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

ORDER PO-2480

Appeal PA-050127-1

Ontario Human Rights Commission

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NATURE OF THE APPEAL:

The Ontario Human Rights Commission (the Commission) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to monetary settlements concerning any complaints filed against a named individual (the affected person) and a named native cultural centre (the Centre). The affected person was the executive director of the Centre.

By way of background, the requester is seeking access to information relating to the alleged misuse of the Centre's financial resources to pay settlements in sexual harassment cases involving several former female staff, the affected person and the Centre.

The Commission issued a decision refusing to confirm or deny the existence of responsive records pursuant to section 21(5) of the *Act*.

The requester (now the appellant) appealed this decision.

Attempts at mediation were unsuccessful and the file was moved to the adjudication stage of the appeal process for an inquiry.

I commenced my inquiry by sending a Notice of Inquiry to the Commission, inviting its representations. The Commission submitted representations in response.

I then sent a Notice of Inquiry and a summary of the Commission's representations to the appellant. The appellant submitted representations in response and raised for the first time the possible application of the section 23 "public interest override".

I invited the Commission to reply to the appellant's representations. The Commission submitted reply representations.

I shared the Commission's reply representations with the appellant and invited the appellant to respond to them. The appellant declined to do so.

I note that in the Commission's representations it states that it does not have custody or control of any cheques or copies of any cheques, other than one that the appellant has already gained access to, in regard to the settlement of any human rights complaints. Given that the Commission consented to the disclosure of its representations, including the above part, I find that the Commission has in effect waived its reliance on section 21(5) with regard to the existence or non-existence of cheques or copies of cheques with respect to the settlement of human rights complaints involving the affected person and the Centre. Pursuant to the Commissioner's consent, this passage was in fact disclosed to the appellant. I will therefore restrict my inquiry to the application of section 21(5) to the existence or non-existence of any other records responsive to the appellant's request.

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF A RECORD

Section 21(5) gives the Commission discretion to refuse to confirm or deny the existence of a record in certain circumstances. It states:

> A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 21(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 21(5), the Commission is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases [Order P-339].

Before the Commission may exercise its discretion to invoke section 21(5), it must provide sufficient evidence to establish both of the following requirements:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

The Ontario Court of Appeal has upheld this approach to the interpretation of section 21(5), stating:

> The Commissioner's reading of s. 21(5) requires that in order to exercise his discretion to refuse to confirm or deny the report's existence the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy.
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> [Orders PO-1809, PO-1810, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813 (C.A.), leave to appeal dismissed (May 19, 2005), S.C.C. 30802]

Part one: disclosure of the record (if it exists)

Definition of personal information

Under part one of the section 21(5) test, the institution must demonstrate that disclosure of the record, if it exists, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. 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].

The Commission states in its representations that, if they existed, records responsive to the appellant's request would be comprised of "case status sheets" for complaints filed with the Commission. The Commission submits that, in the event they exist, such records would contain the personal information of individuals who filed complaints, including their names, sex, file numbers assigned to their complaints, names of their employers, grounds of complaint, disposition of complaints and, in some cases, their addresses and home phone numbers.

The appellant does not offer representations on this issue.

If records responsive to the appellant's request exist, I am satisfied that they would contain information about identifiable individuals, including the names, sex and file numbers of individuals who filed human rights complaints, the names of their employers and the grounds and dispositions of their complaints. In my view, information of this nature, if it exists, qualifies as personal information.

Unjustified invasion of personal privacy

The factors and presumptions in sections 21(2), (3) and (4) help in determining whether disclosure would or would not be "an unjustified invasion of privacy" under section 21(5). Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) lists some criteria for the Commission to consider in making this determination; and section 21(3) identifies certain types of information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, 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 "public interest override" at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

The Commission takes the position that disclosing any responsive information, if it exists, would constitute a presumed unjustified invasion of privacy under section 21(3)(b) and, in some cases, under section 21(3)(d). These sections provide:

> 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;

(d) relates to employment or educational history;

With regard to the application of the presumption in section 21(3)(b), the Commission states that all records, if they exist, would be compiled by the Commission as part of an investigation into a possible violation of the *Ontario Human Rights Code, 1990* (the *Code*). In support of its position, the Commission relies on the conclusions reached in Order PO-2419.

With regard to the presumption in section 21(3)(d), the Commission states that some of the records, if they exist, would contain the names of the complainants' employers.

The appellant does not provide representations that address the application of the presumptions in sections 21(3)(b) and (d).

In Order PO-2419 I found that the section 21(3)(b) presumption applies to information that was compiled and is identifiable as part of an investigation into a possible violation of the discrimination provisions of the *Code*. My finding is consistent with previous decisions of this office in similar circumstances (see Orders P-363, P-449, P-507, P-510, P-1167, PO-1858 and PO-2201).

Accordingly, turning to the circumstances in this case, I am satisfied that any records, if they exist, would have been compiled by the Commission during the course of its investigation into a violation of law under the *Code* and, therefore, subject to the presumption under section 21(3)(b). This presumption cannot be overcome by one or any combination of listed or unlisted factors under section 21(2) of the *Act*. Having found that the section 21(3)(b) presumption applies, I do not need to consider the application of the section 21(3)(d) presumption.

In the circumstances of this appeal, I find that the section 21(3)(b) presumption is not rebutted by section 21(4). The exception to the exemption at section 21(1)(f) therefore does not apply. Accordingly, the disclosure of any information responsive to the appellant's request, if it exists, would constitute an unjustified invasion of personal privacy. The appellant has however raised the application of the section 23 "public interest override". Therefore, I must determine whether the presumption at section 21(3)(b) can be overcome by a compelling public interest that outweighs the purpose of the exemption at section 21(1).

Public interest override

As stated above, the appellant has raised the application of the section 23 "public interest override" as a basis for requiring disclosure of records responsive to his request, if they exist, even if disclosure is found to constitute an unjustified invasion of personal privacy pursuant to section 21(1).

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)]. In Order P-1398, Senior Adjudicator John Higgins made the following statements regarding the application of section 23:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

The appellant states in his representations that his goals are twofold: firstly, to remove the affected person from his position as executive director of the Centre and, secondly, to assist the Centre in returning to its "original [community] objectives". The appellant states that the Centre had misused money to pay a $3,000 settlement to an alleged victim of a sexual harassment claim involving the affected person and he suggests that other funds may also have been misused for

the same purpose. The appellant states that his first goal has been achieved - the executive director has been removed. The appellant indicates that a "full forensic audit" of the Centre's activities is now being sought by a named municipal institution. The appellant seeks the information requested in this appeal in order to further the Centre's quest to determine whether additional funds were inappropriately used to pay settlements in other human rights cases involving the affected person and the Centre.

The Commission submits in response that the appellant's interest in obtaining access to information with respect to the fiscal activities of the Centre "may qualify as a compelling public interest." However, the Commission submits that any public interest in such information "does not clearly outweigh the purpose of the exemption, namely protecting the personal privacy rights of individuals who may have filed human rights complaints against the Centre."

Having carefully considered the parties' representations, I am not convinced – despite the Commission's apparent admission that a public interest may exist – that there is a compelling public interest in the disclosure of information responsive to the appellant's request, if it exists. In my view, the appellant's motives for obtaining this information appear to be private in nature, as evidenced by his desire to remove the former executive director of the Centre and to restore the Centre to its community mandate. While the appellant's objectives appear sincere and may garner some public interest, I am not satisfied that the interest in the requested information, if it exists, serves the purpose of informing the citizenry about the activities of their government. In addition, the appellant has suggested that a full forensic audit of the Centre's activities is now being sought by a municipal institution. This raises the clear possibility that information of the nature the appellant is seeking may be available through another public forum. This office has found that a compelling public interest does not exist where another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539].

Finally, even if I were to find that a public interest does exist in the circumstances of this case, I agree with the Commission that any public interest in such information does not clearly outweigh the purpose of the section 21(1) exemption. In my view, the appellant has not demonstrated that any public interest in making this information, if it exists, publicly available clearly outweighs the need to protect the personal privacy rights of individuals who may have filed human rights complaints against the Centre.

Accordingly, I find that disclosure of the records, if they existed, would be an unjustified invasion of personal privacy, meeting part 1 of the test under section 21(5).

Part two: disclosure of the fact that the record exists (or does not exist)

Under part two of the section 21(5) test, the Commission must demonstrate that disclosure of the fact that a record exists, or does not exist, would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

With regard to this part of the test under section 21(5), the Commission submits that disclosing whether or not records exist would in itself convey sensitive information to the appellant, with the nature of the information conveyed such that disclosure would constitute an unjustified invasion of personal privacy pursuant to section 21(1).

Again, the appellant's representations do not address this issue.

For the same reasons given above under part 1, I am satisfied that disclosing the existence or non-existence of the fact that information responsive to the appellant's request exists or does not exist would in itself convey information, such that disclosure would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b). Again, for the reasons given above, sections 21(4) and 23 do not apply, and therefore, I find that part two of the test has also been met.

Conclusion

As both parts of the test for the application of section 21(5) have been met, I find that the Commission properly exercised its discretion to refuse to confirm or deny the existence of responsive records, if they exist, and that section 21(5) applies in this case.

ORDER:

I uphold the Commission's decision.

Original Signed By: June 28, 2006
Bernard Morrow
Adjudicator