



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2202

Appeal PA-020324-1

Ontario Human Rights Commission



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NATURE OF THE APPEAL:

The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Ontario Human Rights Commission (the OHRC) for access to records contained in his OHRC complaint file.

The OHRC responded as follows:

You requested access to all records contained in the investigation files relating to your human rights complaint . . .

I have identified the responsive records . . . These records fall into three general categories:

1. Records submitted to the Commission by you and/or your counsel.
2. Records submitted to the Commission by the respondents during the course of case processing.
3. Records generated internally by Commission staff.

I am pleased to provide you with copies of all of the records in the first category.

I am also providing you with copies of records under category 2, that relate exclusively to you, including records which were already released to you during the case processing of the complaint.

With respect to the third category, I am releasing copies of all records that were already disclosed to you during case processing. However, I am withholding records that contain staff advice that are exempt under section 13 of the *Act* and those relating to law enforcement pursuant to sections 14(1) and (2) of the *Act* . . .

The OHRC included an index of records with its decision letter to the appellant.

The appellant then appealed the OHRC's decision to this office.

During the mediation stage of the appeal, the OHRC wrote to the requester with a revised decision, indicating that it was disclosing additional records. The revised decision letter also included a revised index of records.

Mediation was not successful in resolving all of the issues in the appeal, so the matter was streamed to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the issues in the appeal to the OHRC, which submitted representations in response. I then sent the Notice, together with a copy of the OHRC's representations, to the appellant, who submitted representations in response. The appellant's representations do not address the issues under the *Act* as described in the Notice. Rather, they

explain the nature of his concerns surrounding his complaint to the OHRC and other related matters.

RECORDS:

The eight records at issue in this appeal are described in the following table.

Record	Description	Exemption claimed
2	Systems and ADP Cross Reference form	Sections 49(a)/13
3	Database Case Opening/ESI Information form	Sections 49(a)/13
6	Investigation Plan form	Sections 49(a)/13 Sections 49(a)/14(2)(a)
9	Case Disposition – Jurisdictional Closings form	Sections 49(a)/13
10	Case Management Unit File Tracking form	Sections 49(a)/13
11	Officer's/Supervisor's Response to Parties' Submissions (Disclosure) form	Sections 49(a)/13 Sections 49(a)/14(2)(a)
13	Office of Reconsideration form	Sections 49(a)/13
14	Letter from the OHRC to a legal clinic	Sections 49(a)/13 (released in part)

DISCUSSION:

PERSONAL INFORMATION

The first issue for me to decide is whether the records contain personal information and, if so, to whom it relates. Under section 2(1) of the *Act*, the term “personal information” is defined, in part, to mean recorded information about an identifiable individual.

The OHRC submits:

Record 2 contains a reference to the nature of the appellant's handicap, as defined under the [*Human Rights Code* (the *Code*)] and the file number of the complaint. Thus this information qualifies as the appellant's “personal information” under sub-sections 2(1)(b) and (c) of the *Act*.

Record 3 contains a reference to the appellant's name, file number, address, telephone number, work type, and the ground (handicap) under which he is filing his human rights complaint. This information qualifies as the appellant's “personal information” under sub-sections 2(1)(b), (c), (d) and (h) of the *Act*.

Record 6 contains a reference to the appellant's name, file number, the ground (handicap) that is being cited in his human rights complaint and the type of

handicap that is being claimed. This information qualifies as the appellant's "personal information" under sub-sections 2(1)(b), (c) and (h) of the *Act*.

Record 9 contains a reference to the appellant's file number and thus qualifies as his "personal information" under sub-section 2(1)(c) of the *Act*.

Record 10 contains a reference to the appellant's name, file number and the fact that he is filing a human rights complaint under the ground of handicap. This information qualifies as the appellant's "personal information" under sub-sections 2(1)(b), (c) and (h) of the *Act*.

Records 11 and 13 contain a reference to the appellant's name and file number. This information qualifies as the appellant's "personal information" under sub-sections 2(1)(c) and (h) of the *Act*.

The severed portion of Record 14 contains a reference to an opinion expressed by another individual about the appellant and this qualifies as the appellant's personal information under sub-section 2(1)(g) of the *Act*.

I agree with the OHRC that all of the records at issue contain personal information of the appellant as that term is defined in section 2(1), including his name, address, telephone number and OHRC file number, in addition to detailed information about his human rights complaint.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/ADVICE OR RECOMMENDATIONS

Introduction

Section 47(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exceptions to this general right of access.

Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, 13, 14, 14(1), 14(2), 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information. In this case, the OHRC has cited section 13.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-1894, PO-1993].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders P-1037, P-1631, PO-2028]

Representations

The OHRC submits:

[The records] all contain references to advice made by Commission staff with respect to the disposition of the appellant’s complaint.

During the course of processing a human rights complaint, [OHRC] staff are required to make certain recommendations to the Commissioners of the [OHRC], regarding the disposition of the cases assigned to them. The Records at issue contain staff recommendations regarding the disposition of the complaints at various stages of the [OHRC’s] process.

Section 34(1) of the *Code* provides the Commissioners with the discretion, in limited circumstances, to decide to “not deal with” a complaint. A section 34(1) “not deal with” decision may be recommended through the initiation of [OHRC] staff. As part of a staff initiated section 34(1) recommendation, [OHRC] staff will review the complaint file and make a recommendation to the Commissioners that the complaint should “not be dealt with” pursuant to section 34(1) of the *Code*.

Once the Commissioners have decided to “not deal with” a complaint under section 34(1) of the *Code*, the complainant can file an appeal of this decision with the [OHRC’s] Reconsideration department. Upon completion of a reconsideration analysis, Reconsideration staff are required to make a recommendation to the Commissioners as to whether the Commissioners should “uphold” or “reverse” their original decision.

The OHRC goes on to specify the advice given in each of the records at issue. The OHRC states:

In Records 2, 3, 6, 9, 10, 11 and 13, Commission staff made recommendations to the Commissioners regarding the disposition of the appellant's complaint.

In the case of Record 14, the advice of the Regional Manager to one of her staff members was intended to assist her in deciding how the appellant's complaint should be processed by the Regional Office.

The OHRC explains that disclosure of the advice could reasonably be expected to inhibit the free flow of advice or recommendation to the government, because

. . . [OHRC] staff would not feel free and open to express their minds in writing on specific issues if they were aware that their advice or recommendations were subject to possible public scrutiny . . . [T]he Commissioners of the [OHRC] must have the benefit of staff advice which is candid, direct and to the point.

Finally, the OHRC submits that Order P-363 is applicable in these circumstances:

In Order P-363, Assistant Commissioner Tom Mitchinson found that portions of an OHRC case disposition form were exempt [from] disclosure under sections 13(1) and 49(a) of the *Act* since they would reveal the advice of a public servant. The [OHRC] contents that similarly, the Records at issue in this appeal are exempt from disclosure under sections 13(1) and 49(a) of the *Act*, since they also contain the advice of a public servant.

Findings

I agree with the OHRC that in Order P-363, this office found that a record indicating OHRC staff advice to Commissioners as to how a specific case should be disposed of (in that case, whether or not it should refer a complaint to a Board of Inquiry (now the Human Rights Tribunal of Ontario)), was exempt, to the extent that it revealed the suggested course of action. I agree with the approach taken in Order P-363 (which was upheld in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)). Accordingly, I find that any information in the records that reveals how the OHRC Commissioners should dispose of the appellant's case is exempt under section 49(a)/13. However, as in Order P-363, once this information is removed, the remaining information, which consists mainly of administrative matters such as dates on which certain steps were taken, and whether relevant documents are attached, does not qualify as "advice or recommendations" and is therefore not exempt under section 49(a)/13.

In the circumstances, most of the records do not contain any information that qualifies for exemption under section 49(a)/13, for the reasons explained below.

Record 2 does not reveal any suggested course of action as to how the appellant's complaint should be dealt with; it merely indicates that the appellant's complaint is being forwarded to the

Commissioners for consideration and a decision under the section 34 “deal with or not deal with” process.

Record 3 is an intake form that records various administrative steps in the process and personal information about the appellant and his complaint. It reveals no suggested course of action.

Record 6, an investigation plan form, also neither contains nor reveals any information that could be considered advice as to a suggested course of action. While it contains brief notes regarding potential grounds for dismissal under section 34 of the *Code*, it suggests that staff must investigate further before any conclusion or recommendation can be reached as to how the Commissioners should proceed under section 34.

Record 9, a case disposition form, reveals a suggested course of action from staff as to whether the Commissioner’s should deal with or not deal with the complaint. In the circumstances, this record is not reasonably severable and, therefore, it is exempt under section 49(a)/13 in its entirety.

Record 10, a case management unit file tracking form, contains advice as to whether to deal or not deal with the complaint. This portion is exempt, while the remaining portions are not.

Record 11, an “officer’s/supervisor’s response to the parties’ submissions (disclosure)” form, neither contains nor reveals any suggested course of action and is therefore not exempt under section 49(a)/13.

One portion of Record 13 reveals a suggested course of action under section 34 of the *Code*; therefore, this portion qualifies for exemption.

Finally, the withheld portions of Record 14 consist of the handwritten advice of an OHRC Regional Manager to one of her staff members, for the purpose of assisting the staff member in deciding how she should process the appellant’s complaint. In Order P-363, Assistant Commissioner Mitchinson dealt with very similar information as follows:

Record 5 consists of a July 18, 1990 memo from the investigating human rights officer to her supervisor, together with the supervisor's reply, dated August 14, 1980. The July 18, 1980 memo simply seeks direction regarding how the investigation should be handled which, in my view, places it outside the ambit of section 13(1). As for the August 14, 1980 response, it just outlines the supervisor’s direction on how the investigation should proceed. It does not contain any information that can properly be characterized as “advice or recommendations” as these words are used in section 13(1). The supervisor does not set out a suggested course of action which may be either accepted or rejected in the deliberative process; he simply provides direction to the officer under the terms of the Commission’s governing legislation. In my view, the August 14, 1980 response also does not qualify for exemption under section 13(1).

I agree with the Assistant Commissioner's approach. Given that the withheld notes in Record 14 in this case are similar in nature to the "supervisor's response" portion of Record 5 in the earlier case, I find that the withheld portions of Record 14 are not exempt under section 49(a)/13 of the *Act*.

To conclude, I find that all of Record 9, and portions of Records 10 and 13, qualify for exemption under section 49(a) in conjunction with section 13 of the *Act*. The remaining records or portions of records are not exempt under section 49(a)/13.

If the information falls within the scope of section 49(a), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy. I will address the OHRC's exercise of discretion under section 49(a) below.

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/LAW ENFORCEMENT

Introduction

The OHRC relies on section 14, the law enforcement exemption, in conjunction with section 49(a), to withhold Records 6 and 11. In particular, the OHRC relies on section 14(2)(a), which reads:

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;

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

The OHRC submits:

. . . Both Records 6 and 11 are reports that were prepared by [OHRC] staff during the case processing of the complaint.

Record 6 is an Investigation Plan. Investigation Plans are formal documents which are prepared by [OHRC] staff after they have been assigned to a particular

complaint. The Investigation Plan reviews the positions of the parties and the information already in the file and based upon a collation and consideration of this information, reports on what issues are in dispute in the complaint; what evidence is already in the file; what further evidence will be required and where it will be obtained.

In Record 6, Commission staff collated and considered the information in the file with respect to the issue of applying a section 34(1) analysis to the complaint. The [OHRC] staff then outlined issues that would have to be investigated in a section 34(1) analysis; reported on what information with respect to the section 34(1) issue was already in the file; reported on what further evidence would be required and indicated where [OHRC] staff would attempt to obtain it.

Record 11 is a document entitled Officer's/Supervisor's Response to the Parties' Submissions (Disclosure). This is another formal document that is prepared by [OHRC] staff after the Case Analysis Report has been disclosed to the parties and the parties have been given an opportunity to make submissions to the Case Analysis Report. In Record 11, the [OHRC's] Regional Manager reviewed the Case Analysis Report and the Appellant's submissions to the Case Analysis Report and then after a collation and consideration of this information, reported on her response to the submissions and in particular whether the submissions raised any information that had not already been canvassed in the Case Analysis Report.

The OHRC also submits that it has the function of enforcing and regulating compliance with a law, namely the *Code*.

I agree with the OHRC that in investigating matters under the *Code*, the OHRC is engaging in "law enforcement" as that term is used in section 14 (see Orders P-324, P-1341).

However, in my view, neither Record 6 nor Record 11 qualifies as a "report". Regarding Record 6, in Orders P-1239 and P-1241, this office found that similar OHRC "investigation plans" were not exempt under section 14(2)(a) for the following reasons:

Record 3 is an Investigation Plan prepared by the [Human Rights] 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) . . .

[Order P-1239]

As indicated, pages 15-16 are an "Investigation Plan". The OHRC submits that they constitute a "report" in that they collate the positions of both parties, identify the issues in the case, the facts or information relevant to each issue and possible sources of evidence.

However, these pages contain no formal statement or account of the results of the collation and consideration of information in that the information has yet to be collected. As the form itself indicates, it sets out the issues "to be answered by the investigation", the facts "to be proven" to answer each issue and the evidence "to be obtained to prove each fact". It is an outline of the manner in which the investigation of the complaint is to be conducted. As pages 15-16 do not constitute a "report", I find they do not qualify for exemption under section 14(2)(a) of the *Act*.

[Order P-1341]

I agree with the approach taken in these orders.

Record 6 is similar to the investigation plans in these earlier cases, in that it contains a summary of the appellant's position, identifies relevant facts and issues, and includes possible sources of evidence. As well, this record indicates that issues are to be determined and that additional facts are to be collected. On this basis, I conclude that Record 6 is not "a formal statement or account of the results of the collation and consideration of information" and therefore it does not qualify for exemption under section 49(a) in conjunction with section 14(2)(a).

Record 11 is a one-page form that indicates the names of the parties, the name of the OHRC investigating officer, the case number and a comment from an OHRC Regional Manager regarding the timeliness of the appellant's submission and an additional comment. In my view, this record clearly on its face does not constitute "a formal statement or account of the results of the collation and consideration of information". Accordingly, I find that Record 11 does not qualify for exemption under section 49(a) in conjunction with section 14(2)(a).

To conclude, neither Record 6 nor Record 11 qualifies for exemption under section 49(a) in conjunction with section 14(2)(a) of the *Act*.

EXERCISE OF DISCRETION

Regarding its exercise of discretion under section 49(a), the OHRC submits:

[The OHRC] maintains that its exercise of discretion has been made in full appreciation of the facts of the case, and upon proper application of the principles of law. [The OHRC] further maintains that the decisions to apply the above discretionary exemptions were governed by the principles that information should

be available to the public; that individuals should have access to their own personal information; that exemptions to access should be limited and specific; and that the Institution has considered the individual circumstances of the request.

The OHRC's statement regarding its exercise of discretion adequately sets out general discretion principles, but is lacking in specific details regarding the circumstances of this case. However, in light of the OHRC's representations as a whole, I am prepared to accept that the OHRC did in fact consider the particular circumstances of this case in deciding to rely on the 49(a) exemption.

Accordingly, I uphold the OHRC's exercise of discretion under section 49(a).

ORDER:

1. I order the OHRC to disclose to the appellant all of Records 2, 3, 6, 11 and 14 no later than **November 21, 2003**.
2. I order the OHRC to disclose to the appellant portions of Records 10 and 13 in accordance with the highlighted copies of those records included with the OHRC's copy of this order, no later than **November 21, 2003**. To be clear, the OHRC should *not* disclose the highlighted portions.

Original signed by: _____
David Goodis
Senior Adjudicator

_____ October 30, 2003