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

ORDER PO-1787

Appeal PA-990255-1

Ontario Human Rights Commission

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NATURE OF THE APPEAL:

The Ontario Human Rights Commission (the OHRC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to "the complete name, title, company name and address of the anonymous writer of the statement...". This request refers to the OHRC's "letter of December 10, 1997, furnishing me an anonymous and partially blacked-out statement from the respondent, who is conceivably a law professional."

The OHRC denied access to the identity of the "anonymous law professional" pursuant to sections 14(1)(a), (b) and (d) of the Act.

The requester (now the appellant) appealed this decision.

During mediation, it was clarified to the OHRC that the appellant was seeking access to the identity of the "anonymous human rights lawyer" who had made submission on behalf of Bi-Way in December of 1997. The appellant had filed a complaint against Bi-Way with the OHRC and believes that an anonymous human rights lawyer drafted the respondent's statement but didn't get involved in the investigation.

The OHRC contacted the lawyer representing Bi-Way in an attempt to obtain consent to disclosure but the lawyer declined. The Mediator also contacted the lawyer but the lawyer continued to decline to consent to disclosure.

The OHRC issued a supplementary decision to the appellant denying access to the name of the lawyer on the basis of section 21(2)(e) of the Act. The OHRC also provided written confirmation to the Mediator that it was only raising the application of section 21(2) with respect to this information.

A Notice of Inquiry was initially sent to the OHRC and the lawyer. Representations were received from both parties. This Notice was modified to reflect additional issues arising from the representations of the lawyer, and in particular the application of the discretionary exemptions at sections 14(1)(a), (b), (d) and (e), and sent to the appellant with the non-confidential representations of the OHRC. In reply, the appellant submitted a letter addressed to Commissioner Cavoukian. I have considered this letter as the appellant's representations in this appeal.

RECORDS:

The record at issue in this appeal is the name, title, firm name and address of the lawyer. Although the telephone number and fax number of this individual appear on the record, the appellant has not requested access to this information.

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 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.

Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official government capacity, and found that in some circumstances, information associated with a person in his or her professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" [See Orders P-257, P-427, P-1412, P-1621].

The Commissioner's orders dealing with non-government employees, professional or corporate officers treat the issue of "personal information" in much the same way as those dealing with government employees. The seminal order in this respect is Order 80. In that case, the institution had invoked section 21 to exempt from disclosure the names of officers of the Council on Mind Abuse (COMA) appearing on correspondence with the Ministry concerning COMA funding procedures. Former Commissioner Linden rejected the institution's submission:

> The institution submits that "...the name of the individual, where it is linked with another identifier, in this case the title of the individual and the organization of which that individual is either executive director or president, is personal information defined in section 2 of the FIO/PPA....All pieces of correspondence concern corporate, as opposed to personal, matters (i.e. funding procedures for COMA), as evidenced by the following: the letters from COMA to the institution are on official corporate letterhead and are signed by an individual in his capacity as corporate representative of COMA; and the letter of response from the institution is sent to an individual in his corporate capacity. In my view, the names of these officers should properly be categorized as "corporate information" rather than "personal information" under the circumstances.

[See also Orders P-113, P-118, P-300 and P-478]

The information at issue in this appeal is the name, title, firm name and address of the lawyer. The information appears in the context of this individual's professional capacity as a lawyer.

Both the OHRC and the lawyer have submitted representations in favour of finding that this information qualifies as personal information based on the motivations for the request and the potential outcome of disclosure. While the appellant's request for this information may raise concerns for the lawyer that are personal in nature, in my view, the lawyer's concerns about the possible outcome of disclosure do not change the essential character of the information from professional to personal. Accordingly, I find that the name, title, firm name and address of the lawyer do not qualify as personal information.

Discretionary Exemptions Relied On By The Lawyer

Sections 14(1)(a), (b), (d) and (e) are a discretionary exemptions and are not relied on by the OHRC for the name, title, firm name and address of the lawyer. In Order P-257, Assistant Commissioner Mitchinson was asked to consider whether an affected person ought to be entitled to rely on the application of a discretionary exemption which was not claimed by the institution. At Page 5 of that order, he held:

> 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. If, during the course of an appeal, a head indicated a change in position in favour of release of information not covered by sections 17(1) or 21(1), again, this would almost always be an acceptable course of action, consistent with the purposes of the Act. 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. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. 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. [my emphasis]

In Reconsideration Order R-980015 (Reconsideration of Order P-1538), Adjudicator Donald Hale considered the raising of the discretionary exemption at section 20 by an affected person. Section 20 is similar to section 14(1)(e) in that section 20 provides an exemption for records where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual. The affected person who initiated the reconsideration request submitted that the Commissioner's office has an inherent obligation to ensure that all persons potentially affected by an order of disclosure of information are made a party to the inquiry and are given the right to make submissions on disclosure. In considering the circumstances of that appeal Adjudicator Hale stated:

> The affected person goes on to submit that:

> The exemption under section 20 is one of those relatively rare instances where the person who is in the better position to make full and informed submissions is the affected party and not the head of the institution. Who is likely to have the most information and be better motivated to advance the arguments on danger to safety of an individual than the individual [his/her]self.
>
> In view of the obvious concerns expressed by the affected person and the great care taken in preparing his/her submissions, I feel that it is appropriate to consider them in the present circumstances.

In this appeal, the lawyer has expressed concerns about potential danger to his physical safety. He refers to documentation in the records as evidence of the appellant's aggressive and violent behaviour, and points out that the requested information would enable the appellant to contact him. In my view, the circumstances are similar to those considered by Adjudicator Hale in Reconsideration Order R-980015, and I find it is appropriate to consider the application of section 14(1)(e).

Health and Safety

Section 14(1)(e) of the Act requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the section 14 exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm by virtue of section 53 of the Act. (Order P-188)

The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the Act dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In Ontario (Minister of Labour), the Court of Appeal for Ontario drew a distinction between the requirements for establishing "health or safety" harms under sections 14(1)(e) and 20, and harms under other exemptions. The court stated (at p. 6):

> The expectation of harm must be reasonable, but it need not be probable. Section 14(1)(e) requires a determination of whether there is a reasonable basis for concluding that disclosure could be expected to endanger the life or physical safety of a person. In other

> words, the party resisting disclosure must demonstrate that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety . . . Where there is a reasonable basis for believing that a person's safety will be endangered by disclosing a record, the holder of that record properly invokes [section 14(1)(e)] to refuse disclosure.

In my view, despite this distinction, the party with the burden of proof under section 14(1)(e) still must provide "detailed and convincing evidence" of a reasonable expectation of harm to discharge its burden. This evidence must demonstrate that there is a reasonable basis for believing that endangerment will result from disclosure or, in other words, that the reasons for resisting disclosure are not frivolous or exaggerated. (Order PO-1747)

As indicated above, the lawyer submits that disclosure of the information at issue would enable the appellant to contact him. The OHRC and the lawyer submit that the records show that the appellant has in the past exhibited violent behaviour against those whom he perceives have not treated him fairly. Both the OHRC and the lawyer believe that the appellant views the lawyer as "the prime culprit" in the matter. The lawyer indicates that if the record was disclosed, he would be exposed to physical danger and may have to undertake security measures to protect himself.

In the circumstances, I am find that the OHRC and the lawyer have demonstrated that the reasons for resisting disclosure is not a frivolous or exaggerated expectation of endangerment to safety. I am satisfied that there is a reasonable basis for believing that disclosure could be expected to endanger the lawyer's personal safety, and I find that section 14(1)(e) applies.

ORDER:

1. I do not uphold the application of section 21 to the record.

2. I find that the record at issue qualifies for exemption under section 14(1)(e) of the Act.

3. I order the OHRC to exercise its discretion under section 14(1)(e) of the Act in light of the factual circumstances outlined in these reasons and any other relevant considerations, and to inform the appellant and the lawyer in writing by **June 1, 2000** of its decision respecting disclosure of the record.

4. I order the OHRC to provide me with a copy of its decision by **June 8, 2000.**

Original signed by: May 18, 2000
Holly Big Canoe
Adjudicator