



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

ORDER P-1239

Appeal P-9600107

Ontario Human Rights Commission



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant requested information under the Act from the Ontario Human Rights Commission (the OHRC). The information pertains to the appellant's case file with the OHRC. In his request, the appellant specifically referred to "the final Commissioner's report" regarding his case as one document that he was particularly interested in receiving.

The OHRC identified the contents of its investigation file regarding the appellant's complaint as being responsive to this request and provided the majority of the information contained in it to the appellant. The OHRC withheld the remaining information in the investigation file, in whole or in part, under the following sections of the Act:

- advice and recommendations - section 13
- law enforcement report - section 14(2)(a)
- invasion of privacy - sections 21(1) and 49(b)
- discretion to refuse requester's own information - section 49(a)

In appealing this decision, the appellant stated that he submitted a request for the final Commissioner's report regarding his case. He indicated that this report was not included in the records sent to him by the OHRC.

Upon receipt of the Confirmation of Appeal, the OHRC advised this office that as a result of a telephone conversation with the appellant prior to processing this request, it was under the impression that he wanted access to his complete file. The OHRC indicated further that subsequent to his receipt of the disclosed materials, the appellant contacted its Freedom of Information and Privacy office with regard to the "final Commissioner's report". At that time he was advised that no such record exists.

In his letter of appeal, the appellant reiterated that he wanted a copy of this report as well as all other related materials. In my view, the appellant has raised the adequacy of search as an additional issue in this appeal.

This office sent a Notice of Inquiry to the OHRC and the appellant. Both parties submitted representations to this office in response to this Notice. The OHRC's representations include an affidavit sworn by its Freedom of Information and Privacy Co-ordinator (the Co-ordinator).

In his representations, the appellant expresses his dissatisfaction with the manner in which the OHRC handled the investigation of his complaint. He believes that his human and Charter rights have been violated and that the OHRC's processing of his complaint was flawed and based on inaccurate information. He indicates that he requires the requested information to prove his allegations against the OHRC.

The records at issue in this appeal consist of various memoranda, internal OHRC documents generated by staff during the investigation of the appellant's complaint, and draft documents and decisions.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, “personal information” is defined, in part, to mean recorded information about an identifiable individual. The records at issue pertain to the OHRC’s investigation into the appellant’s complaint. I find that all of the records at issue contain the appellant’s personal information. I find this to be the case even where the appellant is not referred to by name, as the information in the records is sufficiently connected to the investigation to render it personal to him within the meaning of the definition.

I find that some records also contain the personal information of individuals other than the appellant (Records 5, 8, 9, 11, 12, 14 and 15). For the most part, this personal information is intertwined with that of the appellant’s in such a way that it is not severable.

With respect to Record 8, however, which contains the Human Rights Officer’s (the Officer’s) notes, only three lines pertain to individuals other than the appellant. Once this information is severed, the remaining information in this record pertains only to the appellant.

Similarly, only portions of Record 12 (the Record of Investigation) contain the personal information of the appellant and other individuals. Once this information is severed, the remaining portions of this record relate to the steps taken in processing the appellant’s complaint.

The OHRC claims that section 49(b) (invasion of privacy) applies to exempt the personal information in Records 5, 8, 9, 11, 12, 14 and 15 from disclosure, and that section 49(a) (discretion to refuse requester’s own information) applies to exempt the remaining information from disclosure.

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.

DISCRETION TO REFUSE REQUESTER’S OWN INFORMATION

Under section 49(a) of the Act, the OHRC 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 both of the exemptions claimed with respect to the records at issue, namely law enforcement (section 14) and advice or recommendations (section 13).

LAW ENFORCEMENT REPORT

The OHRC claims that Records 3, 6, 13 and 16 are exempt under section 14(2)(a). This section provides:

A head may refuse to disclose a record,

that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

Record 3 is an Investigation Plan prepared by the Officer. It contains a summary of the parties' positions and identifies the relevant issues. It also records the facts or information relevant to each issue and includes possible sources of evidence. In my view, this record does not contain any formal accounting of the results of the collation and consideration of this information (Order 200). Accordingly, I find that it does not qualify as a "report" within the meaning of section 14(2)(a). Record 3 is, therefore, not exempt under this section.

Record 6 is a document which summarizes the Officer's response to the parties' submissions. Record 13 is a draft of a Case Analysis form prepared by the Officer. It contains a summary of the parties' positions, the issues to be determined, an analysis of these issues and the summary and conclusions drawn by the Officer on the basis of this analysis. Record 16 is a Record of Intake on which the Officer has set out her conclusions of the issues in this case based on her analysis of the relevant information.

In my view, these three records contain a formal statement or account of the results of the collation and consideration of information, and thus qualify as reports. There is no doubt that they were prepared in the course of the OHRC investigation of the complaint, which is a law enforcement investigation conducted pursuant to the OHRC's mandate to enforce the Ontario Human Rights Code (the Code) (Order 89). Accordingly, Records 6, 13 and 16 qualify for exemption under section 14(2)(a).

I have previously found that Records 6, 13 and 16 contain the appellant's personal information. As noted above, section 49(a) provides an exemption for records containing a requester's own personal information where certain other exemptions (including section 14) would otherwise apply. Having found that these records qualify for exemption under section 14(2)(a), I find that they are exempt from disclosure under section 49(a).

ADVICE OR RECOMMENDATIONS

Section 13(1) of the Act states that:

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.

The OHRC relies on this exemption with respect to Records 1, 2, 3, 4, 7, 10, 11, 12, 13 and 16. I have already found that Records 13 and 16 are exempt under section 14(2)(a) and, accordingly, I will not consider them in this discussion.

Record 1 is a Case Management Unit File Tracking form. The OHRC has disclosed the majority of this record to the appellant. The portion which has been withheld contains the recommendation of the Officer with respect to the disposition of this case.

Records 2 and 4 are draft decisions prepared by staff for the Commission's decision-makers. As I indicated above, Record 3 is an Investigation Plan prepared by the Officer. The OHRC submits that this record contains the investigation plan that the Officer had recommended for approval by the Manager. The second page of this record which contains a section entitled "Approval" has been completed by the Manager.

Record 7 is entitled Reconsideration Report. Although it is referred to as a "report", it is in effect, a two-part checklist. The first part, which refers to the package contents, was disclosed to the appellant. The OHRC has withheld the second part, which contains a staff recommendation.

Record 10 is a memorandum which reflects the discussions of staff relating to the processing of the appellant's complaint.

Record 11 is a memorandum of a telephone conversation between the Officer and counsel for the respondent.

Record 12, entitled Record of Investigation, contains the Officer's notes which essentially reflect the work done by the Officer on the case.

I have carefully reviewed the information in the records listed above and I find that, except for Records 11 and 12, they qualify for exemption under section 13(1) of the Act because they set out a suggested course of action with respect to the OHRC's decision-making mandate as established in the Code.

None of the information in Records 11 and 12 relates in any way to a suggested course of action. Therefore, I find that these two records do not qualify for exemption under section 13(1). The appellant asserts that the exceptions to the section 13(1) exemption in sections 13(2)(a), (h), (j) and (l) are applicable in the circumstances of this appeal. These sections state:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (h) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;
- (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution,

whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

- (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
- (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

I have considered the application of these exceptions to those records which I have found qualify for exemption pursuant to section 13(1). The factual material in these records is so intertwined with the advice and recommendations that it is not possible to disclose the factual material without also disclosing the material which is properly exempt. Therefore, the section 13(2)(a) exception does not apply.

In order for the exceptions in sections 13(2)(h) and (j) to apply, each record in question must be a report. For a record to qualify as a report, it must consist of a formal statement or account of the results of the collation and consideration of information (Order 200). In my view, none of the records which I have found qualify for exemption under section 13(1) constitute a "report" within the meaning of the Act. Thus, sections 13(2)(h) and (j) do not apply.

In its representations, the OHRC refers to its procedures pertaining to the investigation and decision-making functions. It explains that investigations are carried out by OHRC staff investigators, who then prepare a summary of investigation findings which is disclosed to the parties to the complaint for comments. The OHRC indicates that under its process, OHRC staff do not have any statutory power of decision; that such jurisdiction is given by the statute only to the Commission to be exercised by a Commissioner.

Upon completion of this process, the investigator submits the case to the Commissioners for a decision under section 34 of the Code. If a party is not satisfied with the Commissioners' decision, he or she may apply for reconsideration of this decision under section 37 of the Code.

In this case, the OHRC states that the actual decisions under sections 34 and 37 of the Code containing the Commission's reasons were provided to the appellant during case processing and again in response to his access request. It maintains that the records at issue all consist of staff advice and recommendations, or draft documents prepared by staff, and that the nature of the information contained in these records is distinct from the actual decisions made by the Commissioners.

In his affidavit, the Co-ordinator affirms that the appellant was provided with copies of these decisions. The Co-ordinator attached copies of both decisions to his affidavit. I note that these

documents indicate the decision made by the Commission as well as the reasons for the decisions.

I am satisfied that the appellant has received the reasons for the final decision of the Commission. Moreover, I agree with the OHRC's characterization of the records at issue in this discussion as being distinct from the types of records contemplated in this section. Accordingly, I find that section 13(2)(l) does not apply.

In summary, I find that none of the section 13(2) exceptions claimed by the appellant apply to the advice and recommendations which I have previously found to qualify for exemption under section 13(1). Therefore, Records 2, 3, 4 and 10 in their entirety together with the withheld portions of Records 1 and 7 qualify for exemption under section 13(1), and are therefore exempt under section 49(a) of the Act.

INVASION OF PRIVACY

As I indicated above, the OHRC claims that section 49(b) applies to exempt the personal information in Records 5, 8, 9, 11, 12, 14 and 15 from disclosure.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the OHRC determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the OHRC has the discretion to deny the requester access to that information. In this situation, the requester is not required to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that 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 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.

I have found that once the three lines which refer to individuals other than the appellant in Record 8, and the portions of Record 12 which contain the personal information of other individuals are severed, the remaining portions of these records contain only the personal information of the appellant. In the circumstances of this appeal, disclosure of the remaining portions of these two records cannot constitute an unjustified invasion of personal privacy, and section 49(b) does not apply.

Record 5 is a memorandum from the Officer to the Acting Manager. The majority of this record was disclosed to the appellant. The two lines which were withheld refer to general work

performance issues concerning the Officer.

Records 9, 11, 14 and 15 consist of memoranda submitted by the respondent in connection with the Officer's investigation of the complaint, or record discussions between the Officer and the respondent during the investigation.

Similarly, the portions of Records 8 (Officer's notes) and 12 (Record of Investigation) pertaining to other individuals reflect discussions or material received from the respondent during the course of the Officer's investigation into the complaint.

The OHRC submits that the records at issue were compiled and are identifiable as part of an investigation into a possible violation of the Code. As such, the OHRC submits that disclosure of the personal information contained in these records would constitute a presumed unjustified invasion of personal information under section 21(3)(b). This section provides:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The OHRC indicates further that, in considering the possible application of section 49(b) to this information, it determined that the personal information of the appellant is intertwined with that of the other individuals such that no reasonable severances could be made.

The appellant submits that section 21(2)(g) is a relevant factor which weighs in favour of disclosure. This section states:

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,

the personal information is unlikely to be accurate or reliable.

I have reviewed the records and I find that, with the exception of the severance on Record 5, the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law, namely the Code. Accordingly, I find that disclosure of the personal information in Records 8, 9, 11, 12, 14 and 15 would constitute a presumed unjustified invasion of personal privacy and this information qualifies for exemption under section 21(3)(b).

I find that the appellant's assertion that the information is unlikely to be accurate or reliable, based on his dissatisfaction with the process and decision that was rendered by the OHRC in his case, is insufficient to establish relevance of section 21(2)(g). Even if I were to find that this section was relevant in the circumstances of this appeal, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held

that the factors and considerations in section 21(2) cannot be used to rebut the presumptions in section 21(3).

With respect to the personal information which the OHRC has withheld from Record 5, I find that it pertains to performance issues concerning the Officer and, as such, is highly sensitive within the meaning of section 21(2)(f), which is a factor which weighs in favour of privacy protection. Section 21(2)(f) states:

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,

the personal information is highly sensitive.

Moreover, I find that this information does not relate to the appellant's complaint, and in this regard I find that there are no factors in section 21(2) which favour disclosure of this information.

Having weighed the presumption and factor favouring privacy protection against the appellant's right to access personal information about himself, I find that the presumption and factor favouring privacy protection are more compelling in the circumstances of this appeal.

None of the personal information in these records falls within the ambit of section 21(4). Nor has the appellant maintained that there is a public interest in the disclosure of this information under section 23 of the Act. Accordingly, I find that the personal information in Records 5, 8, 9, 11, 12, 14 and 15 is exempt under section 49(b).

I have attached a highlighted copy of Records 8 and 12 to the copy of this order sent to the OHRC's Freedom of Information and Privacy Co-ordinator. The information which is highlighted is exempt and should not be disclosed. As no other exemptions apply to the remaining portions of these two records, the portions which are not highlighted should be disclosed to the appellant.

REASONABLENESS OF SEARCH

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

In its representations, the OHRC indicates that the appellant has received all of the information to which he is entitled, and that this was explained to him at the time of processing his access request. In this regard, the OHRC states:

[The appellant] described this record as containing the summary of everything done during the investigation and the decision of the Commissioners. It was explained to him that the investigation is carried out by the staff of the Commission (not the Commissioners), that the Commissioners do not prepare reports, that the summary of investigation findings is prepared by the investigator and disclosed to the parties for comments prior to submitting the case to the Commissioners for a decision ... that such summary had already been provided to him ... he applied for reconsideration, that the reconsideration report was also disclosed to the parties for comments prior to submitting his application to the Commission for its reconsideration ... It was also explained to him that the only "final report" in chronological terms would be the reconsideration report. This had been disclosed to him ...

In his affidavit, the Co-ordinator describes the OHRC's procedures in processing a complaint brought under the Code. He indicates that in accordance with this procedure, all materials received and all information collected or produced in the course of case processing would be filed and contained only in the Investigation File opened to deal with the complaint. He described the steps take to search for and retrieve the file relating to the appellant's complaint.

The Co-ordinator refers to above-noted conversations he had with the appellant regarding the "final Commissioner's report", and indicates that based on his review of the Investigation File, the procedures Manual of the OHRC, and his experience as a human rights officer, the only records which could be considered as the "final report" would be the Officer's Case Analysis or the Reconsideration Report, both of which were disclosed to the appellant.

Having considered the representations of the parties, and the affidavit provided by the OHRC, I am satisfied that the OHRC's search for responsive records was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the OHRC's decision to withhold from disclosure the information in Records 1 - 7, 9 - 11 and 13 - 16, and the portions of Records 8 and 12 which are highlighted on the copies of these records which are sent to the OHRC's Freedom of Information and Privacy Co-ordinator with a copy of the order.
2. I order the OHRC to disclose the portions of Records 8 and 12 which are not highlighted to the appellant by sending him a copy of the severed records on or before **August 20, 1996**.
3. The OHRC's search for responsive records was reasonable and this portion of the appeal is dismissed.
4. In order to verify compliance with the provisions of this order, I reserve the right to require the OHRC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ July 31, 1996