



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

ORDER P-1288

Appeal P-9600271

Ministry of Health



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NATURE OF THE APPEAL:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records relating to a Workplace Discrimination and Harassment Prevention (WDHP) investigation. The requester was one of the respondents to the complaint which gave rise to the investigation. The Ministry located 76 responsive records and, pursuant to section 28 of the Act, contacted several individuals whose interests may be affected by the disclosure of the records, seeking their views on the release of the information. One of the individuals consented to the disclosure of his personal information, another refused to consent, while a third individual did not respond. The Ministry was unable at this stage to contact the complainant in the original investigation.

The Ministry disclosed a number of the responsive records, in whole or in part. Access to the withheld information was denied based on the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- solicitor-client privilege - section 19
- invasion of privacy - sections 21 and 49(b)

The requester (now the appellant) appealed the Ministry's decision to deny access to the records. A Notice of Inquiry was provided by this office to the appellant, the Ministry, and to four other individuals whose rights may be affected by the disclosure of the records (the affected persons), including the original complainant in the WDHP investigation who was located and asked to make submissions. Representations were received from the Ministry, the appellant and two of the affected persons.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The Ministry submits that Record 70 is exempt from disclosure in its entirety under section 19. This record does not contain any of the personal information of the appellant. Section 19 consists of two branches, which provide the Ministry 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 order for a record to be subject to the common law solicitor-client privilege (Branch 1), the Ministry must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**
- (b) the communication must be of a confidential nature, **and**

- (c) the communication must be between a client (or his agent) and a legal advisor, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

- 2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

I have reviewed the submissions of the Ministry and Record 70 and find that it qualifies for exemption under section 19 as it represents a confidential written communication between a client and her legal advisor which is directly related to the giving of legal advice.

PERSONAL INFORMATION

Section 2(1) of the Act defines "personal information" to mean, in part, recorded information about an identifiable individual. I have reviewed the undisclosed records and parts of records and make the following findings:

- Records 38, 51, 61, 66, 67 and 69 contain only the personal information of one of the affected persons.
- The undisclosed portions of Records 2, 16, 18, 25, 68, 71 and 75, as well as Record 61 in its entirety, contain only the personal information of another affected person.
- Records 26 and 73 contain the personal information of two of the affected persons.
- The remaining records, or portions of records, contain the personal information of the appellant and one or more of the affected persons.

INVASION OF PRIVACY

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 49 sets out exceptions to this right.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the Ministry to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy. The appellants are not required to prove the contrary.

Where, however, the record only contains the personal information of other individuals, section 21(1) of the Act prohibits the Ministry from disclosing it except in the circumstances listed in sections 21(1)(a) through (f). Section 21(1)(f) permits disclosure if it “does not constitute an unjustified invasion of personal privacy.”

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the Ministry can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in section 21(3) apply, the Ministry must consider the factors listed in section 21(2), as well as all other relevant circumstances.

One of the affected persons consented to the disclosure of her own personal information which is contained in Records 38, 45, 50, 51, 54 and 59. As these records do not contain the personal information of any other individuals (other than the appellant), and no other mandatory exemptions apply to them, they should be disclosed to the appellant.

In addition, the undisclosed portions of Records 2, 16, 18, 25, 68, 71 and 75 contain only the name of the co-respondent to the complaint. As this information is well-known to the appellant, I find that its disclosure to him would not constitute an unjustified invasion of the personal privacy of the co-respondent.

The Ministry submits that the undisclosed information contained in those records which relate only to the affected persons (Records 26, 61, 66, 67, 69 and 73) falls within the presumptions in sections 21(3)(b), (d) and (g). In addition, the Ministry argues that the considerations listed in sections 21(2)(f), (g), (h) and (i) are relevant factors weighing against the disclosure of the information contained in these documents. The Ministry has not, however, explained how or why the presumptions or the section 21(2) factors apply to the records.

The appellant argues that he has a number of concerns about the manner in which the investigation was conducted; in particular, the partiality of the representatives of the employer in dealing with the complaint. He further submits that he should be entitled to receive the initiating complaint and grievance documents in order to determine the appropriateness of the investigation. Essentially, the appellant submits that the rules of natural justice require that he be given the right to face his accuser and know the case which has been made against him.

I have reviewed the records together with the representations of the parties and make the following findings:

1. The personal information pertaining only to the affected persons contained in Records 26, 61, 66, 67, 69 and 73 is highly sensitive (section 21(2)(f)), was provided in confidence to the WDHP investigator (section 21(2)(h)) and its disclosure may unfairly damage the reputation of these individuals (section 21(2)(i)). The presumptions in section 21(3) which are referred to by the Ministry do not apply. Section 21(4) has no application in the present circumstances and the appellant has not raised section 23. Accordingly, the disclosure of Records 26, 61, 66, 67, 69 and 73 would constitute an unjustified invasion of personal privacy and these records are exempt under section 21(1).

2. The remaining records contain the personal information of the appellant and one or more of the affected persons. Many past orders of the Commissioner's office have considered the application of sections 21(2)(f) and (h) of the Act in the context of personal information generated as a result of workplace and/or sexual harassment investigations (Orders P-656, P-738, P-782 and P-903). The general principle underlying the approach taken in past orders is to ensure that when, as in this appeal, the respondent in a harassment complaint seeks information, he is advised of the substance of the accusations and the identity of the complainant. In order to achieve this result, the respondent may require access to information which he has provided to the investigator, information provided by the complainant and information from other witnesses which is directly related to the complaint.

While the principles enunciated in past orders are valuable guidelines to determine the degree of disclosure of personal information in harassment cases, the circumstances of each case must be considered to ascertain if such disclosure would result in an unjustified invasion of the personal privacy of individuals other than the requester.

In this case, the appellant is aware of the identity of the complainant, the specifics of the complaint and the results of the harassment investigation. I find that sections 21(2)(f) and (h) are factors which weigh in favour of non-disclosure of the majority of the records which contain the personal information of both the appellant and the affected persons.

3. I have not been provided with any evidence to demonstrate that the information contained in the records is unlikely to be an accurate or reliable reflection of the information provided by the complainant or the other affected persons. I find, therefore, that section 21(2)(g) does not apply.
4. I am also not satisfied that disclosure of the information contained in these records would unfairly damage the reputation of the individuals referred to in the records, and therefore, section 21(2)(i) does not apply.
5. As noted above, the appellant has been provided with information which describes the nature of the complaint made specifically against him (as opposed to a complaint against another individual) the identity of the complainant and the results of the investigation.

He has not, however, been provided with a copy of the original complaint against him dated August 10, 1992 (Record 57) and a summary prepared by the complainant in February 1993 (Record 58). I find that these documents contain information which is directly related to the complaint and that their release is necessary to ensure an adequate degree of disclosure to the appellant as a respondent to a WDHP complaint. This is an unlisted factor under section 21(2) which weighs in favour of the disclosure of personal information.

6. Section 21(4) does not pertain to any of the information in the records. I also find that section 23 does not apply in the circumstances of this appeal.

7. Balancing the appellant's right of access against the affected persons' privacy interests, I find that the release of the undisclosed personal information contained in Records 1, 3, 4, 9, 10, 11, 12, 13, 28, 43, 60, 62, 63, 64, 65 and 76 would result in an unjustified invasion of their personal privacy. These records are, therefore, exempt under section 49(b).
8. Balancing the appellant's right to receive information which pertains directly to the complaints made against him, I find that the disclosure of Records 57 and 58 to the appellant would not result in an unjustified invasion of the personal privacy of the affected persons. These records should, accordingly, be released.

Because of the manner in which I have addressed the application of section 21(1) to the undisclosed information contained in Record 69, it is not necessary for me to determine whether this document is also exempt under section 13(1).

ORDER:

1. I uphold the Ministry's decision to deny access to Records 1, 3, 4, 9, 10, 11, 12, 13, 26, 28, 43, 60, 61, 62, 63, 64, 65, 66, 67, 69, 70, 73 and 76.
2. I order the Ministry to disclose to the appellant Records 2, 16, 18, 25, 38, 45, 50, 51, 54, 57, 58, 59, 68, 71 and 75 by providing him with a copy by **December 11, 1996** but not before **December 6, 1996**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

November 6, 1996