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

# ORDER PO-2572

## Appeal PA-060076-1

## Ontario Human Rights Commission

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

## NATURE OF THE APPEAL:

The Ontario Human Right Commission (the OHRC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records concerning the appellant and the OHRC. In particular, the request specified:

1. A complete copy of the document entitled, "Exceptions to the Equality Rights Provisions of the Ontario Human Rights Code, as they Relate to the Workplace", an excerpt from which is enclosed.

2. Any previous or more recent versions of the document, "Exceptions to the Equality Rights Provisions of the Ontario Human Rights Code, as they Relate to the Workplace".

3. A copy of any records including [OHRC] policies and correspondence (including emails) dealing with the interpretation of the or effect of section 24(1)(a) and 24(2) of the *Human Rights Code* and the predecessor sections, and the [OHRC's] interpretation or commentary on those sections.

4. A copy of any internal [OHRC] records including correspondence and e-mails, dealing with whether or to what extent religious organizations may refuse to hire only practising members of that religion as employees.

5. All records identifying or relating to [the corporate appellant], including, without restriction:

    a) All records relating to the human rights complaints of [named complainant # 1] and [named complainant # 2] and the investigation and hearing before the Ontario Board of Inquiry in relation to those complaints

    b) All records dated before January 22, 2001, the date of the human rights complaint of [named complainant # 3], and

    c) All records dated on or after January 22, 2001.

The OHRC provided a detailed decision letter that addressed each of the requester's points as follows:

**Points 1 and 2**

1) Please be advised that the copy of the document "Exceptions to Equality Rights Provisions of the Ontario Human Rights Code, as they relate to the Workplace" that you included with your access request is not an excerpt but rather a complete copy of the brochure.

2) Please be advised that the brochure "Exceptions to Equality Rights Provisions of the Ontario Human Rights Code, as they relate to the Workplace" has been

out of print for a least 14 years and the [OHRC] has not released any recent versions of the document.

1) Please consult the [OHRC's] website at www.ohrc.on.ca in order to view the [OHRC's] current policies and brochures, and in particular, please view the documents entitled "Policy on Creed and Religious Observances" and "Human Rights at Work".

**Points 3 and 4**

4) Please be advised that we located six (6) records that are responsive to your request in points 3 and 4. However, these records are exempt from disclosure under sections 13(1) [advice to government] and 14(1)(a) and (b) [law enforcement] and 19 [solicitor-client privilege] of the Freedom of Information and Protection of Privacy Act. 1990, (hereinafter the "*Act"*) and they are therefore being withheld.

**Point 5**

5) Please be advised that we conducted a search of our Record Centre and we have not been able to locate the human rights complaints of [named complainant # 1] or of [named complainant # 2].

6) Please be advised that we have located ten (10) Case Status Sheets in which [the appellant] is named as the corporate respondent. All of these inquires were close at the Intake Stage of the [OHRC's] process and no formal complaints were signed by the complainants. As a result, apart from the Case Status Sheets no other records were kept by the [OHRC] with respect to these inquires.

   Please also be advised that we are willing to disclose these case status sheets, but all the personal identifiers, such as the complaints names, sex file numbers addresses, telephone numbers, work types, prohibited grounds cited, and the location where the alleged discrimination occurred, will be severed from the records pursuant to 21(1)(a), 21(2)(f), and (h) and 21(3)(a), (b), (d) and (h) [invasion of privacy] of the *Act*.

7) Please be advised that we have located the following (7) closed human rights complaints in which [the appellant] is named as a corporate respondent.

   … [7 named complainants]

   Please be advised that the above seven files contain the following categories of records:

a) Records submitted by the complainant

b) Records submitted by the respondent

c) Records generated internally by [OHRC] staff during the course of case processing.

With respect to the first category, please be advised that we are releasing all the records that were already disclosed to the respondent during the course of case processing or that are not exempt from disclosure under the *Act*; however, we will be severing or withholding any records that contain the personal information of the complainants as this information is exempt from disclosure pursuant to subsections 21(1)(a), 21(2)(h), and 21(3)(a), (b), (d) and (h) of the *Act*.

With respect to the second category please be advised that we are releasing all the records in this category.

With respect to the third category, please be advised that we are releasing any records that were already disclosed to the respondent during the course of case processing or that are not exempt from disclosure under the *Act*; however, we are severing or withholding any records that contain staff advise pursuant to sub section 13(1) of the *Act:* we are withholding any records that are exempt under sections 14(1)(a) and (b) of the *Act*; and we are withholding any records that are covered by solicitor/client privilege under section 19 of the *Act*.

8) With respect to file JBAT-4M5GSU, complainant [named complainant # 3], the search was limited to the documents withheld from the [OHRC's] disclosure to [the appellant] under the Rules of Practice of the Human Rights Tribunal of Ontario. Those records are exempt from disclosure under sections 13(1), 14(1)(a)and (b), and 19 of the *Act*.

The appellant appealed that decision, and at the same time, sent further correspondence to the OHRC clarifying the documents that it was interested in pursuing.

The file was dealt with extensively during mediation and some issues were resolved and/or clarified. Mediation could not resolve all of the issues, however, and the file was transferred to adjudication. After the file was transferred to adjudication, further issues arose, which are included in the discussion of the results of mediation set out below.

**Results of mediation and post transfer to adjudication**

**Points 1 and 2**

The appellant did not believe the OHRC fully addressed points 1 and 2 of the request regarding "previous" or "more current versions" of the particular document asked for. To address this concern, the OHRC provided a follow-up letter that stated, "This is to confirm that the [OHRC] has not issued any previous or more recent versions of this document."

After reviewing this letter, the appellant advised that it would no longer pursue this portion of the request. As a result, the OHRC's response concerning points 1 and 2 noted above is no longer at issue.

**Points 3 and 4**

The OHRC advised that the six records that are responsive to the request under points 3 and 4 are listed in the index under the numbers 13, 16, 17, 22, 23 and 24.

Although the appellant indicated that it does not seek to obtain records to which solicitor-client privilege applies, it questions whether the exemption in section 19, in fact, applies in the circumstances. The appellant also maintained that these records should not be exempt from disclosure under the other exemptions claimed (sections 13(1) and 14(1)(a) and (b)). As a result, these records remain at issue.

**Point 5(a)**

The OHRC advised that it conducted a search and was unable to locate the human rights complaints of for individuals #1 and #2. The OHRC acknowledged that the records did exist, but could not be located. The appellant maintained the records should exist and appealed the decision on the basis that the OHRC did not conduct a reasonable search.

After the file was transferred to adjudication, the OHRC issued a supplementary decision in which it indicated that some records pertaining to individuals #1 and #2 were located at the Archives of Ontario. The OHRC granted partial access to the 189 pages that were located, and withheld the remaining records and parts of records pursuant to the exemptions at sections 21(1) and 49(b) [invasion of privacy/discretion to refuse requester's own information] and 13(1) and 49(a) [advice to government/discretion to refuse requester's own information].

The appellant appealed this decision on two grounds. First, it did not agree that the exemptions apply to the records. The appellant also believed that more records should still exist relating to these two matters as both complaints went to hearings and should therefore have generated considerably more than 189 pages of records.

An administrative decision was made by this office to sever the issues relating to the supplementary decision from those in the current appeal (PA-060076-1). A second appeal was opened under the number PA-060076-2 and was referred back to mediation. Accordingly, the reasonableness of the search relating to point 5(a) is not at issue in this appeal. Nor are the issues that arise from the supplementary decision and appeal.

**Points 5(b) and (c)**

**Ten Case Status Sheets (Records 1-10)**

During mediation, the appellant advised that in light of the OHRC's response it would no longer seek access to the complainants' names, sex, file numbers, addresses, telephone numbers or the location of the alleged offence, but continues to request access to the "Work Type" and the "Prohibited Grounds" cited for each alleged offence.

The OHRC maintained its position that it cannot release these identifiers on the case status sheets because of the concern that the identity of the complainant may be inferred by releasing the "Work Type" or the "Prohibited Grounds" cited of the alleged offence.

Accordingly, the only information at issue on these ten records is the "Work Type" and "Prohibited Grounds" listed on the Case Status Sheets.

**Seven closed Human Rights Complaints**

During mediation, the appellant agreed to narrow the appeal and advised that it is not pursuing access to the information in the following records.

> 37, 38, 39, 40, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 62, 67, 68, 69, 70, 71, 72, 73, and 74.

As a result, the above records are no longer subject to appeal.

The appellant continues to seek access to the following records:

> 43, 58, 59, 60, 61, 63, 64, 65, 66, 75 and 76.

With respect to the file pertaining to named complainant # 3, the OHRC's search was limited to the documents withheld from the OHRC's disclosure to the appellant under the Rules of Practice of the Human Rights Tribunal of Ontario. The OHRC maintained that the responsive records (Records 11 – 36) are exempt from disclosure under sections 13(1), 14(1)(a)and (b), and 19.

The appellant did not take issue with the limits placed on the search, but maintained its request for access to the records that were not disclosed.

**The Representations Process**

I decided to seek representations from the OHRC, initially. The OHRC was asked to review the issues set out in the Notice of Inquiry that was sent to it, respond to each of them and explain how and why the exemptions apply to each record or part of a record for which the exemption is claimed.

The OHRC submitted representations in response and consented to sharing most of them with the appellant. The OHRC asked that I withhold small portions of the representations as their disclosure would reveal exempt information. I agreed to withhold certain portions and attached a copy of the OHRC's severed representations to the copy of the Notice that I sent to the appellant. The appellant was asked to review the OHRC's representations and to refer to them, where appropriate, in responding to the issues set out in the Notice.

The appellant submitted representations and I decided to provide the OHRC with an opportunity to reply to them. Accordingly, I provided the OHRC with a complete copy of the appellant's representations. The OHRC was specifically asked to review the appellant's submissions and to reply to each of the points raised in them. In doing so, the OHRC was asked to provide additional explanation regarding how disclosure of "Work Type" or "Prohibited Ground" could permit one to identify a particular individual in the circumstances of this case (with reference to the appellant's argument).

The OHRC submitted representations in reply, and indicated that it no longer intended to withhold the information pertaining to "Work Type" and "Prohibited Ground" in Records 1-10. As this was the only information at issue in these ten records, they are no longer at issue in this appeal. The OHRC also agreed to disclose the withheld information in Records 75 and 76. Accordingly, these two records are also not at issue. The OHRC did not indicate whether this information had been disclosed to the appellant. Accordingly, if it has not already done so, I will include a provision for their disclosure in the order provisions below.

It should be noted that the OHRC did not claim the possible application of the mandatory exemption at section 21(1) for some of the records in its decision. Nor does the index provided by the OHRC make any reference to this exemption for some of the records, claiming instead that they are exempt under one or more of the other exemptions cited and referred to above. However, in its representations, the OHRC stated that some of these pages also contain personal information, but did not include a discussion of these records under section 21(1). In the list of records described below, I have indicated in brackets, the records that fall into this category. Because section 21(1) is a mandatory exemption, I will consider its possible application where applicable.

## RECORDS:

As a result of mediation and the disclosures made during adjudication, the following records remain at issue in this appeal: Records 11-36, 43, 58-61, and 63-66. In particular:

> Records 58-60 and 63 are witness statements and Records 61 and 65 are comments. These records have been withheld in full pursuant to the mandatory exemptions at section 21(1), with reference to the presumption at section 21(3)(b).
>
> Record 22 is a memorandum and has been withheld under both sections 13(1) and 14(1)(a) and (b) (The OHRC claims this record also contains personal information).
>
> Record 12 is an e-mail and has been withheld under sections 14(1)(a) and (b) and 19 (The OHRC claims this record also contains personal information).
>
> Record 11 is an e-mail that has been withheld under section 14(1)(a) and (b) (The OHRC claims this record also contains personal information).
>
> Records 64 and 66 are policy responses that have been withheld in full under section 13(1) (The OHRC claims these records also contain personal information).
>
> Records 13-16, 18-21 and 24-36 are e-mails, Records 17 and 23 are memoranda and Record 43 is a legal input request. All of these records have been withheld, in their entirety, pursuant to the exemption at section 19 (The OHRC claims all of these records, except Records 26 and 30 also contain personal information).

## DISCUSSION:

### PRELIMINARY MATTER

In its submissions, the appellant noted that a number of people had been involved in one of the cases before the OHRC, including the former Chief Commissioner. The appellant asked for confirmation that the former Chief Commissioner had been contacted and that all records relating to his involvement in the file were received and reviewed by the OHRC.

Although this issue appears to have been raised for the first time in the appellant's submissions, the OHRC answered the query in its reply submissions, stating that all relevant records were reviewed by the OHRC.

Regardless of the appellant's views concerning the OHRC's response, due to the identification of a potential issue at this late stage in the process, I do not intend to address whether or not records pertaining to the former Chief Commissioner were obtained and reviewed in this order.

**PERSONAL INFORMATION**

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 if 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, 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 OHRC submits that the records contain the personal information of complainants, witnesses and one client of the appellant. The OHRC submits further that although some of the information in the records identifies individuals in their professional capacity these individuals were interviewed in their personal capacity regarding their personal experiences and interactions with certain co-workers. The OHRC adds that this information was obtained during investigations into complaints. The OHRC indicates that the personal information is contained in the records of the statements made or in other records that make reference to these individuals in the context of the complaints process.

The appellant takes the position that because it is already aware of the personal information in the records, these records should not be withheld from it. In this respect, the appellant states that it knows all or most of the information contained in the records because the complainants and witnesses are its employees and it is aware of this information, such as names, gender, marital status, address, etc., of its employees as a result.

The appellant also indicates that it would have reviewed the complaints and responded to them, and is thus aware of the content of the complaints. As well, the appellant states that its legal counsel often attended interviews of witnesses. The appellant acknowledged that it has received some records containing information from interviews that its counsel took part in, and does not believe that a distinction should be drawn between these and other interviews.

The appellant also states that it fills the role of substitute decision-maker for its clients and thus knows all of the personal information pertaining to any clients referred to in the records. It is noteworthy that other than a statement of its role, the appellant has provided no other evidence to support this position. It is also clear, in the context of this request, that the appellant is acting in its corporate interest as the respondent to human rights complaints, rather than as an advocate for its client.

In its response to the appellant's submissions, the OHRC points out that the appellant received witness statements for interviews at which its counsel were present, noting that the remaining statements were made when counsel was not present. The OHRC submits further that even though the appellant might have knowledge of the identities and other personal information of the individuals referred to in the records, it does not alter the fact that this constitutes their personal information.

Having reviewed the records at issue, I find that all of them, except Record 30, contain personal information. The personal information consists of the names and other personal identifiers of complainants, witnesses and other individuals referred to in the records, including other staff members and clients of the appellant. As well, the records either refer specifically to individual

respondents to the human rights complaints or to those who are identifiable *via* the context of the complaints. All of the records contain elements of the complaints and/or discussions of the law in the context of the circumstances of the complaints.

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). In the circumstances, because the information in the records pertains to complaints under the *Ontario Human Rights Code*, I find that it qualifies as "personal" information rather than "professional" even though individuals are referred to in their professional capacities.

Moreover, although the appellant may well know the personal identity of its employees or former employees or clients, by virtue of the employment relationship, that does not impact on the nature of the information. The information in the records clearly falls within the ambit of the type of information about identifiable individuals referred to in the definition of personal information in section 2(1) of the *Act*.

Although I have identified that some of the information in the records pertains to individual respondents employed by the appellant and thus qualifies as their personal information, I have no evidence before me to indicate that the appellant is representing the interests of the individual respondents. All communications from the appellant indicate that only the corporate interest is directing this request and appeal. Accordingly, my analysis will be conducted under Part II of the *Act*.

**SOLICITOR-CLIENT PRIVILEGE**

The OHRC claims that Records 12-17, 18-21, 23-36 and 43 are exempt pursuant to the discretionary exemption at section 19.

When the request in this matter was filed, section 19 stated as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 was recently amended (S.O. 2005, c. 28, Sched. F, s. 4). However, the amendments are not retroactive, and the original version (reproduced above) applies in this appeal.

Section 19 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

**Branch 1: common law privilege**

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" refers to the substantive rule of law that protects the confidentiality of the solicitor-client relationship. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 31, *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.), Orders PO-2483, PO-2484]

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

The OHRC submits that:

> Records 12, 13-21, 23-26 represent a series of communications between the Investigator, assigned to the complaint and Counsel for the OHRC, in which the investigator sought and received legal advice to assist her in the conduct of the Investigation. Record 43 is a legal Input request that was submitted by an OHRC Mediator to the OHRC Counsel requesting legal advice on how to proceed with a complaint and the legal opinion that was drafted by OHRC Counsel in response to the request for legal advice.

The appellant reiterates that it does not seek records that are properly exempt as solicitor-client privileged. However, it does not believe that the exemption should apply to all of the records for which it is claimed. The appellant submits that where a record contains both privileged and non-privileged information, they should be disclosed with the privileged information redacted. In addition, the appellant submits that if any of the records are being withheld pursuant to litigation privilege, these documents must be disclosed in accordance with the reasoning in *Blank v. Canada (Minister of Justice)*, [2006] S.C.J. No. 39 as any litigation has ended.

As noted above under the description of records, the records at issue in this discussion consist of e-mails, memoranda and a legal input request (with legal memorandum attached). These records all contain communications between the investigator or mediator assigned to the human rights complaints made against the appellant and counsel for the OHRC, in which legal advice on a particular issue in the complaints is either requested or given. Based on the records themselves and the representations of the OHRC, I am satisfied that these records each contain a direct communication of a confidential nature between a client and solicitor, made for the purpose of obtaining or giving professional legal advice. Furthermore, I have not been provided with any evidence that the privilege in these documents was waived or that the privilege was otherwise lost. Accordingly, I find that these records are subject to solicitor-client communication privilege under Branch 1 of section 19 of the *Act*.

It should be noted that Record 11 is a duplicate of the first page of Record 12. Although the OHRC did not claim the application of section 19 to Record 11 at first instance, or in its initial representations, on reply, the OHRC identified its error and asked to have Record 11 included under the section 19 discussion.

I note that there are a number of e-mail chains contained in the records, many of which are duplicates and/or partial duplicates. For example, these consist of copies of e-mails received earlier in the chain and which are included along with copies of later e-mails as the chains progressed through various people or reflect the back and forth between two people. The e-mail set out in Record 11 was isolated from the chain in which it belonged and in the circumstances, I accept that the OHRC inadvertently identified it incorrectly. Moreover, having found that the e-mail chain in Record 12 qualifies for exemption under section 19, it would not make sense to find that it does not similarly apply to a duplicate record. Accordingly, I find that Record 11 is also subject to solicitor-client communication privilege under Branch 1 of section 19 of the *Act*.

## ADVICE OR RECOMMENDATIONS

The OHRC has claimed the application of the discretionary exemption at section 13(1) to Records 22, 64 and 66.

**General principles**

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.)].

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

The OHRC submits that these records comprise Policy Responses that were drafted by OHRC policy analysts and that they contain specific advice on issues relating to the processing of the complaints and on the drafting of the Case Analysis Reports.

The OHRC submits further that these three records contain specific recommended courses of action regarding the information to be included in the Case Analysis Reports, whether the Case Analysis Report should recommend that the complaint be referred to the Human Rights Tribunal and whether or not the complaints are dealing primarily with evidentiary issues or whether they also include policy issues.

The OHRC takes the position that its policy branch must be able to freely and frankly advise other staff on the processing of complaints and that regular consultations are held between them

in order to obtain advice on how to apply the OHRC's policies or to determine whether any policy issues arise in particular complaints.

Finally, the OHRC asserts that the exceptions to the exemption in sections 13(2) and (3) do not apply in the circumstances. In particular, with respect to the exception in section 13(2)(a), the OHRC states that none of these three records contains a coherent body of fact separate from the advice or recommendations.

The appellant is not convinced that Records 22, 64 and 66 contain specific advice on the processing of human rights complaints to the extent that disclosure could reasonably be expected to inhibit the free flow of advice or recommendations. In the alternative, the appellant believes that even if the records do contain some advice or recommendations, not all of the information in them would so qualify. The appellant believes that if the records contain factual or background, analytical, evaluative information, or notifications, views, drafts or supervisory direction to staff, this type of information should be separated from the advice or recommendations and disclosed.

I have reviewed the information in the records listed above and find that the records, in their entirety, qualify for exemption under section 13(1) of the *Act* because they set out a suggested course of action with respect to the OHRC's decision-making mandate as established in the *Ontario Human Rights Code*. The records are Policy Responses, the purpose of which is to set out the concerns of the author raised by his or her review of the Case Analysis Report and suggested ways of addressing these concerns and/or to provide comments directed at advising the recipient of issues, potential issues and/or affirming an approach taken in the Cases Analysis Report.

I have considered the application of the exceptions to those records which I have found qualify for exemption pursuant to section 13(1). In my view, none of the exceptions apply to these records. In particular, I find that the section 13(2)(a) exception does not apply as the factual material in these records is so intertwined with the advice and recommendations that it is not possible to disclose the factual material without also disclosing the material which is properly exempt.

**EXERCISE OF DISCRETION**

The section 19 and 13 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)].

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

The OHRC indicated that in exercising its discretion not to disclose information pursuant to sections 13 and 19, it considered whether the appellant was an individual seeking his or her own personal information, the relationship between the appellant and any affected persons, the nature of the information and the extent to which it is significant and/or sensitive to the institution, the appellant or any affected person, and the historic practice of the institution with respect to similar information.

Based on the OHRC's submissions and the nature of the records at issue, I am satisfied that it has taken into consideration relevant factors in deciding to exercise its discretion not to disclose the records withheld under sections 13 and 19. I therefore find that the OHRC's exercise of discretion was proper. As a result, Records 22, 64 and 66 are exempt pursuant to section 13 and Records 11, 12-17, 18-21, 23-36 and 43 are exempt in accordance with section 19.

**INVASION OF PRIVACY**

Although I found above that all but one of the records contain personal information, I have found that the discretionary exemptions at sections 13 or 19 apply to many of them. Therefore, I will not address the application of section 21(1) to those records which qualify under another exemption. As a result, the ensuing discussion will pertain only to Records 58-61, 63 and 65.

Having determined that the remaining information contained in the records is the personal information of individuals other than the appellant, the mandatory exemption at section 21(1) requires that the OHRC refuse to disclose the information unless one of the exceptions to the exemption at sections 21(1)(a) through (f) applies. In my view, the only exception which could have any application in the present appeal is set out in section 21(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy within the meaning of section 21(1)(f). Section 21(2) provides criteria to consider in making this determination, section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy and section 21(4) refers to certain types of information whose disclosure does not 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).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The OHRC relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > 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;

The OHRC states that the presumption in section 21(3)(b) applies as the records were compiled and are identifiable as part of an investigation into a possible violation of law, a violation of the *Ontario Human Rights Code*.

The appellant does not directly address this issue, stating only that it has knowledge of the personal information in the records. As noted above in the discussion under the heading "Personal Information", the appellant takes the position that it is already aware of all or most of the information contained in the records because the complainants and witnesses are its employees and it knows information about them, such as their names, gender, marital status, address, etc. as a result of that employment relationship.

The appellant also indicates that it would have reviewed the complaints and responded to them, and is thus aware of the content of the complaints. As well, the appellant states that its legal counsel often attended interviews of witnesses. The appellant acknowledged that it has received some records containing information from interviews that its counsel took part in, and does not believe that a distinction should be drawn between these and other interviews.

The appellant also states that it fills the role of substitute decision-maker for its clients and thus knows all of the personal information pertaining to any clients referred to in the records. As I noted above, other than a statement of its role, the appellant has provided no other evidence to support this position. Moreover, it is also clear, in the context of this request, that the appellant is acting in its corporate interest as the respondent to human rights complaints, rather than as an advocate for its client.

The appellant refers to Rule 41 of the Ontario Human Rights Tribunal's *Code of Practice* relating to disclosure in hearings before that tribunal, and queries why certain records have not been disclosed.

The appellant submits that to withhold the personal information in the records in the circumstances outlined above, would lead to an absurd result.

In responding to the appellant's arguments, the OHRC indicates that its practice is not to disclose the identities of witnesses who are interviewed, with the exception of any personal respondents who have been interviewed, to the parties of a human rights complaint unless the matter has been referred to the Human Rights Tribunal. The OHRC points out that the records at issue in this discussion pertain to a matter that was not referred to the Human Rights Tribunal.

With respect to the appellant's argument that it knows the identities and other personal information of the individuals in the records because of the employment relationship, the OHRC submits that the appellant does not have knowledge of the names of the individual witnesses nor what each particular witness said in their interviews. Consequently, the OHRC does not agree that withholding this information would give rise to an absurdity.

Based on my review of the parties' representations and the information contained in the records themselves, I am satisfied that the information in the records was compiled as part of an investigation by the OHRC into a possible violation of the *Ontario Human Rights Code*. Previous orders have established that OHRC investigations undertaken pursuant to the *Code* are law enforcement matters that fall within section 21(3)(b) (Orders PO-1858, PO-2201 and PO-2359).

As noted above, 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). I find further that neither section 21(4) nor 23 are applicable in the circumstances.

**Absurd result**

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt, because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]. This principal has generally been considered in cases where section 49(b) has been claimed. In this case, I have found that the personal information in the records pertains to individuals other than the appellant and the analysis has been conducted under section 21(1). I addressed the possible application of the absurd result principle in situations outside of the section 49(b) context in Order MO-1323:

> In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders and has been

extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).

In Order M-444, former Adjudicator Higgins also noted that it is possible that, in some cases, the circumstances would dictate that the "absurd result" principle should not be applied even where the information was supplied by the requester to a government organization. I agree and find that all of the circumstances of a particular case must be considered before concluding that withholding information to which an exemption would otherwise apply would lead to an absurd result.

The reasoning in Order M-444 was based on the principle that individuals should have access to records containing **their own personal information** unless there is a compelling reason for non-disclosure. The circumstances of this appeal raise the question whether the "absurd result" may also apply to a record which contains another individual's personal information despite the fact that the record does not contain the appellant's personal information. In examining this issue, I have considered the rationale behind the findings in Order M-444 and the purposes of the *Act*.

As noted above, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.

In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).

In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the

> record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).
>
> In all cases, the "absurd result" has been applied **only** where the record contains the appellant's personal information. In these cases, it is the contradiction of this higher right of access which results from the application of an exemption to the information. In my view, to expand the application of the "absurd result" in personal information appeals beyond the clearest of cases risks contradicting an equally fundamental principle of the *Act*, the protection of personal privacy. In general, I find that the fact that a record does not contain the appellant's personal information weighs significantly against the application of the "absurd result" to the record. However, as I indicated above, all of the circumstances must be considered in determining whether this is one of those "clear cases" in which the absurdity outweighs the privacy protection principles.[emphasis in the original]

Turning to the facts of this case, I find that, based on the evidence and argument presented and outlined above, I find that this is clearly not one of those "clear cases". The mere fact that the appellant might know the identities and other personal information about people in its employ and those whom it serves does not give it the right to know other personal information relating to these OHRC complaints brought by these individuals or by witnesses who provide information to assist in the investigation of the complaint. An employee's right to pursue a complaint to the OHRC and/or to otherwise communicate with the OHRC clearly outweighs any right the appellant might have to obtain the details of these communications, unless and until the appellant is required to address the complaints. In this case, the process and procedures employed by the OHRC and the Ontario Human Rights Tribunal direct the type and amount of personal information which the appellant is entitled to receive. As the OHRC points out, the complaint to which the records at issue in this discussion pertain was not referred to the Ontario Human Rights Tribunal. I conclude that withholding the personal information in this case would not result in any absurdity, but rather, protects in principle and in practice, the privacy of the individuals who have had dealings with the OHRC in fulfilling its law enforcement mandate.

Finally, with respect to the appellant's belief that the disclosure rules pursuant to the Ontario Human Rights Tribunal should come into play in a request under the *Act*, I note that section 64 of the *Act* provides:

> (1) This *Act* does not impose any limitation on the information otherwise available by law to a party to litigation.
>
> (2) This *Act* does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

This section of the *Act* has been considered in a number of previous orders (see, for example: Orders P-609, M-852, MO-1109, MO-1192 and MO-1449). In Order MO-1109, former Assistant Commissioner Tom Mitchinson commented on this section (under the Municipal *Act*) as follows:

> Accordingly, the rights of the parties to information available under the rules for litigation are not affected by any exemptions from disclosure to be found under the *Act*. Section 51(1) does not confer a right of access to information under the *Act* (Order M-852), nor does it operate as an exemption from disclosure under the *Act* (Order P-609).
>
> Former Commissioner Sidney B. Linden held in Order 48 that the *Act* operates independently of the rules for court disclosure:
>
> > This section [section 64(1) of the provincial *Freedom of Information and Protection of Privacy Act*, which is identical in wording to section 51(1) of the *Act*] makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the *Freedom of Information and Protection of Privacy Act, 1987* is unfair ...

With respect to the obligations of an institution under the *Act*, the former Assistant Commissioner stated:

> The obligations of an institution in responding to a request under the *Act* operate independently of any disclosure obligations in the context of litigation. When an institution receives a request under the *Act* for access to records which are in its custody or control, it must respond in accordance with its statutory obligations. The fact that an institution or a requester may be involved in litigation does not remove or reduce these obligations.
>
> The Police are an institution under the *Act*, and have both custody and control of records such as occurrence reports. Therefore, they are required to process requests and determine whether access should be granted, bearing in mind the stated principle that exemptions from the general right of access should be limited and specific. The fact that there may exist other means for the production of the same documents has no bearing on these statutory obligations.

I agree with the above comments. In my view, the two schemes work independently. In this case, the fact that information may be obtainable through discovery or disclosure is not determinative of whether access should be granted under the *Act*.

For all these reasons, I conclude that the absurd result principle does not apply in the circumstances of this case. Moreover, having concluded that disclosure of the personal information in Records 58-61, 63 and 65 would constitute a presumed unjustified invasion of

personal privacy pursuant to section 21(3)(b), I find that these records are properly exempt under section 21(1)(f) of the *Act*.

Because of the decisions made in this order, it is not necessary to address the possible application of the discretionary exemption at section 14(1)(a) and (b) to Records 11, 12 and 22.

## ORDER:

I uphold the OHRC's decision to withhold the records at issue.

Original signed by: April 30, 2007
Laurel Cropley
Adjudicator