



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1167

Appeal P-9500570

Ontario Human Rights Commission



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NATURE OF THE APPEAL:

The appellant was one of four respondents named in six sexual harassment complaints filed with the Ontario Human Rights Commission (the Commission). The complaints were filed against a police services board (the Police), a town (the Town), the Town's Chief of Police (the Chief) and the appellant. The appellant was a member of the Town's police force.

As a result of proceedings under the Police Services Act, the appellant's employment with the Police was terminated.

Subsequently, in the course of the conciliation of the Commission complaints, the Police, the Town and the Chief entered into a settlement agreement with all the complainants. This agreement resolved all complaints against all the respondents, including the appellant. The appellant was not involved in any of the discussions and negotiations that lead to the settlement. Nor was he a party to the actual agreement.

The appellant submitted a request to the Commission under the Freedom of Information and Protection of Privacy Act (the Act). He sought access to the following four categories of information related to the aforementioned matter:

- (1) a copy of the minutes of settlement signed by the complainants and the Police;
- (2) copies of the minutes of any meetings chaired by, attended by or held in conjunction with the Commission and the complainants, the Police, the Chief or any of their legal representatives;
- (3) copies of any correspondence between the Commission and the complainants, the Police, the Chief and any of their legal representatives; and
- (4) copies of any minutes or correspondence between any of the aforementioned and any other human rights officer or office.

The Commission located 172 pages of responsive records consisting of the draft and final copies of the minutes of settlement, and correspondence between the Commission and the solicitors for the Town, the Police, the Chief and the complainants. The Commission denied access to these documents in their entirety. The Commission also advised the appellant that no minutes of any meetings with the complainants and/or the Police and/or their legal representatives existed.

The appellant filed an appeal of this decision and raised the issue of the application of section 23 of the Act, the so-called "public interest override".

The Commission subsequently issued another decision regarding access to the records. The following exemptions have now been applied to deny access to the records:

- advice and recommendations - section 13(1)
- third party information - section 17(1)
- invasion of privacy - sections 21(1) and 49(b)

- discretion to refuse requester's own information - section 49(a)

A Notice of Inquiry was sent to the appellant, the Commission, the six complainants, the Police, the Town and the Chief. In this order, I will refer to these individuals and corporate entities collectively as the "affected parties." Representations were received from all of the parties.

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.

The Commission states that many of the pages at issue contain only the personal information of the complainants and individuals other than the appellant. There are certain pages which do not refer to the appellant by name. They do, however, refer to the six complaint files in which the appellant was a respondent. Drafts of the agreement which do not refer to the appellant by name or by file number refer to the "personal respondents", which clearly includes a reference to the appellant. Despite the fact that the appellant was neither a party nor a signatory to the settlement agreement, the claims against him were settled. All of the pages relate to the six complaint files, the status of the complainants, the respondents and the ultimate disposition of the complaints. In these circumstances, I find that all of the pages contain the personal information of the appellant, the complainants and the Chief.

Information related to employees of the Commission appears in their professional capacity and, therefore, does not qualify as 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(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the 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.

Section 21(3)

The Commission states that the presumption in section 21(3)(b) of the Act applies because the personal information was compiled and is identifiable as part of an investigation into a possible violation of the Ontario Human Rights Code (the Code).

Many of the records deal with the settlement offers exchanged between the lawyers for the complainants and those for the respondents. They reflect the parties' positions at various stages of the negotiation of the settlement to resolve the complaints. Some of these records were created during the early stages of the process as part of the Commission's early settlement initiatives. Most of them refer to the parties' proposals and counter-proposals during the course of conciliation pursuant to section 33 of the Code.

The Commission states:

In the course of conciliation, the parties are advised that the process is confidential. Indeed, confidentiality is the hallmark of the conciliation process conducted by the Commission and its officers.

Section 5.2.3 of the Commission's Procedures Manual provides:

5.2.3. Confidentiality of negotiations. Admissions made by parties during the course of settlement negotiations are privileged, and **are inadmissible in proceedings before a board of inquiry, as are any offers and counter-offers of settlement.** (Emphasis added)

The Commission further notes that section 33(1) of the Code requires the Commission or a person authorized by the Commission for these purposes, to "investigate a complaint and may endeavour to effect a settlement". The Commission notes that the second function is carried out by way of the conciliation process during which the human rights officer assumes the role of a conciliator and acts as a "... neutral third party performing services analogous to those of a mediator or conciliation officers appointed as a neutral third party to resolve a labour relations dispute". The settlement was not reviewed by the Commission, which had determined that it was not necessary for it to approve the settlement.

In these circumstances, I do not find that the personal information on pages 1-46, 50-59, 64-74, 91-94, 107-118, 132-138 and 147-151 was compiled as a result of an investigation into a possible violation of the Code by the Commission. Rather it represents the positions of the parties to the complaints during their efforts to resolve the issues either pursuant to the early settlement initiative or as part of the conciliation phase of the Commission's process. If the complaints had not settled and the Commission had been required to decide whether the matter would proceed to a Board of Inquiry, none of the information contained in the settlement documents would have been admissible. It would not be presented as part of the Commission's "investigation" into the complaints.

I do find that the personal information on pages 47-49, 60-63, 75-90, 95-105, 119-131, 139-145 and 152-172 was compiled as part of the Commission's investigation into the complaints. This information falls outside that exchanged among the parties in their efforts to settle the complaints. I adopt and apply the previous orders of this office which have determined that an investigation conducted by the Commission into allegations of breaches of the Code constitutes an "investigation into a possible violation of law" for the purposes of section 21(3)(b) of the Act (Orders P-449, P-507 and P-510). Accordingly, I find that the personal information contained in pages 47-49, 60-63, 75-90, 95-105, 119-131, 139-145 and 152-172 falls within the presumption.

As I have previously indicated, once a presumption in section 21(3) is found to apply, the only way in which it can be rebutted is if it falls under section 21(4) or where section 23 is found to apply. This result is dictated by the findings of the Divisional Court in John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767.

I have considered the application of section 21(4) of the Act and find that none of the personal information at issue falls within the ambit of this provision. Thus, the personal information contained in the records is exempt under section 49(b) of the Act. I will address the appellant's section 23 arguments in the section which follows.

Section 21(2)

I will now consider the position of the parties with respect to the factors under section 21(2) as they apply to the personal information on pages 1-46, 50-59, 64-74, 91-94, 107-118, 132-138 and 147-151, which I have found not to have been compiled as part of a law enforcement investigation.

The Commission has not provided any submissions on this issue as it has taken the position that all of the personal information is subject to the presumption in section 21(3)(b) of the Act. However, the affected parties have all addressed this matter.

The affected parties submit that the personal information contained in the records was supplied in confidence. As I have previously indicated, the Commission has described the confidentiality attached to its conciliation and settlement processes. In addition, while the Commission itself was not bound by any confidentiality agreements, it is clear that all the signatories to the settlement expected that the terms of the agreement, which includes their personal information, would not be disclosed. On this basis, I find that section 21(2)(h) of the Act, which applies where the personal information has been supplied by the individual to whom it relates in confidence, is a relevant factor favouring privacy protection.

The complainants maintain that section 21(2)(f) is a relevant consideration in that the information contained in the records is highly sensitive. I accept that information related to sexual harassment issues is of this nature.

In addition, the complainants maintain that they will be exposed unfairly to pecuniary or other harm and that their reputations may be unfairly damaged should the records be disclosed. These arguments relate to the application of sections 21(2)(e) and (i) of the Act. In this regard, the

complainants submit that the settlement was signed almost a year ago and that they now wish to bring some closure to these incidents. They are concerned that disclosure of this information at this time would perpetuate the publicity attendant on this matter. In addition, the complainants have expressed some unsubstantiated concerns that the settlement agreement may be jeopardized should the records be released.

I agree that section 21(2)(e), unfair exposure to pecuniary or other harm, is a relevant consideration in this case. I am of the view that once the parties have followed the appropriate procedures to file a complaint with the Commission and have reached a satisfactory settlement, they are entitled to consider the matter as "closed". Based on the information contained in the records and the submissions of the parties, including the Town and the Police, I accept that disclosure of the records at this time could expose the complainants unfairly to harm in the form of a continuing, and potentially public, reminder of these unpleasant events.

However, I have not been provided with sufficient evidence to conclude that section 21(2)(i), unfair damage to reputation, is a relevant consideration.

The appellant maintains that disclosure of the personal information is relevant to a fair determination of his rights (section 21(2)(d)). He notes that a human rights officer who investigated the complaints advised him that the Police settled the complaints internally "... as a result of information supplied to them by the Ontario Human Rights investigators ...". The appellant, therefore, submits that he did not have the opportunity to review the information provided by the complainants or to "provide his side of the story".

As I have indicated, the pages remaining at issue are those containing information related to the settlement discussions among the parties. They do not contain any information related to the substance of the complaints or allegations that were made against the appellant. Any such information is found only in those records which I have found subject to the presumption in section 21(3)(b). In addition, I note that the Commission did advise the appellant that the complaints against him had been resolved. Although the matter was settled without the participation of the appellant, neither did he incur any of the legal costs associated with this matter. Based on the nature of the information contained in the records and the admittedly unique circumstances of this case, I find that disclosure of the personal information on pages 1_46, 50-59, 64-74, 91-94, 107-118, 132-138 and 147-151 is not relevant to a fair determination of the rights of the appellant and section 21(2)(d) is not a relevant consideration.

To summarize, I have found that the personal information that is not subject to section 21(3)(b) was supplied in confidence and is highly sensitive. I have also found that its disclosure would unfairly expose the complainants to harm. All of these factors favour privacy protection.

Having considered the submissions of all of the parties and the circumstances of this case, and in view of the application of sections 21(2)(e), (h) and (i), I find that disclosure of pages 1-46, 50_59, 64-74, 91-94, 107-118, 132-138 and 147-151 would result in an unjustified invasion of the personal privacy of the complainants and the Chief. They are, therefore, exempt under section 49(b) of the Act.

PUBLIC INTEREST IN DISCLOSURE

Section 23 of the Act states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I have found that the personal information at issue is exempt under section 49(b). Section 23 does not refer specifically to this exemption. I have previously considered this issue in Order P_541, where I made the following comments concerning sections 23, 49(b) and 21 of the Act:

In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21.

Accordingly, I will consider the possible application of section 23 to the personal information which I have found to qualify for exemption under section 49(b).

In order for section 23 to apply, there must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question.

The appellant submits that there is a public interest involved in this case as the parties involved are public servants paid by public funds. He thus argues that the public has a right to know how its tax dollars are spent. He further submits that the complaints filed against him were held in secrecy and that "... [M]ost of the information was kept from the Civilian Board which governs the Police Unit" and that the Act should apply to ensure that such a public organization is accountable to the public.

The Town states that the total amount of the settlement is a matter of public record through the authorization of accounts by the Police and the Town council. Further the Town states that the "appellant has had due process through the Police Services Act and that the charges have been upheld through the process and the subsequent appeals." It is the position of the Commission that there is no public interest involved in this case, only the private interest of the appellant.

I agree with the submissions of the Commission that the appellant has a private, as opposed to a public interest, in seeking access to these records. Furthermore, any concerns the appellant has concerning the manner in which the Police handled his case and the information before it are beyond the jurisdiction of this office. Therefore, I find that section 23 does not apply in the circumstances of this appeal.

Because of the manner in which I have dealt with sections 49(b) and 23, I need not consider the application of the exemptions in sections 13(1) and 17(1) of the Act.

ORDER:

I uphold the decision of the Commission.

Original signed by: _____ April 17, 1996
Anita Fineberg
Inquiry Officer