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

ORDER PO-2331

Appeal PA-030179-1

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 all information supplied by all parties," including reports from the requester's family doctor, pertaining to a specified Human Rights complaint file in which the requester is the complainant.

The OHRC issued a decision letter to the requester, denying access to the records in their entirety, relying on sections 14(1)(a) and (b) of the *Act*.

The requester (now the appellant) appealed the OHRC's decision to deny access.

During mediation, the OHRC issued a new decision letter to the appellant granting partial access to the records. As it appeared that some of the records at issue could contain the personal information of both the appellant and other individuals, the mediator raised the possible application of the discretionary exemptions at sections 49(a) and (b) of the *Act*.

Mediation did not resolve the appeal and the file was transferred to adjudication.

This office initially sought and received representations from the OHRC. In its first submissions, the OHRC indicated that it was claiming the exemption at section 49(a) in conjunction with section 13(1) for certain portions of Records 6 and 15. The OHRC also agreed to disclose additional records.

This office then sought supplemental representations from the OHRC regarding the additional exemptions. The OHRC provided further representations. The OHRC also issued a further decision letter to the appellant advising him of the additional exemptions claimed and releasing records 6 and 15 (in part) and 1, 2, 10, 11, 13, and 14 (in full).

This office then sent a Notice of Inquiry along with a copy of the OHRC's representations to the appellant. The appellant did not provide representations.

RECORDS:

The records remaining at issue are: 3, 4, 5, 6 (in part), 7, 8, 9, 12, 15(in part), 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25.

The records include correspondence between the OHRC and the solicitors for the respondent in the appellant's human rights complaint, internal memoranda, a case disposition and chronology, telephone contacts, and an Investigation Plan by the investigating officer.

DISCUSSION:

PRELIMINARY ISSUE

LATE RAISING OF DISCRETIONARY EXEMPTIONS

The OHRC in its representations claimed the discretionary exemptions at section 49(a) in conjunction with section 13(1) for portions of Records 6 and 15. The mediator had raised the possible application of section 49(a), but the OHRC had not previously referred to section 13(1).

On June 10, 2003, this office provided the OHRC with a Confirmation of Appeal that provided the OHRC with 35 days from the date of the confirmation (July 15, 2003) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

The OHRC submits that the appellant has not been prejudiced by the late raising of the new discretionary exemptions because:

> the institution's original decision was to withhold the records under sections 14(1)(a) and (b) and 49(a) as the complaint was ongoing and was being investigated. However, the institution has since decided to disclose these records, subject to severances pursuant to the exemptions set out in sections 13(1) and 49(a) of the *Act*. Therefore, the late raising of the discretionary exemptions will

> have the effect of increasing the amount of information being disclosed to the appellant.

In the circumstances of this appeal, I am prepared to accept the OHRC's submissions on this point. The OHRC originally claimed that records 6 and 15 were fully exempt under sections 14(1)(a) and (b) of the *Act*. The appellant has now been granted partial access to these records. The appellant also has had an opportunity to make representations on the application of the new discretionary exemptions.

I find that the late raising of the discretionary exemptions has not prejudiced the appellant and I will proceed to consider section 49(a) in conjunction with section 13(1) for the portions of Records 6 and 15 still at issue.

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature,

> and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Analysis

The OHRC submitted that the records contain the appellant's personal information and that of other individuals. It states:

> **Records 1 – 9, 12, 15, 16, 18 – 23:** contain the personal information of the appellant, as defined in section 2(1) of the *Act*, since they refer to his name; his human rights complaint file number and the name of the corporate respondent which he cited in his human rights complaint.
>
> **Records 10, 11, 13, 14:** contain the personal information of the appellant, as defined in section 2(1) of the *Act*, since they refer to the appellant's name; home address and telephone number and to the fact that the appellant has moved.
>
> **Records 17, 24, and 25:** contain the personal information of the appellant, as defined in section 2(1) of the *Act*, since they refer to the appellant's name; human rights complaint number and the name of the corporate respondent which he cited in his human rights complaint. These records also contain the personal information of other individuals as defined by the *Act*.

> **Record 17:** contains the names of six third party witnesses, who are not named as personal respondents in the appellant's human rights complaint, and the reference to them in this record does not indicate whether they are being referred to their professional capacity as employees of the respondent corporation.
>
> **Records 24 and 25:** contain references to two of the named personal respondents in the appellant's human rights complaint in conjunction with references to their employment situations with the corporate respondent, which have changed since the date that the human rights complaint was filed. The references to the changed employment situations of these two individuals can be defined as their employment history and therefore qualifies as their personal information, under the provisions of section 2(1) of the *Act*.

I find that all of the records contain the personal information of the appellant as the records relate to his human rights complaint. The appellant's name, address, phone number and the particular details of his human rights complaint all qualify as personal information under section 2(1) of the *Act*.

Record 17 contains the names of six third party witnesses. I find that their names, in conjunction with other information on the record, qualify as their personal information under section 2(1) of the *Act*.

Records 17, 24 and 25 contain the names of the individual respondents to the appellant's human rights complaint. Previous decisions of this Office have held that information about an individual in his or her professional or employment capacity does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position (see Reconsideration Order R-980015 and Order PO-1663). However, where information about the individual involves an evaluation of his or her performance as an employee or an investigation into his or her conduct as an employee, then these references are considered to be the individual's personal information (see Orders P-721, P-939, P-1318 and PO-1772). Based on the particular facts of this case and the nature of the appellant's human rights complaint, I accept the OHRC's position that the names and other undisclosed information pertaining to the personal respondents qualifies as their personal information under section 2(1) of the *Act*.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/ADVICE OR RECOMMENDATIONS

General principles

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

Under section 49(a), an institution has the discretion to deny an individual access to their own personal information 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 relies on section 49(a) in conjunction with section 13(1) to deny access to portions of Records 6 and 15.

Section 13(1) states:

> 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 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-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Analysis

The OHRC submits:

> The institution states the specific advice contained in records 6 and 15 are recommendations, made by Commission staff to the Commissioners of the Ontario Human Rights Commission, (hereinafter the OHRC), on the disposition of the appellant's complaint.
>
> The institution also refers you to Order PO-2201 in which Senior Adjudicator David Goodis ruled on identical records to the records at issue in this appeal and found that:
>
> "any information in the records that reveals how the OHRC should dispose of the appellant's case is exempt under section 49(a)/13."
>
> …

> The recommended course of action in record 6 is a proposed decision under section 34 of the *Human Rights Code, 1990* (hereinafter the *Code*), and in record 15 the recommended course of action is a proposed decision under section 37 of the *Code*.
>
> …
>
> It is the institution's position that the disclosure of the advice or recommendation could reasonably be expected to inhibit the free flow of advice or recommendation to the government. This is for the reason that Commission staff are required to make recommendations regarding the dispositions of the complaints assigned to them, to the Commissioners of the OHRC. The Commissioners then review these staff recommendations when deciding upon the dispositions of the complaints. It is the institution's position that Commission staff would not feel free to make the recommendations required of them, if they were aware that these recommendations could be subject to possible public scrutiny and as a result, the Commissioners would not have the benefit of the recommendations of Commission staff, when deciding on the dispositions of the complaints.

In Order PO-2201, Senior Adjudicator David Goodis dealt with similar records to those at issue here. Senior Adjudicator Goodis agreed with the OHRC that a record which would reveal OHRC staff advice to the Commissioners on how a case should be disposed of was exempt to the extent that the information disclosed would reveal the suggested course of action. On the other hand, Senior Adjudicator Goodis also found that:

> ..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.

I agree with Senior Adjudicator Goodis' approach and will apply it here. Record 6 is a Case Disposition and Chronology and Record 15 is a proposed decision under section 37 of the *Code*. In this appeal, the OHRC has already disclosed the type of information on these records which could be described as administrative matters. I find that the information withheld, namely the actual recommended course of action, is exempt from disclosure under section 49(a) and 13(1) as advice or recommendations.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION / LAW ENFORCEMENT

General principles

As stated above, under section 49(a) the OHRC has the discretion to deny an individual access to their own personal information 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.

The OHRC relies on section 49(a) in conjunction with section 14(1)(a) and (b) to deny access to the remaining records, namely records 3, 4, 5, 7, 8, 9, 12, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25.

Sections 14(1)(a) and (b) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The term "law enforcement" is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

Where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

For section 14(1)(a) to apply the law enforcement matter in question must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

For section 14(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations [Order PO-2085].

Analysis

The OHRC submitted the following in support of its position that section 14(1)(a) applies to exempt the records from disclosure.

> It is the institution's position that the matter in question is a law enforcement matter and the institution refers the IPC to Order 89, in which Commissioner Linden found that an investigation into a human rights complaint conducted by the Human Rights Commission qualifies as a "law enforcement matter" within the meaning of subsection 14(1)(a) of the *Act*.
>
> It is the institution's position that the interference is with a specific, ongoing law enforcement matter. As stated above, the investigation of the appellant's complaint has been completed and the complaint is now in the first stage of the Commission's decision-making process. Again, should the Commissioners decide to not refer the subject matter of the complaint to the Human Rights Tribunal, the complainant has the right to ask the Commission for a reconsideration of its decision. The institution refers the IPC to Order 178, in which Assistant Commissioner Tom Wright found that:
>
> "until either a board of inquiry [now the human rights tribunal] has been appointed or the reconsideration process has been completed, it is not possible to categorically state that the institution's investigation has been completed."
>
> …the institution is of the opinion that the remaining records at issue are sufficiently linked to the actual investigation of the appellant's complaint and therefore do satisfy the requirement for exemption under sections 14(1)(a) and (b).

The OHRC submitted the following in support of its position that section 14(1)(b) applies.

> The institution refers the IPC to Order 89 in which Commissioner Linden found that:
>
> "the proceedings of a board of inquiry under the Code would be "law enforcement proceedings" within the meaning of subsection 14(1)(b) of the *Act*."

> The investigation in question was conducted by the Commission into the appellant's human rights complaint and it could result in the Commissioners referring the subject matter of the complaint to the Human Rights Tribunal (formerly the board of inquiry). As such, the investigation into the appellant's complaint is a "law enforcement" investigation for the purposes of subsection 14(1)(b) of the *Act*.

In order for a record to qualify for exemption under either section 14(1)(a) or (b), the matter to which the record relates must first satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act* (Order P-324). It has been previously established that OHRC investigations meet this definition (Order 89 and many subsequent orders) and I adopt this finding for the purposes of this order.

Furthermore, I find that proceedings before the Human Rights Tribunal are considered law enforcement proceedings within section 14(1)(b) and that until the Tribunal has rendered a decision or until the reconsideration process has been exhausted, the investigation is considered ongoing (Orders P- 178 and P-507).

Nevertheless, I am not persuaded that disclosure of a number of records could reasonably be expected to interfere with an OHRC investigation. Records 5, 7, 8, 9, 12, 16, 18 and 23 are all correspondence from the OHRC to the lawyer for the corporate respondent in the appellant's human rights complaint. All of these documents, which I would describe as "cover letters", refer to information that is general and administrative in nature. I am unable to see how disclosure of these records would interfere with the ongoing investigation. Moreover, the OHRC has not provided me with detailed and convincing evidence that such harm could occur if these records were disclosed. As a result, I find that sections 14(1)(a) or (b) do not apply to Records 5, 7, 8, 9, 12, 16 and 18 and these records do not qualify for exemption under section 49(a).

While Record 23 is also a cover letter, it contains a request by the OHRC investigation officer for specific information in the investigation of the appellant's complaint. I agree with the OHRC that disclosure of this information may interfere with the ongoing investigation under section 14(1)(b) and find it exempt under section 49(a). The rest of Record 23 refers to more general OHRC information and I find it not exempt under section 49(a) and 14(1)(b).

On the other hand, Records 3, 4, 17, 19, 20, 21, 22, 24 and 25 all contain specific information relating to the investigation of the appellant's human rights complaint. I agree with the OHRC that this information is "sufficiently linked to the actual investigation of the appellant's complaint" and as such qualifies for exemption under section 49(a) and 14(1)(b) of the *Act*.

EXERCISE OF DISCRETION

The section 49(a) exemption is discretionary and permits the OHRC to disclose information, despite the fact that it could be withheld. On appeal, this office may review the OHRC's

decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

In support of its position that it exercised its discretion in a proper manner, the OHRC submitted that:

> the institution considered the factors of the need of not allowing the premature disclosure of information to interfere with an ongoing investigation into a law enforcement matter and the need to maintain the ability of the institution's staff to make recommendations to the Commissioners of the Human Rights Commission as relevant to whether these records should be disclosed.

I am satisfied, based on the OHRC's representations and the circumstances of this appeal, that the OHRC properly exercised its discretion in refusing to disclose the remaining records under section 49(a).

ORDER:

1. I order the OHRC to disclose Records 5, 7, 8, 9, 12, 16, 18 in full and 23 in part by **November 4, 2004.** For greater certainty, I am providing the OHRC with a highlighted version of Record 23 with the order, identifying the portion that it must not disclose.

2. I uphold the OHRC's decision to deny access, in full, to Records 3, 4, 17, 19, 20, 21, 22, 24, 25, and in part to Records 6, 15 and 23.

3. In order to verify compliance with this order, I reserve the right to require the OHRC to provide me with a copy of the records that are disclosed to the appellant.

Original Signed By: October 13, 2004
Stephanie Haly
Adjudicator