



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

INVESTIGATION REPORT

INVESTIGATION I94-006P

MINISTRY OF NATURAL RESOURCES



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INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning the Ministry of Natural Resources (the Ministry).

In 1990, the Ontario Public Service Employees Union (the Union) filed a grievance against the Ministry with the Ontario Crown Employees Grievance Settlement Board (the GSB) claiming that a large number of seasonal jobs should be "classified", i.e. made permanent.

On June 13, 1991, this grievance was settled when the Ministry and the Union signed a memorandum of settlement agreeing to convert the seasonal positions which met certain conditions to permanent status. Both parties to the settlement (i.e. the Union and the Ministry) requested that the memorandum of settlement be made an order of the GSB. However, the Union further grieved that the Ministry did not appoint all staff which the Union felt should have been appointed. The ruling on this subsequent grievance determined which of these additional staff should have been appointed to a permanent position.

The complainant was identified as one of the additional employees who met the criteria to be reinstated further to the ruling on the subsequent grievance. Therefore, under the memorandum of settlement the Ministry was required to reimburse him, after making specific deductions, for the period that he was not employed by the Ministry (i.e. the reinstatement period). The Ministry's district human resources staff sent the complainant an electronic mail message requesting that he provide "details of gross pay, regular salaries, overtime payments, pension payments, CPP contributions, etc.". This information was collected from each of the employees who had met the criteria to be reinstated. Once the information had been collected, each employee was provided with a document also entitled "memorandum of settlement", setting out the amount of reimbursement and the specific deductions for that employee during the period of reinstatement.

The complainant was concerned that the collection of his personal information was contrary to section 38(2) of the Freedom of Information and Protection of Privacy Act (the Act).

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Was the information in question "personal information", as defined in section 2(1) of the Act? If yes,
- (B) Was the collection of the personal information in accordance with section 38(2) of the Act?

RESULTS OF THE INVESTIGATION

Issue A: Was the information in question "personal information", as defined in section 2(1) of the Act? If yes,

Section 2(1) of the Act states, in part:

"personal information" means recorded information about an identifiable individual, including,

- (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,
- (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 information in question was the details of gross pay, regular salaries, overtime payments, pension payments, and Canada Pension Plan (CPP) contributions for each employee who had met the criteria for reinstatement, including the complainant, for the period when not employed by the Ministry.

In our view, this information met the requirements of paragraphs (b) and (h) of the definition of personal information in section 2(1) of the Act.

Conclusion: The information in question was personal information as defined in section 2(1) of the Act.

Issue B: Was the collection of the personal information in accordance with section 38(2) of the Act?

Section 38(2) of the Act states:

No person shall collect personal information on behalf of an institution unless the collection is expressly authorized by statute, used for the purposes of law enforcement or necessary to the proper administration of a lawfully authorized activity.

The Crown Employees Collective Bargaining Act (the CECBA) sets out an arbitration process and allows for the settlement of grievance matters. Where a settlement is not realized, section 19 of the CECBA authorizes that the matter may be referred for arbitration to the Ontario Crown Employees Grievance Settlement Board and that any decision made by the GSB is final and binding upon the parties. The memorandum of settlement between the Ministry and the Union was made an order of the GSB. The Ministry was then obliged to implement the terms of reinstatement in the settlement (i.e. comply with the order of the GSB). In our view, the Ministry's implementation of the terms of reinstatement in the settlement was a lawfully authorized activity.

The Ministry was required to retroactively compensate those employees, including the complainant, who met the criteria to be reinstated, for any lost wages. In order to determine the total compensation to which these employees, including the complainant, were entitled, the Ministry requested details of gross pay, regular salaries, overtime payments, pension payments, and CPP contributions.

Section 38(2) of the Act requires that the collection of personal information be "necessary" to the proper administration of a lawfully authorized activity. Therefore, to determine whether the collection of the personal information was necessary to the lawfully authorized activity of implementing the settlement's terms of reinstatement, each piece of information was considered.

Gross pay, regular pay, and over-time payments:

The Ministry advised that this information was necessary to implement the terms of the settlement. These amounts were required so the Ministry could reduce the wages owing to each of the employees for the reinstatement period. The Ministry advised that this was based on the common law doctrine of mitigation which requires that:

... when a contract is broken the injured party is entitled generally to receive such a sum by way of damages, as will, so far as possible, put him in the same position as if the contract had been performed - the damages being limited to those that are the natural and direct consequences of the breach..

But this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss...

Therefore, the gross pay, regular pay, and overtime payment information was collected to determine the amount owing to each employee. The Ministry advised that over-time payments were not deducted from gross pay in calculating the settlement. Therefore, over-time payments were requested so that proper amounts owing could be calculated even if the employee could only provide two of the three amounts.

In our view, this information was necessary to the proper administration of the lawfully authorized activity of implementing the settlement's terms of reinstatement, which included mitigation of the complainant's loss.

Pension payments:

The Ministry advised that pension payments were requested because some of the employees involved in the grievance settlement could have worked for the Ontario Government during the reinstatement period. Those individuals could have chosen to make contributions, as unclassified employees, to the Public Service Pension Fund.

The terms of reinstatement required the Ministry to pay any monies owing to the Ontario Pension Board. The amount due was equal to the calculated pension owing for the reinstatement

period less any contribution made while the individual was employed in the Ontario Public Service during this period.

In our view, this information was necessary to the proper administration of the lawfully authorized activity of implementing the settlement's terms of reinstatement.

CPP contributions:

The Ministry advised us that, at the time this information was requested from the complainant, it was thought that the CPP contributions were to be calculated for the time that the salary was earned (i.e. retroactively). The Ministry sought clarification from Revenue Canada on November 15, 1993, to determine the correct method of calculation. The response from Revenue Canada stated that the CPP payments were calculated on earnings in the year in which they are paid to the employee. Therefore, the Ministry did not require this information and stated that it should not have been collected.

We agree with the Ministry's view that this information was not necessary to the proper administration of the lawfully authorized activity of implementing the terms of reinstatement.

Unemployment insurance benefits:

The electronic mail message sent to the complainant requesting his personal information included the term "etc.". The Ministry advised that the electronic mail message was not well written and the information which the "etc." was intended to cover was any unemployment insurance benefits which might have been received by the complainant during the reinstatement period. The Ministry was required under section 38(1) of the Unemployment Insurance Act and in the settlement's terms of reinstatement to deduct unemployment insurance benefits received during the reinstatement period from any wages owing to the employees and to return them to the Receiver General of Canada.

In our view, this information was necessary to the proper administration of the lawfully authorized activity of implementing the settlement's terms of reinstatement.

Conclusion: The collection of the gross pay, regular pay, over-time payments, pension payments and unemployment insurance benefits was in accordance with section 38(2) of the Act.

The collection of CPP contributions was not in accordance with section 38(2) of the Act.

SUMMARY OF CONCLUSIONS

- The information in question was personal information as defined in section 2(1) of the Act.
- The collection of the gross pay, regular pay, over-time payments, pension payments and unemployment insurance benefits was in accordance with section 38(2) of the Act.

The collection of CPP contributions was not in accordance with section 38(2) of the Act.

RECOMMENDATIONS

During the course of this investigation, the Ministry acknowledged that its collection of each employee's CPP contribution information was unnecessary, and it no longer seeks this information from the complainant.

The Ministry advised that it will, therefore, increase the emphasis on the privacy aspects of the Act, as part of its regular program to train staff on the requirements of the legislation. In our view, this is a satisfactory response to the findings of this report and we make no further recommendations.

Original signed by: _____
Susan Anthistle
Compliance Review Officer

April 25, 1994 _____
Date
