



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

ORDER P-1152

Appeal P-9500657

Ontario Hydro



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NATURE OF THE APPEAL:

Ontario Hydro (Hydro) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the recommendations made following an internal investigation of a harassment complaint initiated by the requester. Hydro located and identified a three page document as the sole record responsive to the request and denied access to it, in its entirety, claiming the application of the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- invasion of privacy - section 21

The requester (now the appellant) appealed Hydro's decision. During the mediation stage of the appeal, Hydro disclosed pages two and three of the record in their entirety and part of page one to the appellant. The information remaining at issue consists of the undisclosed portions of Item three on page one of the record.

A Notice of Inquiry was provided to Hydro, the appellant and five individuals whose interests may be affected by the outcome of this appeal (the affected persons). Representations were received from Hydro, the appellant and three of the affected persons.

Because the record appeared to contain the personal information of the appellant, the Notice of Inquiry raised the possible application of sections 49(a) (discretion to refuse requester's own information) and 49(b) of the Act (invasion of privacy).

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

I have reviewed the record at issue and I find that it contains the personal information of the appellant and the affected persons. Although the affected persons are referred to by way of a designated letter, I find that the appellant is sufficiently familiar with the events surrounding the investigation that the individuals are identifiable to him, without their actual names being present.

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 Hydro determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, Hydro has the discretion to deny the requester access to that information. In this situation, the appellant is not required to prove that the disclosure of the personal information would not constitute an unjustified invasion of the personal privacy of another individual. Since the appellant has a right

of access to his own personal information, the only situation under section 49(b) in which he can be denied access to the information is if it can be demonstrated that the disclosure of the information would constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether 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, Hydro must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations which are relevant in the circumstances of the case.

Hydro submits that the personal information is highly sensitive (section 21(2)(f)) because it relates to the potential disciplinary action which may be taken against the affected parties. Hydro adds that the affected persons have not had the opportunity to review the recommendations.

The affected persons submit that they would be exposed unfairly to harm should the record be disclosed (section 21(2)(e)), that the information contained in the record was provided by them to Hydro in confidence (section 21(2)(h)) and that their reputations would be unfairly damaged by the disclosure of the record (section 21(2)(i)). These are all considerations favouring the non-disclosure of personal information.

The appellant submits that, as a party to the matter investigated by Hydro, disclosure of the information contained in the record would not be an unjustified invasion of personal privacy.

Having reviewed the representations and the records, I have made the following findings:

- (1) I have not been provided with sufficient evidence to demonstrate that the disclosure of the information relating to the affected persons would expose them **unfairly** to pecuniary or other harm or that their reputations would be **unfairly** damaged.
- (2) In this case, I agree that the undisclosed information contained in the record may be considered highly sensitive (section 21(2)(f)). It is my view, however, that the information which may be regarded as highly sensitive pertains primarily to the appellant. I find, therefore, that section 21(2)(f) is not a relevant consideration which weighs heavily in favour of a finding that the disclosure would be an unjustified invasion of the affected persons' personal privacy.
- (3) The undisclosed information was not supplied to Hydro by the affected parties. Rather, this portion of the record describes the **potential** disciplinary actions which may be undertaken against the affected persons. I find, therefore, that section 21(2)(h) is not applicable in the circumstances of this appeal.

Having considered all of the factors present in this appeal and balancing the appellant's right to access his personal information against the interests of the affected persons in protecting their privacy, I find that disclosure of the remaining portions of the record would not result in an unjustified invasion of the personal privacy of the affected persons. Accordingly, section 49(b) does not apply to exempt this portion of the record from disclosure.

ADVICE OR RECOMMENDATIONS/DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

Section 49(a) of the Act provides another exception to the general right of access. Under section 49(a) of the Act, Hydro has the discretion to deny access to records which contain an individual's own personal information in instances where certain exemptions would otherwise apply to that information. The exemptions listed in section 49(a) include the exemption claimed with respect to the record at issue, namely advice or recommendations (section 13(1)). In the discussion which follows, I will consider whether the record qualifies for exemption under this section as a preliminary step in determining whether the section 49(a) exemption applies to it.

ADVICE OR RECOMMENDATIONS

Section 13(1) of the Act states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, or any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that in order to qualify as "advice" or "recommendations" within the meaning of section 13(1), the information contained in the records must relate to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. In addition, the information must relate to the giving of advice or the making of a recommendation, as opposed to the seeking of such information.

In Order 94, former Commissioner Sidney B. Linden discussed the general purpose of the section 13(1) exemption, and made the following comments:

... in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making.

Hydro submits that the undisclosed information consists of recommendations resulting from an investigation into allegations of harassment and that it addresses very specific issues relating to the affected persons, the disclosure of which would interfere with the resolution of labour

relations issue currently being addressed by Hydro and the union representing the affected persons.

In my view, portions of the undisclosed information set out Hydro's policy position statement on the issue of workplace harassment and discrimination and do not contain any recommendations and/or advice regarding the investigation of the appellant's complaint. With respect to the remaining parts, it is my view that the "recommendations" made are not sufficiently detailed for them to be considered as part of the deliberative process as contemplated by the exemption. I find that the suggested course of conduct contained in these portions of the record is not sufficiently specific so as to qualify as a recommendation within the meaning of section 13(1). Accordingly, I find that the record at issue does not qualify for exemption under section 13(1) and, therefore, section 49(a) of the Act does not apply.

ORDER:

1. I order Hydro to disclose the record at issue, in its entirety, to the appellant by sending him a copy by **April 25, 1996** but not before **April 22, 1996**.
2. In order to verify compliance with this order, I reserve the right to require Hydro to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ March 21, 1996