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

ORDER 178

Appeal 890112

Ontario Human Rights Commission

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VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 178
Ontario Human Rights Commission
Appeal No. 890112

This letter constitutes my Order in your appeal from the decision of the Ontario Human Rights Commission (the "institution") regarding your request for records made under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act").

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The appeal file indicates that on February 27, 1989, you wrote to the institution asking for access to the following:

> All notes of [a named Human Rights Officer], taken in the course of his investigation of the complaint by [a named complainant] under the Human Rights Code at, during or arising from all meetings at which the Officer, pursuant to section 32(3)(d) of the Human Rights Code, questioned numerous persons [some unknown to the requester] on matters that are or may be relevant to the complaint. The notes of the Officer will have been made between July 13, 1987 and February 24, 1989. I am aware that notes exist for each interview conducted by [a named Human Rights Officer]. Those interviewed include:
>
> [A list of names followed.]

On March 20, 1989, the institution's Freedom of Information and Privacy Co_ordinator responded to your request as follows:

> Access is denied to the notes taken by the Human Rights Officer in accordance with section 14(2)(a) of the Act.
> ...
>
> This section applies because the notes by the Human Rights Officer constitute reports prepared in the course of a law enforcement investigation.
>
> Access is also denied to the notes taken by the Human Rights Officer in accordance with sections 14(1)(a) and 14(1)(b) of the Act. These sections apply because disclosure of the records could reasonably be expected to interfere with a law enforcement matter.

On April 21, 1989, you appealed the decision of the institution. Notice of the appeal was provided to you and the institution on May 2, 1989.

Subsequent to your appeal, you reached an agreement with the institution that your request would be deemed to have included the questions for each of the interviews. As a result, the institution advised that it was relying on subsections 14(1)(a), (b) and (c) and 14(2)(a) of the Act to exempt the questions from disclosure.

As you know, as soon as your appeal was received an Appeals Officer was assigned to investigate the circumstances of the appeal and to attempt to mediate a settlement. The Appeals Officer obtained and reviewed the records in question. They consist of 19 sets of interview notes from interviews of 18 different people with 7 sets of interview questions interspersed among them.

Settlement of the issues in this appeal was not achieved during mediation. Accordingly, an Appeals Officer's Report was prepared and sent to you and the institution on October 2, 1989, together with a Notice of Inquiry. You and the institution were invited to make representations concerning the subject matter of this appeal.

Representations were received from you and the institution. I have considered the representations in reaching my decision.

As indicated above, the institution has cited subsections 14(1) (a), (b) and (c) as reasons for refusing to disclose the requested records. These subsections read as follows:

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;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> ...

The words "law enforcement" are defined in subsection 2(1) of the Act 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);

In Order 89 (Appeal Number 890024), dated September 7, 1989, Commissioner Sidney B. Linden reviewed the provisions of the Human Rights Code, 1981 (the "Code") and the procedures used by the institution in carrying out its mandate under the Code. In that Order, Commissioner Linden stated:

> The institution administers and enforces the Ontario Human Rights Code, 1981, and is responsible for implementing a program of compliance and conciliation. To carry out this mandate, the institution receives or initiates complaints; investigates and mediates complaints; and prosecutes violations of the Code.
>
> The institution is required to investigate and attempt to settle any complaint it decides to deal with. If settlement is not achieved, the institution may decide to refer the matter to a board of inquiry constituted under the Code. The board conducts a hearing, and, if it finds that a right under the Code has been infringed by a party to the proceedings, the board is empowered to make a binding order directing that party to comply with the Code and/or to make restitution, including monetary compensation.

I have considered the records in issue in the present appeal and it is clear that they form part of the institution's investigation file of a complaint under the Code, which complaint may lead to proceedings before a board of inquiry. In my view, the investigation of this complaint qualifies as a "law enforcement matter" within the meaning of subsection 14(1)(a) of the Act, and 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.

Having found that investigations by the institution are properly "law enforcement matters", I must now decide whether disclosure of the records at issue in this appeal could reasonably be expected to interfere with these investigations.

The matter of interference with an investigation under the Code was also addressed by Commissioner Linden in Order 89 supra. I concur with Commissioner Linden's view that the ability of the Ontario Human Rights Commission to conduct an investigation without interference, is vital to the Commission's effectiveness in carrying out its responsibilities and mandate under the Code.

If, pursuant to subsection 35(2) of the Code, the institution decides not to appoint a board of inquiry with respect to the complaint referred to in this appeal, subsection 36(1) of the Code provides that the complainant may request the institution to reconsider this decision. If the complainant in this case applies for reconsideration, then it is possible that further investigation of the complaint would be undertaken. Therefore, it is my view that until either a board of inquiry 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.

Therefore, it is my view that disclosure of the interview notes or the lists of questions in this case, could reasonably be expected to interfere with the institution's investigation of the complaint. I say this while cognizant of your argument regarding those particular interviews at which you were present and for which you are requesting the notes and questions. However, my conclusion is based on the principle that disclosure of the records to you must be viewed as disclosure to the public generally. Premature and unlimited access by the public to such information could interfere with the investigation undertaken by the institution.

Section 14 of the Act provides the head with the discretion to release a record even if it meets the test for an exemption. I find nothing improper in the way in which the head has exercised his discretion.

Because I have found that the exemption provided by subsection 14(1)(b) of the Act applies to the records at issue in this appeal in their entirety, it is not necessary for me to consider

the application of the other exemptions that were raised by the institution. However. I would like to note that I have considered your submissions regarding the applicability of subsections 14(4), 63(2) and your implicit reference to section 23 of the Act.

As my decision has not been based upon subsection 14(2)(a) of the Act, to which subsection 14(4) is relevant, it is not necessary for me to consider that subsection.

Section 23 states as follows:

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

Section 23 does not apply in this circumstances of this appeal, as I have based my decision on the application of subsection 14(1)(b).

You also referred to the potential application of subsection 63(2) of the Act to the facts of this appeal. Subsection 63(2) reads as follows:

> This Act shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this Act comes into force.

Subsection 63(2) requires that the information in question not be personal information. Although this Order has not dealt with whether the records at issue contain personal information, previous Orders have made such a finding with respect to similar records.

In this case, you suggest that the Human Rights Officer's stated practice was to provide copies of his notes to parties who requested them. Without conceding that this was actually the case, the institution states that even assuming the accuracy of this allegation, "it is clear that the notes were not available to the public but only to the parties" to a complaint. You further indicated that, in addition to the parties, persons who were interviewed had been provided with a copy of the notes of their interview.

It is my view that availability to the public is a requirement of subsection 63(2). Prior access to the public at large has not been demonstrated or even alleged. Even if I were to find that the notes did not contain personal information, I find that the availability of the notes to the parties or those interviewed during the course of an investigation under the Code, does not demonstrate that access by the public was

available by custom or practice immediately before the Act came into force.

In summary, the requirements for exemption under subsection 14(1)(b) of the Act have been satisfied and I uphold the decision of the head.

Yours truly,

Tom A. Wright
Assistant Commissioner

cc: _ Ms Catherine Frazee, Chief Commissioner
Ontario Human Rights Commission
_ Mr. Anthony Griffin, Counsel
Ontario Human Rights Commission
_ Mr. Roger Palacio, FOI Co_ordinator
Ontario Human Rights Commission