



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2359

Appeal PA-040163-1

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*) from an individual who was subject to a complaint to the OHRC of alleged sexual harassment. The requester sought all statements provided to the OHRC by two witnesses (the affected persons) in relation to that complaint.

The OHRC identified two witness statements taken by an OHRC staff member (records 1 and 2) and one additional statement in the form of a letter (record 4) as being responsive to the request. Record 3 is not at issue in this appeal.

The OHRC notified the two individuals who provided statements (the affected persons) of the request. One of them gave the OHRC consent to disclose her witness statement (record 1) with any information severed that would reveal her identity. The other affected person consented to disclosure of the witness statement given to OHRC staff (record 2) with information severed that would reveal her identity, but did not consent to the OHRC releasing the statement that she had prepared in the form of a letter (record 4).

In its decision, the OHRC granted partial access to records 1 and 2, severing only a name and a description of a time period in one of them and severing more extensive identifying information in the other. The OHRC refused access to record 4 in its entirety.

As grounds for the severances to records 1 and 2 and the refusal to disclose record 4, the OHRC relied upon section 49(b) (discretion to refuse requester's own information), section 2(1) (definition of "personal information"), and section 21(3)(b) (investigation into a violation of law) of the *Act*.

The requester (now the appellant) appealed the decision of the OHRC.

During the course of mediation, the OHRC clarified that it is not relying on section 2(1) of the *Act* as an exemption from the disclosure requirement. The OHRC advised it is relying on section 49(b) in conjunction with sections 21(1)(f) and 21(3)(b) of the *Act* to deny access to the records.

The Mediator contacted the affected person who made the statement in letter form (record 4) to inquire whether this individual would consent to disclosure of the letter. The affected person did not consent to the release of this letter to the appellant.

As mediation did not resolve the issues, an inquiry was conducted. Initially, this office sent a Notice of Inquiry setting out the facts and issues in the appeal to the OHRC and the two affected persons, inviting them to provide representations. Representations were received from the OHRC and one of the affected persons. The second affected person did not respond.

I sent a copy of the Notice of Inquiry to the appellant along with the representations of the OHRC in their entirety, and invited him to provide representations. I withheld the representations of the affected person due to confidentiality concerns. The appellant submitted representations, which included a letter to this office together with several supporting documents.

DISCUSSION:

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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

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.)].

The records in question contain the views or opinions of the affected persons about the appellant and the appellant's name. They also contain information about statements allegedly made by the appellant in the presence of the affected persons. Records 1 and 2 also contain a number assigned to the complaint by the OHRC which is associated with the appellant's name. The three records refer to events that allegedly occurred in the context of a professional or business environment. However, where information about an individual involves an investigation into his or her conduct in an employment setting, this is information, which, if disclosed, would reveal something of a personal nature about the appellant. (Order PO-2331). Therefore, I find that the records contain the personal information of the appellant.

On my review of the records, I find that they also contain the names of the affected persons, the home telephone number of one of them, their sex, marital or family information, information about their education, their employment history, and their views and opinions other than those relating to another individual.

These records refer to events that occurred in an employment environment. However, previous orders of this office have held that information about individuals detailing their interactions with an individual under investigation found in witness statements in OHRC investigations contain personal information. (See orders PO-2201 and PO-2331). Therefore, I am satisfied that they contain information which, if disclosed, would reveal something of a personal nature about the affected persons. I find that record 1 contains the personal information of one of the affected persons and records 2 and 4 contain the personal information of the other affected person.

As the records contain the personal information of the appellant as well as of other individuals, I will consider whether they are exempt from disclosure under section 49(b).

RIGHT OF ACCESS TO ONE'S OWN PERSONAL INFORMATION/UNJUSTIFIED INVASION OF PERSONAL PRIVACY

General principles

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 exemptions from this right. Under section 49(b), where a record contains personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

If the information falls within the scope of section 49(b), 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.

Sections 21(1) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold under section 49(b) is met. Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. The list of factors under section 21(2) is not exhaustive. The institution must also consider any other factors that are relevant in the circumstances of the case, even if they are not listed under section 21(2) [Order P-99].

Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

The Ministry claims that the presumption in paragraph (b) of section 21(3) applies. Section 21(3)(b) states:

- (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
 - (b) 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;

Even if no proceedings were commenced against any individuals, section 21(3)(b) may still apply. The presumption only requires that there be an investigation into a possible violation of law [Order P-242]. Section 21(3)(b) does not apply if the records were created after the completion of an investigation into a possible violation of law [Orders M-734, M-841, M-1086]

The information in the three witness statements was compiled as part of an investigation by the OHRC into a possible violation of the *Ontario Human Rights Code* (the *Code*). OHRC investigations undertaken pursuant to the *Code* are law enforcement matters that fall within section 21(3)(b) (Orders PO-1858 and PO-2201). Therefore, the disclosure of the personal information to the appellant is presumed to be an unjustified invasion of the privacy of the affected persons except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

In his representations, the appellant relies on this exception. He alleges that disclosure of the information in the records is necessary because “legal proceedings have been commenced by me against these two witnesses at the College of Veterinarians of Ontario so disclosure is necessary to prosecute the violations.”

In my view, in this case, the phrase “except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation” refers to the investigation and possible prosecution for which the OHRC compiled the information, that is, the OHRC investigation into a possible violation of the *Code*. It does not refer to the proceedings instituted by the appellant at the College of Veterinarians of Ontario.

I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law and does not fall within the exception in section 21(3)(b). Therefore, disclosure of it would be presumed to be an unjustified invasion of the personal privacy of the affected persons, unless the information at issue is caught by section 21(4) or if the “compelling public interest” override at section 23 applies.

I find that section 21(4) does not apply. The appellant has not claimed that section 23 (the public interest override) applies in this case, and in my view, it would not apply in any event.

If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239]. The Ministry claims that section 21(2)(f) applies as a factor favouring privacy protection.

In this case, I have found that the presumed unjustified invasion of privacy at section 21(3)(b) applies, and it has not been rebutted by section 21(4) or 23. Therefore, section 21(2)(f) need not be considered.

I find, therefore, that disclosure of the withheld information in the records at issue would constitute an unjustified invasion of the personal privacy of the affected parties and the records are therefore subject to the discretionary exemption.

EXERCISE OF DISCRETION

The section 49 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

In its representations, the OHRC described how it exercised its discretion:

In exercising its discretion under section 49, the Institution considered the factors that information should be available to the public; that individuals should have access to their own personal information; that exemptions from the right of access should be limited and specific and that the privacy of individuals should be protected.

As a result, the Institution exercised its discretion by granting the appellant access to the witness statements in records 1 and 2 and only severed any personal identifiers that could reveal the identities of the witnesses. In this way, access was granted to the appellant and the privacy of the witnesses was protected.

With respect to its decision to withhold record number 4 in its entirety, the Institution exercised its discretion under section 49 in order to protect the privacy of the individual who submitted this letter to the OHRC. This is for the reason that the appellant is aware of the identity of the individual who submitted the letter to

the OHRC and as a result, the disclosure of this record would constitute an unjustified invasion of this individual's personal privacy.

As the appellant has asked that his representations not be shared with the affected persons, I do not refer here to his submissions as to why the OHRC's exercise of discretion is improper. However, his submissions are not supported by the evidence and I find that they have no merit. Therefore, I find no error in the OHRC's exercise of discretion.

ORDER:

1. I uphold the decision of the OHRC to deny access to the portions of the records remaining at issue in this appeal.

Original signed by: _____
John Swaigen
Adjudicator

January 6, 2005