



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

INVESTIGATION REPORT

INVESTIGATION I93-036P

MINISTRY OF CONSUMER AND COMMERCIAL RELATIONS

March 4, 1994



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INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning the Ministry of Consumer and Commercial Relations (the Ministry). The Ministry had conducted an internal investigation of a complaint of harassment made against the complainant by another Ministry employee (the aggrieved employee), under a Sexual Harassment Directive (the Directive) dated January 1991, which applied to all ministries subject to the Management Board of Cabinet directives. In response to our draft report, the complainant indicated that the policy in question was an Ontario Public Service policy which strengthened the sexual harassment provisions of the existing Personal Harassment policy. The finding of the Ministry's investigation was that the complainant had harassed the aggrieved employee.

Sometime after the first harassment complaint was made, the aggrieved employee complained that the harassing behaviour was continuing, and a second investigation was initiated by the Ministry. This investigation was conducted by an investigator from another ministry, who was appointed through the Workplace Discrimination and Harassment Prevention Branch of Management Board Secretariat.

While the second investigation was ongoing, an incident related to the second harassment complaint occurred. Copies of a letter written by the second investigator to the complainant were discovered by the complainant's Manager and by the aggrieved employee, in open areas near the elevator banks of the Ministry's office building.

The complainant believed that during the course of the above investigations, the Ministry had breached the Freedom of Information and Protection of Privacy Act (the Act) in the following ways:

1. The first harassment complaint was disclosed to various individuals who were not allowed access to it, according to the terms of the Directive;
2. A covering letter written by the Ministry to the complainant to accompany the harassment complaint was disclosed to the aggrieved employee;
3. The Ministry disclosed the letter from the second investigator to the complainant by leaving it in open areas of the office building; and
4. The information about the complainant that the Ministry had collected and used to write the harassment investigation report was inaccurate.

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Did the harassment complaint, the covering letter that accompanied the harassment complaint, and the letter from the second investigator to the complainant contain the complainant's "personal information", as defined in section 2(1) of the Act? If yes,
- (B) Was the complainant's personal information in the harassment complaint disclosed to various individuals in accordance with section 42 of the Act?
- (C) Was the complainant's personal information in the covering letter disclosed to the aggrieved employee in accordance with section 42 of the Act?
- (D) Was the complainant's personal information in the letter from the second investigator disclosed by the Ministry in accordance with section 42 of the Act?
- (E) Did the Ministry take reasonable steps, in accordance with section 40(2) of the Act to ensure that the complainant's personal information was accurate and up to date, before using it to write the harassment investigation report?

RESULTS OF THE INVESTIGATION

Issue A: Did the harassment complaint, the covering letter that accompanied the harassment complaint, and the letter from the second investigator to the complainant contain the complainant's "personal information", as defined in section 2(1) of the Act?

Section 2(1) of the Act defines "personal information" as recorded information about an identifiable individual, including,

...

- (d) the address, telephone number, fingerprints or blood type of the individual,

...

- (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;

In our view, since the first harassment complaint contained the complainant's name, as well as recorded information about the harassment allegations against the complainant, it contained the complainant's "personal information", as defined in sections 2(1)(g) and (h) of the Act.

The covering letter contained the complainant's name and address, and indicated that an internal formal complaint had been filed. The letter also contained references to the complainant's right to representation and to examine the allegations and identify witnesses and documentation to support the complainant's position. It also included the fact that an appointment would be made with the complainant to discuss the allegations and the complainant's defence. Since the covering letter contained the above recorded information about the complainant, in our view, it contained the complainant's "personal information" as defined in sections 2(1)(d), (g), and (h) of the Act.

The letter from the second investigator to the complainant contained the complainant's name and address, and indicated that a harassment complaint had been filed against the complainant. It included the details of the complaint, copied from the complaint letter. Since the letter from the second investigator to the complainant contained the above recorded information about the complainant, we believe it contained the complainant's "personal information" as defined in sections 2(1)(d), (g), and (h) of the Act.

Conclusions: The harassment complaint, the covering letter that accompanied the harassment complaint, and the letter from the second investigator to the complainant contained the complainant's personal information, as defined in section 2(1) of the Act.

Issue B: Was the complainant's personal information in the harassment complaint disclosed to various individuals in accordance with section 42 of the Act?

Section 42 of the Act prohibits the disclosure of personal information by an institution, except in the circumstances listed in sections 42(a) through (n). In our view, the section relevant to the disclosure in question is 42(d), which states:

An institution shall not disclose personal information in its custody or under its control except,

- (d) where disclosure is made to an officer or employee of the institution who needs the record in the performance of his or her duties and where disclosure is necessary and proper in the discharge of the institution's functions;

The Ministry has a responsibility to all employees to provide a workplace free from harassment. Therefore, it is our view that disclosures of personal information to employees who needed the record in the performance of their duties for the purpose of conducting an investigation or taking remedial action to ensure that the workplace was free of harassment, were necessary and proper in the discharge of the Ministry's functions.

The Ministry indicated that the harassment complaint was disclosed to the Deputy Ministry and the Investigator. As well, the Acting Director of the complainant's Branch and the Director of Human Resources had knowledge of the complaint. The aggrieved employee had also informed his/her Supervisor of the complaint.

Deputy Minister

The Directive under which the harassment complaint had been investigated stated that the Deputy Minister was responsible for adhering to the principles and mandatory requirements contained in the Directive. The Directive stated:

Formal complaints are made in writing and signed by the complainant.

The signed complaint should be submitted to the complainant's immediate manager/supervisor, manager/supervisor one level removed, advisor, investigator or directly to the deputy minister, agency head or designate.

All signed complaints must be immediately forwarded to the deputy minister, agency head or their designate, who will assign an investigator to conduct the investigation immediately after receiving the official complaint.

In this case, the harassment complaint was forwarded to the Deputy Minister. Since the Deputy Minister would have needed the record of the harassment complaint in the performance of his/her duties in order to assign an investigator, it is our view that disclosure of the harassment complaint to the Deputy Minister was made in accordance with section 42(d) of the Act.

In response to the above conclusion in our draft report, the complainant stated that the Deputy Minister and the aggrieved employee had discussed the complaint prior to the formal complaint being filed. In our view, the fact that the complaint may have been discussed beforehand is not a factor in determining whether the Deputy Minister needed a copy of the complaint in the performance of his/her duties. Once the complaint had been received in writing, it became a formal complaint. Regardless of whether there had been a meeting beforehand, the Deputy Minister was obligated to assign an investigator immediately to investigate the allegations contained in the complaint. Therefore, we remain of the view that the Deputy Minister needed the complaint in the performance of his/her duties.

Investigator

The Directive states that the investigator assigned was responsible for informing the alleged harasser that the complaint had been filed and the particulars of the complaint; conducting the investigation, and reporting the findings. Thus in our view, the Investigator needed the record of the harassment complaint in the performance of these duties. Therefore, it is our view that the disclosure of the harassment complaint to the Investigator was made in accordance with section 42(d) of the Act.

Acting Director of Complainant's Branch and Director of Human Resources

It is our view that the onus is on the Ministry to demonstrate that the individuals in question needed the record in the performance of their duties. In its comments on our draft report, the Ministry provided additional information as to why senior executives required the record in harassment matters, in the performance of their duties. However, we felt that insufficient detail was provided by the Ministry to permit us to draw a conclusion regarding these submissions.

The Ministry had indicated that when the harassment complaint was registered, a determination had to be made as to whether an investigation was required, or whether a less formal resolution might be appropriate. In order to make this decision, the Acting Director of the complainant's Branch and the Director of Human Resources "had knowledge of the complaint".

According to the Directive, the Deputy Head (i.e. the Deputy Minister) was responsible for designating investigators to conduct investigations **immediately** [emphasis added] upon receiving formal signed complaints. In the circumstances of this case, the complaint had been made in writing and was signed. Therefore, as we understand the Directive, an informal resolution was not an option available to the Ministry.

Accordingly, it is our view that the Acting Director of the complainant's Branch and the Human Resources Director would not have needed the record of the harassment complaint in the performance of their duties to determine if the complaint could be resolved informally, since it could only be resolved through a formal investigation. Therefore, it is our view that disclosure to the Acting Director of the complainant's Branch and to the Director of Human Resources, for the purpose of determining whether the complaint could be resolved informally, was not in accordance with section 42(d) of the Act. It is also our view that no other provisions of section 42 applied to this disclosure.

Aggrieved Employee's Supervisor

The Ministry stated that the aggrieved employee's Supervisor was also informed of the harassment complaint by the aggrieved employee. However, the Ministry did not indicate if this had been the actual process by which the complaint was brought to the Deputy Minister's attention, or if the disclosure had been made by the aggrieved employee in a personal capacity, not while acting on behalf of the Ministry. In our view, the disclosure provisions of the Act do not apply to disclosures that are not made on behalf of the Ministry. Therefore, the disclosure of the harassment complaint by the aggrieved employee in his/her personal capacity is not an issue in this report.

The Directive states that signed complaints should be submitted to one of a number of identified individuals, one of whom is the aggrieved employee's immediate manager/supervisor. In turn, the manager/supervisor is to immediately forward the complaint to the deputy minister, agency head or their designate. In our view, in order to be able to forward a formal complaint to the appropriate level in the performance of one's duties, the Supervisor would have "needed" the record of the harassment complaint. Therefore, it is our view that the disclosure of the harassment complaint to the aggrieved employee's Supervisor for the purpose of referring the complaint to the appropriate level, was made in accordance with section 42(d) of the Act.

Complainant's Supervisor

In response to our draft report, the complainant submitted that the Ministry omitted to include the complainant's Supervisor on the list of people who knew about the harassment complaint. The complainant indicated that the Acting Director of the Branch had told the complainant's Supervisor about the complaint even before the complainant him/herself, was told about it. The

complainant further stated that the Acting Director had said that the Supervisor "had to know" about the complaint.

The Ministry stated that the Supervisor did not receive a copy of the complaint nor any documentation concerning the complainant. The Ministry did not state whether the Supervisor knew about the complaint. The complainant provided no further evidence that the Supervisor knew about, or had received a copy of the complaint.

In our view, there is no evidence to show that the complainant's Supervisor actually received a copy of the complaint. There is no evidence to show exactly what information about the complaint may have been disclosed to the Supervisor, nor is there any evidence to show whether he/she actually needed to know information about the complaint to perform his/her job duties. Therefore, we are unable to draw a conclusion with respect to the disclosure of the complaint to the complainant's Supervisor.

Conclusions: The complainant's personal information in the harassment complaint was disclosed to the Deputy Minister, Investigator, and the aggrieved employee's Supervisor in accordance with section 42(d) of the Act.

The complainant's personal information in the harassment complaint was not disclosed to the Acting Director of the complainant's Branch and the Human Resources Director in accordance with section 42 of the Act.

Issue C: Was the complainant's personal information in the covering letter disclosed to the aggrieved employee in accordance with section 42 of the Act?

The covering letter referred to above was copied to the aggrieved employee by the Ministry. The complainant viewed this disclosure as a breach of both one's privacy and one's rights, indicating that he/she had not received copies of any correspondence written to the aggrieved employee by the Ministry about the matter, or about the aggrieved employee's rights. The issue of the fairness of copying correspondence to one individual without similarly copying correspondence to another individual is not one that falls within the privacy provisions of the Act. Therefore, the only issue that is addressed in this section of our report is whether the disclosure of the covering letter to the aggrieved employee breached the Act.

The Ministry explained that the aggrieved employees had a right to know what was happening to their complaint. The Directive states that the aggrieved employee has the right "to be kept informed throughout the process, subject to the FOI" [the Act]. The Ministry provided us with a sample covering letter, which we assume was from the Ministry's investigation procedures, which indicates in the cc: section that the covering letter is to be copied to the complainant (i.e. the aggrieved employee).

In our view, the section of the Act relevant to the disclosure in question is section 42(c), which states:

An institution shall not disclose personal information in its custody or under its control except,

- (c) for the purpose for which it was obtained or compiled or for a consistent purpose;

The Ministry's purpose for compiling the complainant's personal information in the covering letter was to conduct the investigation of the harassment complaint. The Ministry was obligated under the Directive to keep the aggrieved employee informed throughout the conduct of the investigation into his/her complaint. By copying the letter to the aggrieved employee, the Ministry was informing the aggrieved employee that the Ministry was taking steps to address the complaint, that the complaint had been brought to the attention of the alleged harasser, and that the alleged harasser was being allowed the opportunity to respond to the complaint.

In our view, the disclosure of the complainant's personal information relating to the complaint, the complainant's rights, and the steps the Ministry was taking with the complainant, was for the purpose for which the complainant's personal information had been compiled by the Ministry namely, to conduct the harassment investigation. Therefore, we find that the disclosure of the complainant's personal information, as noted above, was in accordance with section 42(c) of the Act.

In response to our draft report, the complainant stated that the letter had been marked "CONFIDENTIAL". The complainant's view was that copying the letter to the aggrieved employee was a miscarriage of justice and responsibility, and that a personal letter to the aggrieved employee would have fulfilled the requirement of the Directive that both parties be kept informed of the investigation. Although we agree with the complainant that a separate letter to the employee could have fulfilled the Ministry's responsibility, we remain of the view that the disclosure of the letter in question did not contravene the Act, with the following exception:

As previously stated, the Ministry's purpose for compiling the complainant's personal information in the covering letter was to conduct the harassment investigation. In our view, the disclosure of the complainant's address was not necessary to conduct the harassment investigation, and therefore, we find that the disclosure of the complainant's address was not disclosed for the purpose for which it had been compiled by the Ministry. It is also our view that the disclosure of the complainant's address for the purpose of keeping the aggrieved employee informed about the progress of the investigation, was not for the purpose for which the Ministry had compiled the complainant's personal information. Accordingly, it is our view that the disclosure of the complainant's address was not made in accordance with section 42(c) of the Act. It is also our view that no other provisions of section 42 applied to the disclosure of the complainant's address.

The complainant was concerned that other correspondence related to the harassment complaint had also been copied to the aggrieved employee, but provided no specific evidence to support this view. We examined the Ministry's files, but found no evidence, such as a cc: notation on a letter, or a copy of a covering memo, or any other record to indicate that this had been the case. The Ministry indicated that it had confirmed with the aggrieved employee that no other correspondence to the complainant was received from the Ministry. Therefore, we conclude that the Ministry did not disclose any other correspondence to the aggrieved employee.

Conclusions: The complainant's personal information related to the complaint, to the complainant's rights, and to the steps the Ministry was taking with the complainant were disclosed to the aggrieved employee in accordance with section 42 of the Act.

The complainant's address was not disclosed to the aggrieved employee in accordance with section 42 of the Act.

The Ministry did not disclose any other correspondence to the aggrieved employee.

Issue D: Was the complainant's personal information in the letter from the second investigator disclosed by the Ministry in accordance with section 42 of the Act?

The issue addressed in this section of the report is whether the **Ministry** disclosed the above letter by leaving copies of it in open areas of the office building. In our view, none of the circumstances listed in sections 42(a) through (n) of the Act applied to the disclosure in question. Therefore, such a disclosure by the Ministry would have breached section 42 of the Act. In determining whether the Act was breached, we considered the views of the complainant, the second investigator, and the views of the Ministry, which maintained that it did not disclose the letter, and that the letter in question was not in its possession at the time of the incident.

The second investigator believed that the letter had been copied and distributed by the complainant, apparently for the purpose of embarrassing or punishing the aggrieved employee or the second investigator. The second investigator had not sent the Ministry a copy of the letter in question. Only two copies had been made -- one which was in the possession of the investigator, and the second, which had been copied to the complainant's union representative.

The complainant held the view that the disclosure had in fact been made by the Ministry, as a harassment tactic, and that the idea of disclosing embarrassing and insulting information about oneself was absurd and ridiculous. The complainant stated that it might have been the second investigator who left the copies in the office building, pointing out that the investigator's office was only a few minutes away from where the complainant worked.

The issue we are addressing in this section of the report is whether, in our view, the **Ministry** disclosed the above letter by leaving copies of it in open areas of the office building.

In response to our draft report, the complainant stated that the letter in question was **supposed** to have been copied to the Deputy Minister. However, as we understand this process, if it had been followed, the Deputy Minister of the **Ministry** would not have been the Deputy Minister to whom the letter would have been copied -- it would have been copied to the Deputy Minister

of Management Board. The complainant also indicated that at least one copy of the letter had gone astray when it was sent to the former address of his/her union representative, who had moved.

After taking the above views into account, and having examined the Ministry's file and noting that it did not contain a copy of the above letter, and having viewed the letter and seeing that it did not contain a cc: notation to the Ministry, we must conclude that the Ministry did not have the letter in its possession at the time of the incident. Accordingly, we remain of the view that the **Ministry** did not disclose the letter.

Conclusion: The Ministry did not disclose the complainant's personal information in the letter from the second investigator.

Issue E: Did the Ministry take reasonable steps, in accordance with section 40(2) of the Act, to ensure that the complainant's personal information was accurate and up to date, before using it to write the harassment investigation report?

The complainant made numerous assertions that the information the Ministry had collected about him/her during the first investigation was inaccurate. The complainant gave the following example of an inaccuracy related to allegations that he/she had made certain telephone calls: A witness had apparently stated that the complainant's telephone number had been displayed on a certain call display telephone. However, according to the complainant, that particular employee did not have this feature on their telephone. The complainant stated that what he/she had said at his/her interview had been changed and falsified, and that the interview notes had been edited and rewritten.

Section 47(2) of the Act provides that an individual may request correction of personal information where they believe there is an error or omission, and may require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made. We advised the complainant of his/her rights under section 47(2). Therefore, whether the information that was collected was accurate is **not** an issue that we have addressed in this report.

The only issue regarding accuracy that is addressed in this report is whether the Ministry took reasonable steps to ensure that the complainant's personal information was accurate and up to date before using it to write the harassment investigation report.

Section 40(2) of the Act provides that "the head of an institution shall take reasonable steps to ensure that personal information on the records of the institution is not used unless it is accurate

and up to date". We asked the Ministry what steps it took to ensure that the personal information it collected about the complainant was accurate and up to date before using it to write the harassment report. The Ministry responded by stating the following:

The investigator interviewed and completed the report within thirty days, which was the time frame under the sexual harassment policy. The information resulting from the interviews demonstrated a consistent theme on which the investigator was able to arrive at an informed judgement.

In our view, the length of time that elapses between the collection and use of information may be a factor in determining whether the information was up to date before it was used. By

interviewing the complainant, the aggrieved employee, various witnesses, and by preparing the harassment investigation report within thirty days, it is our view that the Ministry took reasonable steps to ensure that the information collected was up to date before using it to write the harassment investigation report.

With respect to the question of accuracy, as we understand the Ministry's submission, the Ministry contended that the information it collected was not contradictory, and as a result of this, the investigator arrived at a certain conclusion. While the information itself may have been accurate, the question of whether the Ministry had taken reasonable steps to ensure that the information it collected was accurate before using it, must be addressed.

Although the Ministry did not explain the steps it had taken, we determined that the Ministry had taken the following steps to ensure accuracy: 1. the Ministry collected information from the complainant, the aggrieved employee and witnesses directly; 2. questions about the same incidents were asked of different witnesses; 3. some individuals were asked to review and sign the investigator's notes; 4. parts of some witness interviews were recorded as direct quotes while other parts appeared to be paraphrased; 5. there appeared to be further verification of some of the original questions asked of the aggrieved employee.

The determination of whether reasonable steps had been taken hinges on the meaning of "reasonable" in section 40(2) of the Act. Black's Law Dictionary defines reasonable as:

"Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view ... Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable."

Thus, for reasonable steps to have been taken would not have required a standard so high as to necessitate that every possible step be pursued to ensure accuracy. In our view, the steps identified above are consistent with Black's definition of reasonable -- appearing to be fair and suitable under the circumstances.

Therefore, it is our view that the Ministry took reasonable steps to ensure that the complainant's personal information was accurate, in accordance with section 40(2) of the Act, before using it to write the harassment investigation report.

Conclusion: The Ministry took reasonable steps to ensure that the personal information was accurate and up to date before using it to write the harassment investigation report.

SUMMARY OF CONCLUSIONS

- The harassment complaint, the covering letter that accompanied the harassment complaint, and the letter from the second investigator to the complainant contained the complainant's personal information, as defined in section 2(1) of the Act.
- The complainant's personal information in the harassment complaint was disclosed to the

Deputy Minister, Investigator, and the aggrieved employee's Supervisor in accordance with section 42(d) of the Act.

- The complainant's personal information in the harassment complaint was not disclosed to the Acting Director of the complainant's Branch and the Human Resources Director in accordance with section 42 of the Act.
- The complainant's personal information related to the complaint, to the complainant's rights, and to the steps the Ministry was taking with the complainant were disclosed to the aggrieved employee in accordance with section 42 of the Act.
- The complainant's address was not disclosed to the aggrieved employee in accordance with section 42 of the Act.
- The Ministry did not disclose any other correspondence to the aggrieved employee.
- The Ministry did not disclose the complainant's personal information in the letter from the second investigator.
- The Ministry took reasonable steps to ensure that the personal information was accurate and up to date before using it to write the harassment investigation report.

RECOMMENDATIONS

The Directive under which the original harassment investigation was conducted has since been replaced by a Workplace Harassment and Discrimination Prevention Program Directive, issued by Management Board of Cabinet. The Information and Privacy Commissioner authorized Management Board of Cabinet's application to collect personal information indirectly for the above program, subject to certain terms and conditions, including the conditions that institutions would take reasonable steps to ensure that the personal information collected was accurate and up to date, and that personal information would be disclosed in accordance with the Act.

Although we have concluded in our report that there were some breaches of the Act in this case, it is our view that no useful purpose would be served by making recommendations with respect to procedures concerning a Directive that is no longer in effect. However, we recommend that all individuals involved in collecting personal information for the Ministry's Workplace Harassment and Discrimination Program be advised of the terms and conditions under which the above application was authorized.

The Ministry should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendation within six months of receiving this report.

Original Signed by: _____

March 4, 1994 _____

Ann Cavoukian, Ph.D.
Assistant Commissioner

Date