by the investigator as well as all statements given by persons interviewed in connection with the investigation.

The Ministry granted partial access to the requested information. The Ministry denied access to the records at issue in this appeal on the basis of the following exemptions in the Act:

- invasion of privacy - section 49(b)
- discretion to refuse requester's own information - section 49(a), with references to sections 13(1) (advice or recommendations) and 18(1)(e) (economic and other interests).

The Ministry also withheld some information on the basis that it is not responsive to the request. A Notice of Inquiry was sent to the appellant and the Ministry. This Notice was also sent to the individuals interviewed in the course of the investigation (the witnesses) as affected persons. Representations were received from the appellant, the Ministry, and six of the witnesses.

A Supplementary Notice of Inquiry was sent to the Ministry and the appellant to seek clarification of a factual nature arising from their initial submissions. At this time, two additional affected persons (the complainant and the investigator) were notified of this appeal and invited to submit representations. In response to these notices, representations were received from the Ministry, the appellant and the complainant.

The records at issue consist of the following:

- first and second drafts of the WDHP investigator's report, including copies with handwritten notations
- parts of the final WDHP report
- witness statements, in whole or in part (parts of some of these were disclosed and the disclosed parts are therefore not at issue)
- lists of witnesses
- confidential background information sheets
- electronic mail (e-mail) printouts, letters, voice-mail transcripts and memos concerning the investigation (parts of some of these were disclosed and the disclosed parts are therefore not at issue)
- briefing notes and draft briefing notes
- handwritten notes.

In this order, I will use the record numbers assigned by the Ministry (as used in the indices previously provided to the appellant and the complainant).

The records at issue include a number of duplicate copies. In the case of exact duplicates, I will only consider the copy of the record with the lowest record number. Record 75 is an exact duplicate of Record 24. Records 17 and 18 are exact duplicates of Record 16. Record 16a is an exact duplicate of Record 12b. Accordingly, this order will consider Records 24, 16 and 12b, and will not deal with Records 75, 17, 18 and 16a.

Record 26 is an exact duplicate of Record 16b, except that Record 16b bears the notation "Appendix 'B'" and records the date of receipt. In my view, these differences are insignificant, and in any event, the additional information is included on the copy of the record I will consider, namely Record 16b. Accordingly, this order will not deal with Record 26.

PRELIMINARY ISSUES:

LATE RAISING OF DISCRETIONARY EXEMPTION

In its initial representations in response to the Notice of Inquiry, the Ministry seeks to claim the exemption relating to solicitor-client privilege provided by section 19 of the Act, with respect to fourteen of the records at issue. This exemption was not previously claimed for any records in connection with this request.

As part of its efforts to expedite the processing of access appeals and in order to sensitize institutions about the prejudice which accrues to appellants when discretionary exemptions are not applied promptly, the Commissioner's office issued an IPC Practices publication in January 1993, entitled "Raising Discretionary Exemptions During an Appeal". This document, which was sent to all provincial and municipal institutions, indicates that:

> The IPC has found that institutions frequently raise new discretionary exemptions after the appeal process is underway. When this happens, the appellant must be informed and given the opportunity to comment on the applicability of the new exemption claims. This

> additional step prolongs the appeal process, particularly when new discretionary exemptions are raised at the later stages of an appeal.
> Effective March 1, 1993, the IPC will permit institutions to raise new discretionary exemptions only within a limited time frame - up to 35 days after the appeal has been opened. The initial notice sent out by the IPC will specify the deadline for claiming any new discretionary exemptions.

The objective of this policy is to provide institutions with a window of opportunity to raise new discretionary exemptions but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant prejudiced.

In accordance with this policy, the Confirmation of Appeal sent to the Ministry when this appeal was filed, indicated that the institution had 35 days from the date of the Notice (that is, until February 2, 1995) to claim any additional discretionary exemptions. The Ministry's representations, which first raised section 19, were sent to this office on May 3, 1995, considerably later than the date stipulated in the Confirmation of Appeal.

With respect to the late raising of this section, the Ministry states that "... we ask that this exemption be allowed to be claimed as, at this point in the proceedings, no prejudice would result to the appellant."

In the circumstances of this appeal, I am prepared to accept the Ministry's submission on this point. In this regard, the initial submissions of the Ministry and the appellant required clarification of a factual nature pertaining to the status of the various proceedings between them. To obtain this information, the Commissioner's office sent out a supplementary Notice of Inquiry, as previously noted. In addition to soliciting the required factual information, the supplementary notice also asked the parties to make submissions on whether I should consider section 19, and in the alternative, whether the records at issue qualify for exemption under section 19.

The appellant objected to the Ministry's attempt to claim this exemption at this stage of the proceedings, on the basis of delay. However, the supplementary notification was required for other reasons, and in response to it I have now received submissions on this exemption from both the Ministry and the appellant. In these circumstances, it is my view that the appellant was not prejudiced by the late raising of this section. Accordingly, I will consider it.

In this case, if the records qualify for exemption under section 19, the applicable exemption would be section 49(a), which gives the Ministry the discretion to deny access to records containing the appellant's personal information where a number of listed exemptions (including section 19) would otherwise apply to that information.

RAISING OF DISCRETIONARY EXEMPTION BY AFFECTED PERSON

One of the witnesses has referred to the discretionary exemption provided by section 49(c) of the Act. This exemption pertains to evaluative or opinion material compiled solely for the purpose of determining eligibility, suitability or qualifications for appointment, or awarding of government contracts and benefits. It

was not claimed by the Ministry. In her representations, the witness did not address the issue of whether she could claim a discretionary exemption when the Ministry did not.
In Order P-257, former Assistant Commissioner Tom Mitchinson considered this question as follows:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. If the head feels that an exemption should not apply, it would only be in the most unusual of situations that the matter would even come to the attention of the Commissioner's office, since the record would have been released ... In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the Act. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

I agree with former Assistant Commissioner Mitchinson's view. I find that a consideration of the proper application of the exemptions which the Ministry **has** claimed will address the interests of all parties, and that it is not necessary or appropriate for me to consider the possible application of section 49(c).

If I had decided to consider this exemption, I would conclude that its application was not substantiated. The records have no bearing on any individual's suitability, eligibility or qualifications for employment or any other benefit.

RESPONSIVENESS OF RECORDS

The Ministry claims that Records 8, 14a, 80 and 84 are non-responsive and are therefore not at issue in this appeal. These records consist of letters and a voice mail transcript. The parties were invited to comment on this issue in the Notice of Inquiry.

The Ministry submits that records 8, 14a and 84 are thank you letters to the investigator, and as such do not constitute information gathered by the investigator pertaining to the investigation. The Ministry also states that these letters have no bearing on the complaints or allegations against the appellant. I agree with the Ministry with respect to Records 14a and 84. In my view, these two records are not reasonably related to the request and I find that they are not responsive. Therefore, I will not consider them further in this order.

While I agree with the Ministry that Record 8 is, in essence, a thank you letter to the investigator, it sets out the Deputy Attorney General's views on the investigation report. In my view, this is reasonably related to

the request and I find that it is a responsive record. I will therefore consider it in my discussion of the exemptions claimed for it, below.

The Ministry submits that Record 80 is a transcript of voice mail conversations regarding several Human Resources issues pertaining to the administration of WDHP matters. The Ministry correctly points out that this document does not refer in any way to the complaint against the appellant or the resulting investigation. In my view, this record is not reasonably related to the request and I find that it is not responsive. Therefore, I will not consider Record 80 further in this order.

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 to determine whether they contain personal information, and if so, to whom the personal information relates. All of the records pertain to an investigation of a complaint against the appellant under the WDHP. Because these records pertain to various aspects of the investigation of the dispute between the complainant and the appellant, I find that all the records contain the personal information of both these parties.

In addition, many of the records contain the personal information of other individuals, namely the witnesses and the investigator. However, some of the information pertains to the witnesses and the investigator in their professional capacity, and this information does not qualify as their personal information.

The personal information about the witnesses includes their identity, in conjunction with the fact that they were witnesses in this investigation, and in some cases also includes their home address and other details of a personal nature. This information appears in Records 12b, 16, 31, 51, 54, 82, and Records 86 through 99 inclusive.

The personal information of the investigator reveals aspects of his work experience, and comments about the way the investigation was conducted. This information appears in Records 8, 16b, 33, 44 and 58.

In addition, Record 93 contains information about another individual in the workplace, including a reference to a grievance involving this individual. I find that this information constitutes this individual's personal information.

Record 95 also contains a peripheral reference to another individual, an employee of the Companies Branch at the Ministry of Consumer and Commercial Relations. I find that this reference does not refer to this individual in his professional capacity. Because it is of a personal nature, I find that it constitutes this individual's personal information.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

I have found that all of the records contain the appellant's personal information. 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 institution has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states as follows:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, **13**, 14, 15, 16, 17, **18**, **19**, 20 or 22 would apply to the disclosure of that personal information (emphases added).

In order to determine whether the exemption provided by section 49(a) applies in this case, I will begin by considering the Ministry's claims that particular records qualify for exemption under sections 13, 18 and 19, all of which are referred to in section 49(a).

ADVICE TO GOVERNMENT

The Ministry claims that the following records qualify under this exemption, which is found in section 13(1) of the Act: Records 7, 12, 12c, 12d, 19, 21a, 21b, 22, 23, 24, 26a, 31, 42, 43a, 44, 51, 52, 53, 54, 55, 56, 57, 58, 59, 70, 74 and 74a.

Section 13(1) states as follows:

> 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 is important to note that section 13(2) sets out a mandatory list of exceptions to this exemption.

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.

Records 12, 19, 22, 26a, 51, 52, 53, 54 consist of draft investigation reports and draft briefing notes prepared by public servants, with handwritten amendments suggested by other public servants. In my view, all of these drafts, and the comments written on them, constitute suggested courses of action concerning the

contents and presentation of the final versions of these documents. In the context of the professional relationships between the individuals who prepared the draft reports and briefing notes, and those who made suggested amendments, I find that these records qualify as recommendations of public servants. Therefore, I find that these records, in their entirety, qualify for exemption under section 13(1). In my view, none of the exceptions in section 13(2) apply to the recommendations embodied in these records.

Record 12c consists of a signed briefing note. Parts of this record consist of options and a recommended course of action, and I find that these parts qualify for exemption under section 13(1). The remaining parts of this record do not set out a recommended course of action and do not qualify under section 13(1).

Records 12d, 42 and 74 set out "Confidential Background Information". Most of this consists of factual information , which is not "advice" or a "recommendation" and which, in any event, falls within the exception to this exemption set out in section 13(2)(a). Several brief passages in Records 12d and 74 set out suggested courses of action, and these qualify for exemption under section 13(1).

Records 7, 23, 24 and 44 consist of e-mails and memoranda. In my view, Record 7 does not contain any information which qualifies as "advice" or "recommendations" and therefore this record does not qualify under section 13(1). I find that parts of Records 23, 24 and 44 constitute advice or recommendations in the sense that a course of action is recommended, and thus qualify for exemption under section 13(1).

Records 21a, 21b, 31, 43a, 55, 56, 57, 58, 59, 70 and 74a consist of notes made by Ministry staff in connection with the investigation and report. I find that Records 21a, 56 and 57 contain passages which set out a recommended course of action to be accepted or rejected, and these passages qualify for exemption under section 13(1). However, the remainder of those documents, and Records 21b, 31, 43a, 55, 58, 59, 70 and 74a in their entirety, do not set out any recommended course of action and I find that the exemption in section 13(1) does not apply.

To summarize, I have found that Records 12, 19, 22, 26a, 51, 52, 53 and 54, in their entirety, and parts of Records 12c, 12d, 21a, 23, 24, 44, 56, 57 and 74, qualify for exemption under section 13(1). These records and parts of records are, therefore, exempt from disclosure under section 49(a). In the case of records which are exempt in part, I have highlighted the exempt passages on the copies of these records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

ECONOMIC & OTHER INTERESTS

The Ministry claims that the following records qualify for exemption under section 18(1)(e): Records 12, 12c, 12d, 23, 24, 42 and 74. I have already found that Record 12, and parts of Records 12c, 12d, 23, 24 and 74 are exempt under section 49(a). In this analysis, I will not consider the records and parts I have previously exempted.

Section 18(1)(e) states:

> A head may refuse to disclose a record that contains,

> positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario.

Order P-219 established that, in order to qualify for exemption under subsection 18(1)(e), the Ministry must satisfy all four parts of the following test:

1. the record must contain positions, plans, procedures, criteria or instructions; and

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and

3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

There is ongoing litigation between the appellant and the Ministry. However, neither the Ministry's representations nor the records themselves set out any basis for me to conclude that negotiations relating to this matter are occurring at present, nor that any are likely to occur in the future. Nor do the representations of any other party offer any basis for reaching such a conclusion. This means that the third aspect of this test (which, in my view, sets out a vital requirement established in this section) has not been met. Therefore, I find that these records do not qualify for exemption under section 18(1)(e).

SOLICITOR-CLIENT PRIVILEGE

The Ministry claims that Records 7, 12, 12c, 12d, 19, 21a, 23, 24, 43a, 55, 56, 57, 58 and 59 qualify for exemption under the solicitor-client privilege exemption provided by section 19 of the Act.

I have already found that Records 12 and 19 in their entirety, and parts of Records 12c, 12d, 21a, 23, 24, 56 and 57, are exempt under section 49(a) because they qualify for exemption under section 13(1). I will not consider these records and parts of records in this analysis.

Section 19 consists of two branches, which provide an institution with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and

2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In this case, the Ministry contends that both branches apply to some records in their entirety, and to parts of other records.

A significant number of the Ministry's claims pertaining to section 19 are based on the involvement of the Ministry's WDHP Co-ordinator. This is not a Crown counsel position, nor is the WDHP Co-ordinator required to be a lawyer. In this case, the occupant of this position at the relevant time happened to be a lawyer. The WDHP Co-ordinator's position was part-time, and this particular individual was also employed by the Ministry in a Crown counsel position. However, it is clear that her involvement in the investigation, as reflected in these records, was in her capacity as WDHP Co-ordinator.

The purpose of the common law solicitor-client privilege (which is the basis for Branch 1 of the section 19 exemption) is to protect the confidentiality of solicitor-client relationships. Accordingly, it is my view that, in order for Branch 1 of this exemption to apply to a record, the person acting as "solicitor" must actually be retained and functioning as such. The mere fact that an individual acting in some other capacity also happens to be a lawyer is not sufficient to raise the application of this privilege.

Similar considerations apply to the question of whether a record has been prepared "by or for Crown counsel" (Branch 2). In my view, the individual by or for whom the record has been prepared must actually be retained and functioning as Crown counsel, in the context of the record in question, before Branch 2 can apply.

For these reasons, where the Ministry has claimed section 19 on the basis of the involvement of the WDHP Co-ordinator, I am not satisfied that the application of section 19 has been established. Accordingly, I find that such records do not qualify for exemption under this section. The Ministry's representations make it clear that the involvement of the WDHP Co-ordinator is the basis for all the Ministry's section 19 claims, except with respect to Record 43a.

Record 43a is a handwritten record of a conversation between a member of the Ministry's WDHP staff and a solicitor who was acting in her Crown counsel capacity. I am satisfied that Record 43a reveals the contents of a confidential solicitor-client communication which is directly related to the seeking, formulating or giving of legal advice (Order 49), and therefore it qualifies for exemption under Branch 1 of section 19. On this basis, it is exempt under section 49(a) of the Act.

INVASION OF PRIVACY

I have already found that all of the records contain the personal information of the appellant and the complainant, and that many also contain the personal information of other individuals.

As previously noted, 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 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.

The Ministry claims that the following records are exempt under section 49(b): Records 12, 12b, 12c, 16, 16b, 19, 21a, 22, 26a, 27, 30a, 31, 33, 43a, 44, 45, 51, 53, 54, 55, 56, 57, 70, 72, 73, 82, and Records 85 through 99 inclusive.
Comparing this list to the records at issue as a totality, it becomes clear that the Ministry has not claimed section 49(b) for all the records. However, as noted above, I have found that all of the records at issue contain the complainant's personal information (i.e. they all contain the personal information of an individual other than the appellant). Because of the importance of privacy protection in the scheme of the Act, I will consider whether the exemption in section 49(b) applies to all records and parts of records at issue consisting of the personal information of individuals other than the appellant, which I have not previously exempted in this order. In this regard, I also note that Records 8 and 58, for which the Ministry has not claimed section 49(b), contain not only the personal information of the complainant (and, of course, the appellant), but other individuals as well.

I will not consider this exemption for records and parts of records previously exempted in this order. I have already found that Records 12, 19, 22, 26a, 51, 52, 53 and 54 in their entirety, and parts of Records 12c, 12d, 21a, 23, 24, 44, 56, 57 and 74, are exempt under section 49(a) because they qualify for exemption under section 13(1). I have also found that Record 43a is exempt under section 49(a) because it qualifies for exemption under section 19. Accordingly, I will not consider these records and parts of records in this analysis.

To summarize, I will consider the application of the section 49(b) exemption to Records 7, 8, 12b, 16, 16b, 21b, 27, 30a, 31, 33, 42, 45, 55, 58, 59, 70, 72, 73, 74a, 82, and 85 through 99 (inclusive), and those parts of Records 12c, 12d, 21a, 23, 24, 44, 56, 57 and 74 not previously found to be exempt.

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 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.

I will now identify the parts of section 21 which the various parties have relied on in their submissions. Once I have done this, I will set out the texts of all sections referred to.

The Ministry relies on sections 21(2)(f) and (i) and 21(3)(a), (d), (f), (g) and (h), to support its decision to withhold information for which it has claimed section 49(b).

The complainant's representations also argue against additional disclosure, based on sections 21(3)(a), (d) and (h).

The representations of the witnesses, which also oppose additional disclosure, refer to sections 21(2)(e), (f), (g), (h) and (i), and section 21(3)(g).

The appellant cites section 21(2)(a) and (d) to support his view that the records should be disclosed.

The parts of section 21 referred to in the parties' representations state as follows:

> (2) 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,
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
>
> (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (g) the personal information is unlikely to be accurate or reliable;
>
> (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.
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
>
> (d) relates to employment or educational history;
>
> (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) consists of personal recommendations or evaluations character references or personnel evaluations; or

(h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The Ministry has divided its representations on this exemption into record categories. I will follow this same breakdown in my analysis. Before doing so, I will make some observations about the application, in the circumstances of this appeal, of the sections which have been referred to by the parties, and other factors which may be applicable. In this analysis, I will exclude sections which I find to be totally inapplicable. I will then apply the conclusions reached in this discussion to the individual records, using the categories established by the Ministry.

PRESUMPTIONS AND FACTORS WEIGHING AGAINST DISCLOSURE

I will begin this discussion of the application of factors and presumptions by reviewing the presumptions under section 21(3) which the parties have cited. After that, I will consider the factors under section 21(2) which have been raised.

Section 21(3)(a)

This presumption applies where information relates to (among other things) an individual's medical history or treatment. There are comments in several of the records about a condition which could relate to the health of an indentifiable individual (the complainant). However, there is no evidence before me that this condition was ever diagnosed or determined to be a "medical condition". For this reason, I find that this presumption does not apply to this information.

Section 21(3)(d)

This presumption applies to information which relates to employment (or educational) history.

There is information in the records which would identify what are now previous positions of several individuals. However, this information relates to individuals who worked in the same branch as the appellant at the time of the investigation, and who have moved on to other jobs. While this might fall under this presumption in some cases, it would not be reasonable to apply the presumption here because the appellant was well aware of the job titles of the other individuals working in his branch. Similar considerations apply to the starting and/or termination dates of staff in the branch during the appellant's tenure there. I will not apply this presumption to the job titles or the starting and termination dates of these individuals.

Section 21(3)(d) is also an issue with respect to some information in Records 33 and 85. I will refer to this when discussing these records (under the headings "WDHP Staff Memos" and "Letters to and from the Complainant", respectively) below.

Section 21(3)(f)

This presumption applies to information which describes an individual's liabilities. Records 55, 56 and 57 refer to a financial obligation of an individual other than the appellant which would in fact be a liability. I find that the presumption applies to that information only. I will refer to this again in my discussion of the records below.

Section 21(3)(g)

The Ministry and several witnesses have argued that a considerable amount of the personal information in the records consists of personal or personnel evaluations. The bulk of this information relates to comments about various individuals provided to the investigator by the parties to the complaint and by witnesses. In Order M-82, Inquiry Officer Holly Big Canoe dealt with this same presumption in the context of the Municipal Freedom of Information and Protection of Privacy Act (which I will refer to as the municipal Act). Section 14(3)(g) of that statute is the same as section 21(3)(g) of the Act. In that order, Inquiry Officer Big Canoe was dealing with the same type of records as those at issue here. She stated as follows:

> Although, in a broad sense, it could be argued that the comments of the author of the records are "evaluations" of individuals other than the appellant, in my view, it is not possible to characterize the author's comments as "personal evaluations" or "personnel evaluations" of these individuals. The records were created during an investigation to determine whether the actions of the affected persons were in violation of the City's policy on personal harassment. The conclusions reached as a result of the investigation are based on whether this policy has been complied with, and have no "personal" or "personnel" component, as required by section 14(3)(g). Accordingly, in my view, section 14(3)(g) does not apply to the information contained in the records.

I agree with Inquiry Officer Big Canoe's views in this regard. I find that section 21(3)(g) does not apply to comments made to the investigator in the context of providing information about the circumstances surrounding the alleged incidents of harassment. These comments relate to the complainant, the appellant and others.

Records 8, 16b, 33, 44 and 58 all contain comments on the way the investigation was done. However, I am not satisfied that these comments pertain to an evaluation based on measurable standards, as required by Order P-447. Moreover, the comments were not of a personal nature, and they were made by individuals whose professional relationship to the investigator would not entail any kind of "personnel" evaluation. For these reasons as well, I find that they do not qualify as "personal" or "personnel" evaluations. Therefore this presumption does not apply to comments about the investigator's handling of the matter.

In summary, I find that this presumption does not apply in the circumstances of this appeal.

Section 21(3)(h)

The arguments advanced by the Ministry and the complainant relating to this presumption pertain to disclosure of the complainant's sexual orientation. The complaint alleges that the complainant's sexual orientation was the basis for harassment, and its contents were communicated to the appellant. The complainant's sexual orientation is also mentioned explicitly in parts of the report which have already been disclosed. In my view, it would not be reasonable to apply this presumption in the circumstances of this appeal and I find that it does not apply.

Having completed my preliminary review of the presumptions in section 21(3) which have been cited, I will now turn to the factors weighing against disclosure in section 21(2) which the parties have raised.

Section 21(2)(e)

Section 21(2)(e) (unfair exposure to pecuniary or other harm) is a factor weighing against disclosure, which has been referred to by one of the witnesses. However, the only information provided by this witness relating to this section is a statement that "there is the possibility of legal or other ramifications ... considering the subject matter of the record [a witness statement] and the fact that there is ancillary litigation pending". This argument does not establish the likelihood of pecuniary or any other type of harm, nor does it address the "unfair" requirement of section 21(2)(e). In my view, section 21(2)(e) does not apply in this case.

Sections 21(2)(f) and (h)

These two sections relate to information which is highly sensitive (section 21(2)(f)), and information provided in confidence (section 21(2)(h)). In Order M-82 (issued under the municipal Act), Inquiry Officer Holly Big Canoe dealt with a request by the complainant in a harassment investigation. She described the general considerations which apply when a party to a complaint of harassment or discrimination requests access to the investigation file. Her comments were particularly directed at the application of sections 14(2)(f) and (h) of the municipal Act (the equivalent of sections 21(2)(f) and (h) of the Act). In that regard, she made the following comments:

> In my opinion, information that pertains to normal, everyday working relationships and workplace conduct is not highly sensitive. However, when an allegation of harassment is made and investigated, it is reasonable for the parties involved to restrict discussion of workplace relationships and conduct and to find such information distressing in nature, as the affected persons have indicated here. Nevertheless, in my view, it is not possible for such an investigation to proceed if the complaint is not made known to the respondents and the direct response to the allegations made in the complaint is not made known to the complainant. Accordingly, I find that section 14(2)(f) is a relevant consideration in the circumstances of this appeal, but only in respect of the information provided by individuals other than the appellant, and not in respect of the information provided by the affected persons in direct response to the appellant's complaint.
> ...
>
> The City and the affected persons submit that all of the information was supplied under verbal assurances of confidentiality by the City. ... 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 appellant's complaint.

This order was the subject of an application for judicial review. This application was recently resolved by the Ontario Court (General Division) Divisional Court (Corporation of the City of Hamilton v. Tom Wright, Information and Privacy Commissioner et al. (February 9, 1995), Hamilton Doc. D246/93). The Divisional Court dismissed the application for judicial review of Order M-82. Commenting on the approach the Inquiry Officer took to section 14(2)(h), the Court stated:

> On the appeal from the refusal of the City to disclose certain information, the Inquiry Officer was bound by this section of the Act to consider and weigh in the balance between the desire to know and the desire to protect privacy, the fact that the information given by the two employees was given in confidence. If the Inquiry Officer failed to do this then her decision must be set aside.
>
> In our view the Inquiry Officer did give due consideration to the fact the personal information was given in confidence. ...
>
> Her decision was in effect that in spite of the fact that information was given in confidence, that it must be disclosed to the complainant, **that otherwise the complainant might be left wondering whether his complaint had been properly investigated** and others might be discouraged from making known incidents of harassment. ...
>
> We are satisfied the Inquiry Officer meant that in the circumstances of this case section 14(2)(h) is not determinative of whether the information must be disclosed, not that the subsection is irrelevant. (emphasis added)

I adopt the Divisional Court's views for the purposes of this appeal. In this case, several of the witnesses have indicated that they were given assurances of confidentiality. On this basis, and following the Divisional Court's reasoning, I am of the view that the factor in section 21(2)(h) applies to all personal information provided by the witnesses and the complainant which pertains to individuals other than the appellant.

In my view, the comments of the Divisional Court about the application of section 21(2)(h) also provide guidance about the way section 21(2)(f) (highly sensitive) should be applied in this case. That is, rather than

finding that section 21(2)(f) is not relevant to information provided in direct response to the complaint, it is my view that information provided in direct response to the complaint is among the most sensitive information contained in the records. Disclosure of this information would likely cause considerable personal distress to the affected persons. Some of the other personal information in the records, pertaining to the beliefs and behaviours of various co-workers of the complainant and appellant, is also highly sensitive.

I will refer to these factors again in my discussion of whether this exemption applies to specific records, below. At that time I will also balance these factors against any applicable factors which favour disclosure.

Section 21(2)(g)

This section would apply if the information is unlikely to be accurate or reliable. This section was raised by one of the witnesses, who states that the summary of his testimony is "grossly truncated and contains bald, blunt statements without additional background and context ...". In my view, the fact that a statement may have been abbreviated is not sufficient to establish the application of this section. I find that it does not apply in this appeal.

Section 21(2)(i)

This section applies where disclosure of personal information would unfairly damage the reputation of any person referred to in the record. Both the Ministry and one of the witnesses rely on this section. As with section 21(2)(e), one of the crucial requirements for the application of this section is the element of "unfairness". In my view, neither the representations I have received, nor the records themselves, provide any basis for concluding that any damage to an individual's reputation which might result from disclosure would be "unfair". I find that this section does not apply in this appeal.

Section 42

One of the witnesses also refers to section 42 of the Act to support the view that disclosure would be an unjustified invasion of privacy. This section deals with disclosure of personal information in contexts other than access requests.

In Order M-96, former Assistant Commissioner Tom Mitchinson found that section 32 of the municipal Act (the equivalent of section 42 of the Act) was not relevant to an access request made under Part I of that statute (the equivalent of Part II of the Act). The access provisions in Part I of the municipal Act, and in its provincial equivalent (Part II of the Act) both relate to **requests for general records**.

Section 42 is found in Part III of the Act, which deals with protection of individual privacy. In addition, Part III of the Act (and in particular, sections 47, 48 and 49) deals with **requests by individuals for access to records containing their own personal information** (as opposed to requests for general records). Since the request in this case was for the appellant's own personal information, it falls under Part III of the Act and not under Part II. In this respect, it differs from the request under consideration in Order M-96.

Because section 42 and the access provisions which apply in this case (namely, sections 47, 48 and 49) all fall within the same part of the Act, the analysis of the applicability of section 42 in this appeal is slightly different from the analysis in Order M-96, where the applicable provisions were in totally separate parts of the statute. However, in my view, sections 47, 48 and 49 create a code for the treatment of requests for records containing an individual's own personal information (including the exemptions which may be applied), and for this reason they are analogous to the "general records" access provisions found in Part II. For this reason, I believe that similar considerations to those adopted by former Assistant Commissioner Mitchinson in Order M-96 apply here, with the result that the provisions of section 42 do not apply to requests for records containing an individual's own personal information. These are fully dealt with by the provisions of sections 47, 48 and 49.
Accordingly, the wording of section 42 of the Act is not a relevant consideration in determining whether the release of personal information constitutes an unjustified invasion of personal privacy in this appeal.

FACTORS FAVOURING DISCLOSURE

Section 21(2)(a)

The appellant's representations raise the possible application of this section. He states:

> No judicial forum would tolerate such failure to disclose. The failure to release [Record 12c] puts the entire process in serious disrepute. **Public interest in upholding the integrity of the system and its laws outweighs the Ministry's secret tribunal system**. ... **Justice must be seen to be done.** (emphasis added).

The objective of section 21(2)(a) is to ensure an appropriate degree of **scrutiny by the public**. In my view, there is public policy support for proper disclosure in proceedings such as WDHP investigations, as evidenced by the rules of natural justice. For this reason, I agree with the appellant that an appropriate degree of disclosure to the parties involved in WDHP investigations is a matter of considerable importance. I will return to this issue under the heading "Public Confidence in the Integrity of an Institution", below.

However, as regards section 21(2)(a), it is my view that the interest of a party to a given proceeding in disclosure of information about that proceeding is essentially a private one. The appellant is not arguing that the public should be able to scrutinize these records. Rather, he seeks to review them himself, in order to ensure that justice was done in this particular investigation, in which he was personally involved. For this reason, I find that section 21(2)(a) does not apply in the circumstances of this appeal.

Section 21(2)(d)

This section applies to personal information which is relevant to a fair determination of rights affecting the person who made the request.

The appellant has filed an appeal with the Public Service Grievance Board of the reprimand placed on his personnel file by the Deputy Attorney General as a result of the findings of the WDHP investigation. In

addition, the appellant has commenced an action in the Ontario Court, General Division, for an order to declare void and quash the disciplinary proceedings against him.

The appellant argues that much of the information which has been withheld, and in particular the witnesses' identities, and the statements given by the witnesses, are required to permit him to prepare for these proceedings. With regard to the identities of the witnesses who spoke to the investigator, the appellant argues that he may wish to subpoena these individuals to appear at his grievance proceeding.

In my view, the proceedings before the Public Service Grievance Board and the Ontario Court, General Division both pertain to legal rights of the appellant. I am also of the view that the personal information in the records which identifies the witnesses, and any other information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter, would have a bearing on the determination of these rights. In addition, I am satisfied that this information is required by the appellant in order to permit him to prepare for these proceedings.

For these reasons, I find that this section applies to personal information in the records which identifies the witnesses, and to any other information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

Public Confidence in the Integrity of an Institution

The preamble to section 21(2) indicates that, in deciding whether disclosure would be an unjustified invasion of personal privacy, "all the relevant circumstances" should be considered. In my view, there are two relevant circumstances which are not specifically listed in section 21(2).

The first of these relates to public confidence in the integrity of an institution. In Order P-237, Commissioner Tom Wright referred this factor, stating as follows:

> ... [D]isclosure of personal information could be desirable for the purpose of ensuring public confidence in the integrity of an institution. This could be considered as an additional unlisted circumstance to be taken into consideration under subsection 21(2).

In my view, the comments made by the appellant, quoted above in my discussion of section 21(2)(a), also raise the possible application of this factor. In my discussion of section 21(2)(a), I found that the appellant's interest in scrutiny of the institution's activities in this case was a private one, and I did not apply section 21(2)(a). However, it is my view that the degree of disclosure to the parties in WDHP investigations does have an influence on public confidence in institutions conducting such investigations.

If it appears that these investigations are secret trials which prejudice the rights of those accused, public confidence will be eroded. Failure to disclose information which was considered by the investigator in arriving at his decision would clearly prejudice the rights of individuals accused of harassment. Accordingly, I find that this factor applies to information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

Adequate Degree of Disclosure

Like "Public Confidence in the Integrity of an Institution", this factor arises as a result of the preamble to section 21(2), which requires consideration of "all the relevant circumstances". This factor, which favours disclosure, has not been referred to in previous orders. It relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice.
In this case, in the context of an administrative proceeding which has had serious consequences for the appellant, a number of witness statements which the investigator considered in reaching his decision were entirely withheld from the appellant. Others were partially withheld.

In upholding the Inquiry Officer's finding in Order M-82, the Divisional Court stated that, without adequate disclosure, "the complainant might be left wondering whether his complaint had been properly investigated". In my view, adequate disclosure is a fundamental requirement in a proceeding such as a WDHP investigation. Both the complainant and the respondent in such a proceeding are entitled to a degree of disclosure which permits them to understand the finding that was made and the reasons for the decision.

In a similar vein, individuals such as the appellant, who face accusations which result in administrative or judicial proceedings, are entitled to know the case which has been made against them.

In the circumstances of this appeal, I find that the factor requiring adequate disclosure applies to the personal information in the records (including the undisclosed witness statements) which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

I will now go on to discuss the presumptions and factors I have found to apply, above, in the context of the specific records which are at issue. The objective of this analysis is to determine whether the records under consideration, listed above under "Invasion of Privacy", or any parts of them, are exempt under section 49(b). I will begin with the record groups established by the Ministry in its representations on this exemption.

WDHP Report

Record 16 consists of the final WDHP Report, which has been disclosed to the appellant in severed form. The severed passages, which are very brief, consist of the job titles of the witnesses. They appear as a list on page 2 of this record, and again when the testimony of each witness is described.

As these were the positions occupied by these individuals at the time of the investigation, I find that the presumption in section 21(3)(d) does not apply, for the reasons outlined in my discussion of that section, above.

However, based on the information provided by the witnesses about their expectations of confidentiality, I find that the factor against disclosure in section 21(2)(h) applies to this information. I am also satisfied that

disclosure of this information would cause considerable personal distress to these individuals and accordingly, in my view, the factor weighing against disclosure in section 21(2)(f) applies.

As noted above, I am also satisfied that the appellant has met the requirements of section 21(2)(d) (fair determination of rights) and has established the application of the factor favouring disclosure provided by that section to information which could identify the witnesses.

In keeping with the directions of the Divisional Court in Corporation of the City of Hamilton v. Tom Wright, cited above, I have weighed the interests of the appellant in disclosure of this information against the factors favouring privacy protection. Many past orders have upheld the denial of access to information which could identify witnesses in harassment investigations. However, in this appeal, bearing in mind that the appellant was reprimanded, and has accepted a transfer to a new position, and in view of the application of section 21(2)(d), I find that the circumstances favouring disclosure are more compelling with respect to the information severed from the WDHP report. Accordingly, I find that its disclosure would not be an unjustified invasion of personal privacy. Therefore, this information is not exempt under section 49(b). As no other exemption has been claimed, and no mandatory exemption applies, it should be disclosed.

Briefing Notes

The only record in this category which remains at issue is Record 12c. Two passages from this record have already been exempted under section 49(a) (in connection with section 13(1)). I will not consider those passages in this discussion.

The Ministry submits that disclosure of passages in this record relating to management practices and the complainant's attitudes would constitute an unjustified invasion of privacy. I agree that the factors in favour of privacy protection in section 21(2)(f) (highly sensitive) and 21(2)(h) (information provided in confidence) apply to this information. However, I am also of the view that this information has a bearing on the decisions reached by the investigator and/or the Ministry with respect to the disposition of the complaint, and therefore, the factor in section 21(2)(d), as well as the unlisted factors pertaining to "Public Confidence in the Integrity of an Institution", and "Adequate Degree of Disclosure", apply to this information.

I have weighed the interests of the appellant in disclosure against the factors favouring privacy protection. In the circumstances of this appeal, I find that the factors favouring disclosure are more compelling, and I find that disclosure of the parts of this record which I have not exempted under section 13(1) would not be an unjustified invasion of personal privacy. Accordingly, it is not exempt under section 49(b). As no mandatory exemption applies, the information in this record which is not exempt under section 49(a) should be disclosed.

Letters to and from the Complainant

The records in this category are Records 16b and 85.

Record 16b is a letter from the complainant to the investigator. In effect, the letter contains the complainant's submissions on the investigator's draft "summary of findings" (an apparent reference to a draft

of the investigator's report) which was sent to him for comment. The Ministry submits that the contents of this letter are highly sensitive.

Record 85 is a letter from the Deputy Attorney General to the complainant, in which the Ministry's decision with respect to the investigator's findings is communicated to the complainant. The Ministry argues that this record is subject to the presumed unjustified invasion of privacy in section 21(3)(d) (employment history). Participation in harassment complaints and investigations is not part of the complainant's usual job functions. Moreover, the findings of the investigation have no bearing on the complainant's position or employment. For these reasons, I find that this information does not form part of his employment history. Therefore this presumption does not apply.

Having reviewed these two documents, I find that the factor in favour of privacy protection in section 21(2)(f) (highly sensitive) applies to both records. I also find that, in the circumstances, the factor in section 21(2)(h) (information provided in confidence) applies to Record 16b. However, I am also of the view that this information relates to the decisions reached by the investigator and/or the Ministry with respect to the disposition of the complaint, and therefore, the factor in section 21(2)(d), as well as the unlisted factors pertaining to "Public Confidence in the Integrity of an Institution", and "Adequate Degree of Disclosure", apply to this information.

I have weighed the interests of the appellant in disclosure against the factors favouring privacy protection. In the circumstances of this appeal, I find that the factors favouring disclosure are more compelling, and I find that disclosure of these records would not be an unjustified invasion of personal privacy. Accordingly, they are not exempt under section 49(b). Since no other discretionary exemptions have been claimed, and no mandatory exemption applies, they should be disclosed to the appellant.

WDHP Staff Memos

The records which remain at issue and form part of this group are Records 27, 30a, 33 and 45, and the part of Record 44 not previously exempted under section 49(a) (in connection with section 13(1)). Record 27 is a memorandum from the investigator to the Assistant Co-ordinator of the Ministry's WDHP unit. Records 30a and 33 are printed copies of electronic mail messages. They deal with routine mechanical aspects of the investigation. Record 44 outlines a meeting between the investigator and the appellant. Record 45 is a memo to file recording a telephone call the author received from the complainant.

Record 33 contains one phrase which relates to the investigator's work experience. This phrase constitutes the employment history of the investigator. In my discussion of section 21(3)(d), above, I found that the presumed unjustified invasion of privacy in section 21(3)(d) applies to it. As sections 21(4) and 23 do not apply to this information, I find that it is exempt under section 49(b). I have highlighted this passage on the copy of this record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

In the circumstances of this appeal, I am not satisfied that disclosure of Records 27, 30a or the remaining contents of Record 33 would cause personal distress to any individual, nor that any of this information was provided in confidence. Because Record 44 outlines a meeting between the appellant and the investigator, I am unable to conclude that its disclosure to the appellant would cause personal distress, nor that its contents should be viewed as confidential vis a vis the appellant. Accordingly, sections 21(2)(f) and (h) do not apply to any of these records. As no factors favouring non-disclosure apply, I find that these records (except the information previously exempted from Record 44 under section 49(a), and the information in Record 33 which I have exempted above) are not exempt under section 49(b). As no other discretionary exemptions have been claimed, and no mandatory exemption applies, the parts of these records which are not exempt under sections 49(a) and (b) should be disclosed to the appellant.

Record 45, however, consists largely of information concerning discussions with the complainant with a view to mediating his complaint. In my view, this information would qualify as "highly sensitive" and I am also satisfied that it was provided to the investigator in confidence. Accordingly, the factors against disclosure in sections 21(2)(f) and (h) apply. Moreover, because this information pertains to mediation, I am of the view that it was not a factor considered by the investigator or the Ministry in the resolution of this matter, and I find that no factors favouring disclosure apply to it. Accordingly, I find that disclosure of this record would constitute an unjustified invasion of personal privacy, and it is exempt under section 49(b).

WDHP Staff Notes

The records which remain at issue and form part of this group are Records 31, 55, 70, 72, 73 and the parts of Records 21a, 56 and 57 which I have not exempted under section 49(a) in connection with section 13(1). All of these records consist of handwritten notes made by members of the Ministry's WDHP staff.

Records 55, 56 and 57 each contain information about a financial obligation of an individual other than the appellant. As I indicated above, I find that the presumed unjustified invasion of personal privacy in section 21(3)(f) applies to this information. As sections 21(4) and 23 do not apply to this information, I find that it is exempt under section 49(b). I have highlighted these passages on the copies of these records which are being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

The Ministry's representations describe several categories of information in the WHDP staff notes whose disclosure would, according to the Ministry, constitute an unjustified invasion of personal privacy. In this regard, the Ministry refers to a telephone number in one of the records as personal information. In fact, there are several telephone numbers in the records. As all appear to be office numbers, I find that they are not the personal information of the individuals assigned to them. Section 49(b) can only apply to personal information, and therefore these telephone numbers cannot be exempt under section 49(b). Similarly, the records contain references to several individuals who were approached to conduct the investigation. In my view, this information pertains to these individuals in their professional capacity only, and it is therefore not their personal information. Again, for this reason section 49(b) cannot apply to this information.

The Ministry also relies on section 21(3)(a) (medical history) with respect to part of Record 73. In my view, since no name or other clear identifying information is provided which might identify the individual in question, the medical information in this record does not relate to an identifiable individual. Therefore it is not this individual's personal information and this presumption does not apply.
I am satisfied that some of the information in the WDHP staff notes was provided to the investigator in confidence, and disclosure of this information could also be expected to cause considerable personal distress to several individuals who are mentioned. On this basis, I find that the factors in section 21(2)(f) and (h) apply. However, I am also of the view that this information relates to the decisions reached by the investigator and/or the Ministry with respect to the disposition of the complaint, and therefore, the factor in section 21(2)(d), as well as the unlisted factors pertaining to "Public Confidence in the Integrity of an Institution", and "Adequate Degree of Disclosure", apply to this information.

I have weighed the interests of the appellant in disclosure of the WDHP staff notes against the factors favouring privacy protection. In the circumstances of this appeal, I find that the factors favouring disclosure are more compelling, and I find that disclosure of these records (except the parts of Records 55, 56 and 57 which I have exempted above) would not be an unjustified invasion of personal privacy, and accordingly, they are not exempt under section 49(b). Since no other discretionary exemptions have been claimed for this information, and no mandatory exemption applies, these records (except the parts of Records 21a, 56 and 57 which I have exempted under section 49(a), and the parts of Records 55, 56 and 57 which I have exempted under section 49(b)) should be disclosed to the appellant.

I have highlighted the exempt portions on the copies of records 21a, 55, 56 and 57 which are being provided to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

Witness Statements

The Witness Statements comprise Records 86 though 99, inclusive. Of these, Records 86, 87, 93, 95, 96, 98 and 99 were partially disclosed. The other records in this group were withheld from the appellant in their entirety. All of these records are marked "Confidential".

To facilitate my analysis of these records, I will summarize the types of information they contain.

Of the records which were partly disclosed, the withheld portions consist of the following:

(1) witness' name and other identifiers including current job title, reporting information and, in some cases, previous position (i.e. the position held by the witness at the time of the complaint)

(2) background information about the complainant and the appellant

(3) information about attitudes of the witnesses and others to the complainant and the appellant

(4) information about other employees in the branch, some of which has a bearing on the conflict between the complainant and the appellant

(5) information about other individuals outside the branch who asked about relations between appellant and complainant (Record 95)

(6) comments on the causes of conflict and the subject matter of the complaint

(7) information re personal circumstances of a witness (Record 93)

(8) information about activities of management pertaining to the situation between the complainant and appellant (Record 93)

(9) attributions of remarks quoted by a witness (Record 98).

The records which were entirely withheld are essentially comprised of the types of information described in items (1), (2), (4), (6) and (8) above.

Based on the evidence provided by the witnesses who did make representations to this office, I am prepared to accept that all of this information was provided in confidence, and I find that the factor weighing against disclosure in section 21(2)(h) applies.

I am also prepared to accept that disclosure of any of this information would cause considerable personal distress to the individuals who provided the information, and in some cases to other individuals mentioned in the records. Accordingly, I also find that the factor weighing against disclosure in section 21(2)(f) (highly sensitive) applies.

I have found, above, that the factor favouring disclosure in section 21(2)(d) (fair determination of rights) applies to information in the records which identifies the witnesses, and to any other information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

With respect to the names and other identifying information pertaining to the witnesses (i.e. the information described in item 1, above), I have weighed the factors in sections 21(2)(f) and (h) against the factor in section 21(2)(d) and the other circumstances favouring disclosure of this information, in particular the fact that the appellant was reprimanded and has been transferred to a new position. Similar to my finding above with respect to identifying information in the WDHP report, I find that the circumstances favouring disclosure of this information are more compelling than those favouring privacy protection. Accordingly, I find that disclosure of the witnesses' names and other identifying information would not be an unjustified invasion of personal privacy. Therefore, this information is not exempt under section 49(b). As no other exemption has been claimed, and no mandatory exemption applies, it should be disclosed.

I will now turn to the remaining undisclosed information in the witness statements. I have found, above, that the factors weighing against disclosure in section 21(2)(f) (highly sensitive) and 21(2)(h) (information

supplied in confidence) apply. I have also found that the factor favouring disclosure in section 21(2)(d) (fair determination of rights) and the unlisted factors favouring disclosure relating to "Public Confidence in the Integrity of an Institution", and "Adequate Degree of Disclosure", apply to information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter.

I have weighed the interests of the appellant in disclosure of the remaining undisclosed information in the witness statements against the factors favouring privacy protection. In the circumstances of this appeal, I find that the factors favouring disclosure are more compelling with respect to information in the records which is directly related to the subject matter of the investigation, the investigator's findings and the Ministry's final disposition of the matter. Therefore, I find that disclosure of this information would not be an unjustified invasion of personal privacy. Accordingly, it is not exempt under section 49(b). As no other exemption has been claimed, and no mandatory exemption applies, it should be disclosed.

However, there are passages in some of the witness statements which are not related to the subject matter of the investigation, the investigator's findings or the Ministry's final disposition of the matter. I find that disclosure of those passages would constitute an unjustified invasion of personal privacy, and they are exempt under section 49(b). I will forward copies of these witness statements to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, on which the exempt passages are highlighted. The exempt passages consist of some information described in items (2), (3) and (4), above, and all of the information described in categories (5) and (7).

Other Records

Under this heading, I will deal with records for which the Ministry claimed section 49(b), but which were not otherwise referred to in the Ministry's representations on this exemption. As explained below, this category also includes records not previously exempted, for which section 49(b) was not claimed.

The Ministry claimed section 49(b) for Records 12b and 82, but did not refer to these records in its breakdown by category. Both of these records consist of lists of witnesses interviewed. I dealt with this same information above under the heading "Witness Statements". In my view, for the same reasons given in the discussion of witnesses' names and other identifying information under "Witness Statements", above, I find that disclosure of this information would not be an unjustified invasion of personal privacy. As no other discretionary exemptions have been claimed for this information and no mandatory exemption applies, these records should be disclosed.

As noted above under the heading "Invasion of Privacy", the Ministry has not claimed section 49(b) in connection with a number of the records at issue. I have found that all of the records contain the personal information of the appellant and at least one other individual (the complainant). In addition, two records for which the Ministry did not claim section 49(b) (Records 8 and 58) also contain the personal information of the investigator. Because of the Act's emphasis on privacy protection, I will consider whether section 49(b) applies to records for which it was not claimed (except those I have already found to be exempt under other sections). Records 7, 8, 21b, 42, 58, 59 and 74a, and the parts Records 12d, 23, 24 and 74 not previously exempted, fall into this category.

I have reviewed all of these records to determine whether disclosure would be an unjustified invasion of personal privacy. In the circumstances of this appeal, I have concluded that no presumptions or factors against disclosure apply to the personal information of individuals other than the appellant in any of these records. Accordingly, the exemption in section 49(b) does not apply. As no other discretionary exemptions have been claimed, and no mandatory exemption applies, Records 7, 8, 21b, 42, 58, 59 and 74a, and the parts Records 12d, 23, 24 and 74 not previously exempted, should be disclosed to the appellant.

REASONABLENESS OF SEARCH

During the course of this appeal, the appellant has indicated that his interview with the investigator was taped. His representations indicate that he expressly asked the investigator not to destroy the tape. Because his interview was taped, he infers that the interviews with other witnesses must also have been taped. He has also raised the issue of records relating to several charitable applications which were discussed during the investigation.

The affidavit submitted by the Ministry in this regard is very general. However, it contains the following statement:

> Recently, it has come to my attention that there are additional records which are responsive to [the appellant]'s request which were inadvertently not included in the documents prepared to respond to this request. It is my understanding that the Ministry will be addressing the issue of these additional records in due course.

Unfortunately, I have not been provided with any information concerning the nature of these newly discovered records, nor with any indication that the Ministry has in fact addressed these records, despite the fact that this affidavit is dated May 2, 1995, some five months ago.

The only other information provided to me regarding the existence of additional records came from several of the witnesses, who made reference to the "reasonableness of search" issue as raised in the Notice of Inquiry. These witnesses indicated that their interviews were not taped.

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

I am not satisfied that the Ministry has conducted a reasonable search for the appellant's interview tapes and I will order them to search again. I will also order them to issue a decision to the appellant with respect to the additional records referred to in the affidavit within two weeks after the date of this order. (In this

regard, I note that unless section 27 or 28 applies, the Act requires institutions to make access decisions on responsive records within thirty days after receiving a request.)

Based on the evidence of the witnesses who commented on this subject, I am satisfied that the Ministry's search for witness interview tapes other than the appellant's was reasonable in the circumstances.

However, in my view, the issue of whether the Ministry's search for records pertaining to the charitable applications was reasonable remains unresolved, since these records could be included in those referred to in the affidavit, for which a decision has yet to be made. Once the appellant has received the Ministry's decision concerning the additional records, it will be open to him to appeal this issue again.

ORDER:

1. I uphold the Ministry's decision to deny access to Records 12, 19, 22, 26a, 43a, 45, 51, 52, 53 and 54 and to the parts of Records 12c, 12d, 21a, 23, 24, 33, 44, 55, 56, 57, 74, 86, 87, 92, 93, 94 and 95 which are highlighted on the copies of those records being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order.

2. I order the Ministry to disclose to the appellant Records 7, 8, 12b, 16, 16b, 21b, 27, 30a, 31, 42, 58, 59, 70, 72, 73, 74a, 82, 85, 88, 89, 90, 91, 96, 97, 98 and 99 in their entirety, and the parts of Records 12c, 12d, 21a, 23, 24, 33, 44, 55, 56, 57, 74, 86, 87, 92, 93, 94 and 95 which are **not** highlighted on the copies of those records being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with a copy of this order, within thirty-five (35) days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

3. I order the Ministry to make a decision regarding access to the additional responsive records it has identified, and to send a decision letter in that regard to the appellant within fifteen (15) days after the date of this letter, in accordance with the provisions of sections 26 (except the time limit, which is reduced to 15 days) and 29 of the Act, as applicable. If section 28 applies, the Ministry may extend its time for response and issue notifications as contemplated in that section. No time extension may be claimed under section 27.

4. To verify compliance with Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed pursuant to that provision.

5. To verify compliance with Provision 3, I order the Ministry to provide me with a copy of its decision letter within twenty (20) days after the date of its order. However, if section 28 is invoked, I require the Ministry to advise me accordingly within twenty (20) days after the date of this order, and to provide me with a copy of its decision letter within fifty (50) days after the date of this order. This should be sent to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: October 6, 1995
John Higgins
Inquiry Officer