



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

INVESTIGATION REPORT

INVESTIGATION I93-039P

MANAGEMENT BOARD SECRETARIAT

June 8, 1994



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INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning Management Board Secretariat (MBS).

The Ministry that employed the complainant had conducted an investigation of a harassment complaint made against the complainant by another Ministry employee (the aggrieved employee). The finding of this investigation was that the complainant had harassed the aggrieved employee.

The complainant was not satisfied that the investigation had been conducted properly, and subsequently, a second investigation was conducted by an investigator from the MBS Workplace Discrimination and Harassment Prevention (WDHP) Branch. This investigation, which was conducted under a WDHP Directive (the Directive) dated March 1992, focused on the procedural aspects of the first investigation, and concluded that there had been some flaws in the procedures of the first investigation.

Some months after the first harassment complaint was made, the aggrieved employee complained that the harassing behaviour was continuing, and another investigation was initiated by the Ministry. At approximately the same time, the complainant wrote to the Premier of Ontario, complaining about the first two investigations. Subsequently, a third investigation was conducted by WDHP extended staff -- an investigator from a different ministry. The subject of the third investigation was the aggrieved employee's complaint of continuing harassment.

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

1. The second and third harassment complaints and investigation report were disclosed to various individuals who should not have had access, according to the terms of the Directive;
2. MBS disclosed a letter from the third investigator to the complainant by leaving copies of it in open areas of the complainant's office building;
3. A letter from the third investigator to the complainant and correspondence to the Premier's office had not been retained by MBS; and
4. The information about the complainant that MBS had collected and used to write the second and third harassment investigation reports was inaccurate.

Issues Arising from the Investigation

The following issues were identified as arising from the investigation:

- (A) Did the records in question contain the complainant's "personal information", as defined in section 2(1) of the Act? If yes,
- (B) Did MBS disclose the complainant's personal information in the second and third harassment complaints to various individuals in accordance with section 42 of the Act?
- (C) Did MBS disclose the complainant's personal information in the second and third harassment investigation reports to various individuals in accordance with section 42 of the Act?
- (D) Did MBS disclose the complainant's personal information in a letter from the third investigator to the complainant by leaving copies in open areas of the building?
- (E) Did MBS retain the complainant's personal information in a letter from the third investigator and in correspondence with the Premier's office, in accordance with section 40(1) of the Act?
- (F) Did MBS take reasonable steps to ensure that the complainant's personal information was accurate and up to date, before using it to write the second and third harassment investigation reports, in accordance with section 40(2) of the Act?

RESULTS OF THE INVESTIGATION

Issue A: Did the records in question 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:

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The records in question are the second and third complaints and investigation reports, a letter from the third investigator to the complainant; correspondence with the Premier's office; the complainant's and witness' statements in the investigation files.

It is our view that the records in question contained the personal information of the complainant, as defined in sections 2(1)(a) through (f) of the Act. Although the second investigation report did not identify the complainant by name, it is our view that in the context in which the report would have been presented to those involved with the investigation, it contained the complainant's "personal information" as defined in section 2(1) of the Act.

Conclusion: The records in question contained the complainant's "personal information", as defined in section 2(1) of the Act.

Issue B: Did MBS disclose the complainant's personal information in the second and third harassment complaints to various individuals in contravention of 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 disclosures 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;

MBS 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 MBS' functions.

Second Harassment Investigation Complaint

MBS submitted that the second harassment complaint was disclosed to the Investigator, the WDHP Co-ordinator, Legal Counsel, and the MBS Assistant Deputy Minister (ADM).

Investigator

The Investigator is responsible for investigating the allegations against the complainant contained in the complaint. Therefore, it is our view that the Investigator would have needed the record of the complaint in the performance of his/her duties, and that the complainant's personal information in the second harassment complaint was disclosed to the second Investigator in accordance with section 42(d) of the Act.

Co-ordinator, WDHP Unit

The WDHP Co-ordinator is responsible for all investigations carried out by WDHP employees and was the Investigator's supervisor. Therefore, it is our view that the Co-ordinator would have needed the record of the complaint in the performance of his/her duties, and that the complainant's personal information in the second complaint was disclosed to the WDHP Co-ordinator in accordance with section 42(d) of the Act.

Legal Counsel

WDHP staff may consult with Legal Counsel for legal advice, to ensure that there are no legal concerns. It is our view that Legal Counsel would have needed the record of the complaint in the performance of his/her duties in order to properly provide advice to WDHP staff. Therefore, it is our view that the complainant's personal information in the second complaint was disclosed to Legal Counsel in accordance with section 42(d) of the Act.

Assistant Deputy Minister

MBS submitted that the complaint was sent to the ADM, who was responsible for WDHP, because the complaint included allegations against the Deputy Minister of the complainant's Ministry, and it would have been inappropriate for the home Ministry to investigate a complaint against its own Deputy Minister. MBS stated that the ADM needed this information in order to perform his/her duties, namely to ensure a thorough and proper investigation into the matter. Therefore, it is our view that the ADM would have needed the record of the complaint in the performance of his/her duties, and that the complainant's personal information in the second complaint was disclosed to the ADM in accordance with section 42(d) of the Act.

In commenting on the draft report, the complainant re-stated his/her concerns that the WDHP policy and guidelines had not been followed. The complainant stated, "When I handed over my complaint to the Harassment Unit of Management Board, I was assured of the process."

The complainant commented on the WDHP Policy and the fact that it does not specifically address how complaints against Deputy Ministers are to be handled. The complainant also expressed concerns that the same individuals (the MBS ADM and Legal Counsel) who ordered an investigation into complaints by the complainant had also ordered an investigation into complaints against the complainant. The complainant went on to say that the Policy clearly indicates and assures that the information collected in [the harassment] investigative process is subject to [the Act].

In the circumstances of the second complaint, the Deputy Minister of the complainant's Ministry was the respondent. Despite the fact that the WDHP Policy does not specifically address this matter, we agree with MBS that the MBS Deputy Minister was the logical individual to receive the results of the investigation.

Since the WDHP Unit may be called upon to assist in any harassment investigation, it may sometimes be the case that investigations into multiple complaints or counter-complaints concerning the same respondents or harassment complainants, will be ordered by the same individuals. The fact that the information collected is subject to the Act does not mean that it may **not** be disclosed to individuals who need the record(s) in the performance of their duties,

in accordance with the Act. Taking all of the above into account, we remain of the view that the disclosures to the ADM and Legal Counsel were in accordance with the Act.

Third Harassment Investigation Complaint

MBS submitted that the MBS staff who received the third harassment complaint were the third Investigator, Legal Counsel and the MBS Assistant Deputy Minister.

Investigator

As in the case of the second investigation, it is our view that disclosure of the record of the third complaint to the Investigator responsible for conducting the investigation was also in accordance with section 42(d) of the Act.

Legal Counsel

As we understand the circumstances of the third investigation, Legal Counsel provided advice to MBS staff with respect to the complaint, made the contacts with respect to the appointment of the third Investigator, and provided direction to the Investigator on how to proceed with the investigation. It is our view that Legal Counsel would have needed the record of the complaint in the performance of these duties. Therefore, it is our view that the complainant's personal

information in the third harassment complaint was disclosed to Legal Counsel in accordance with section 42(d) of the Act.

The above process did not reflect the regular procedures of the WDHP Unit, as we understand them. This is discussed under "Other Matters".

Assistant Deputy Minister

According to the terms of the Directive, where a concern has been expressed about the quality of the Ministry's investigation or the Ministry's ability to handle the complaint impartially and confidentially, the complaint should be investigated by the WDHP Unit. As we understand the circumstances of the third investigation, the ADM received the complaint to ensure that an impartial investigation was undertaken, given that the complainant was dissatisfied with the Ministry's first investigation. Therefore, it is our view that the ADM would have needed the record of the third complaint in the performance of his/her duties, and that the complainant's personal information in the third complaint was disclosed to the ADM in accordance with section 42(d) of the Act.

Conclusions: The complainant's personal information in the second harassment complaint was disclosed to the Investigator, WDHP Co-ordinator, Legal Counsel, and Assistant Deputy Minister in accordance with section 42 of the Act.

The complainant's personal information in the third harassment complaint was disclosed to the Investigator, Legal Counsel and the Assistant Deputy Minister in accordance with section 42 of the Act.

Issue C: Did MBS disclose the complainant's personal information in the second and third harassment investigation reports to various individuals in contravention of section 42 of the Act?

Second Harassment Investigation Report

The second Investigator stated that the second harassment investigation report was disclosed to the WDHP Co-ordinator, Legal Counsel, and the MBS Deputy Minister.

Co-ordinator, WDHP Unit

The second Investigator gave the report to the WDHP Co-ordinator, whose role is to oversee each investigation conducted by WDHP Investigators. The Co-ordinator forwarded the report under his/her signature to the Deputy Minister. Therefore, it is our view that the Co-ordinator would have needed the record of the second investigation report in the performance of his/her duties, and that the complainant's personal information in the second report was disclosed to the Co-ordinator in accordance with section 42(d) of the Act.

Legal Counsel

The second investigator indicated that he/she had shown the second harassment investigation report to Legal Counsel, to determine if there were any legal concerns arising out of the report. It is our view that in order to provide proper legal advice, Legal Counsel would have need the record of the second report. Therefore, it is our view that Legal Counsel would have needed the record of the second report in the performance of his/her duties, and that the complainant's personal information in the second report was disclosed to Legal Counsel in accordance with section 42(d) of the Act.

Deputy Minister

MBS submitted that the second harassment investigation report was forwarded to the MBS Deputy Minister responsible for WDHP Policy because the program Deputy Minister was the respondent in the second complaint. Therefore, it is our view that the Deputy Minister would have needed the record of the report in the performance of his/her duties, and that the complainant's personal information in the second report was disclosed to the Deputy Minister in accordance with section 42(d) of the Act.

Third Harassment Investigation Report

MBS submitted that the MBS staff who received the third harassment investigation report were Legal Counsel and the MBS Assistant Deputy Minister.

Legal Counsel

A memo in the investigation file indicates that Legal Counsel received the report from the Investigator and subsequently wrote a memo to the ADM, enclosing the report, and requesting a meeting with the ADM to discuss how to proceed. It is our view that in order to provide proper legal advice, Legal Counsel would have needed the record of the third report. Therefore, it is our view that Legal Counsel would have needed the record of the third report in the performance of his/her duties, and that the complainant's personal information in the third report was disclosed to Legal Counsel in accordance with section 42(d) of the Act.

Assistant Deputy Minister

The ADM was responsible for ensuring the investigation had been carried out. Therefore, it is our view that the ADM would have needed the record of the third harassment report in the performance of his/her duties, and that the complainant's personal information in the third investigation report was disclosed to the ADM in accordance with section 42(d) of the Act.

Conclusions: The complainant's personal information in the second investigation report was disclosed to the Co-ordinator, Legal Counsel and Deputy Minister in accordance with section 42 of the Act.

The complainant's personal information in the third investigation report was disclosed to Legal Counsel and the Assistant Deputy Minister in accordance with section 42 of the Act.

Issue D: Did MBS disclose the complainant's personal information in a letter from the third investigator to the complainant by leaving copies in open areas of the building?

In determining whether the disclosure was made by MBS, we considered the views of the complainant, the statements made by the third Investigator, and the results of our review of records at the WDHP offices.

The complainant held the view that the disclosure had been made by the third Investigator or MBS, in collusion with the complainant's Ministry, as a harassment tactic. The third Investigator stated in his/her report that he/she believed that the letter had been copied and distributed by the complainant. The third Investigator had not sent MBS a copy of the letter in question. Only two copies had been made -- one was still in the Investigator's possession, at his/her home, and the second had been copied and sent to the complainant's union representative.

After taking the above views into account, and having examined the WDHP file and noting that it did not contain a copy of the above letter, we must conclude that MBS did not have the letter in its possession at the time of the incident. Accordingly, we are of the view that MBS did not disclose the letter.

Conclusion: MBS did not disclose the complainant's personal information in the letter from the third investigator.

Issue E: Did MBS retain the complainant's personal information in a letter from the third investigator and correspondence with the Premier's office, in accordance with section 40(1) of the Act?

Section 40(1) of the Act provides that personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information. Section 5(1) of Regulation 460, R.R.O. 1990, as amended, states:

Personal information that has been used by an institution shall be retained by the institution for at least one year after use unless the individual to whom the information relates consents to its disposal.

Thus, MBS would have been required to have retained the complainant's personal information for a minimum of one year after use. We reviewed the WDHP files in May 1993, but did not find a copy of the letter from the third Investigator. We made further inquiries in June 1993, and found that the third investigation file was being stored at the Investigator's home, rather than on MBS premises. In further submissions, in April 1994, MBS indicated that the investigation file was then being stored in a locked cabinet at the third Investigator's workplace. MBS provided us with a copy of the letter. It is thus our view that the letter had been retained by MBS, in accordance with section 40(1) of the Act.

MBS also submitted that correspondence to and from the Premier's office was contained in the third investigation file, including the complainant's letter to the Premier, and a letter from Cabinet Office to the third Investigator. Therefore, it is our view that the records in question were retained by MBS, in accordance with section 40(1) of the Act. The storage of the third investigation file is discussed under "Regular Procedures" in "Other Matters".

Conclusion: MBS retained the complainant's personal information in accordance with section 40(1) of the Act.

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

The complainant made numerous assertions that the information the Ministry had collected about him/her during the second and third investigation was inaccurate. Section 47(2) of the Act provides that an individual may request correction of personal information where an individual believes 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.

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 MBS what steps it had taken to ensure that the personal information it collected about the complainant was accurate and up to date before using it to write the second and third harassment investigation reports.

Second Investigation Report

The second investigation report was dated July 23, 1992, approximately five months after the complaint was received. During this time frame, the Investigator met with the complainant and other individuals involved in the investigation and reviewed the investigation file from the first investigation in order to gather the information for the report. Accordingly, we are of the view that the information was up to date.

The second investigator stated that he/she had taken the following steps to ensure the complainant's personal information was accurate and up to date:

verified dates, verified witness statements, consulted other documents; verified information through other witness or documentary evidence; repeated information back to witnesses to make sure he/she understood the information; asked witnesses to slow down or repeat information so that he/she could write it down; was very careful about using quotation marks when recording the information; before preparing the final report did a verbal disclosure for the purpose of 1.

advising the complainant of the tentative conclusions with a view to determining if further investigation was needed and 2. providing the opportunity for the correction of factual errors; met with the complainant and his/her union rep three times, spending several hours to go over everything; the complainant objected to the findings, but not the accuracy.

The second Investigator indicated that although some of the witnesses had signed the notes, indicating their agreement that they were accurate, it was not WDHP practice to do so at that time. The complainant did not sign the second Investigator's notes.

Third Investigation Report

The third investigation report was dated January 20, 1993. It mentioned interviews that took place in late September and early October 1992, and other events that took place as late as December 2, 1992. Accordingly, we are of the view that the information was up to date.

MBS submitted that the third Investigator had taken the following steps to ensure accuracy:

contacted the complainant and met with the complainant; during this meeting, ... attempted to verify the information the complainant had provided; ... contacted the witnesses the complainant had referred to.

The determination of whether reasonable steps have 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 the case of the third investigation, the complainant had refused to co-operate with the investigation, after he/she did not receive a complete copy of the complaint against him/her, thus making it more difficult for the Investigator to pursue further steps to ensure accuracy. The third Investigator was unable to make any findings on the specific allegations of the third harassment complaint. It is our view that the steps identified above in the second and third investigations are consistent with Black's definition of reasonable -- appearing to be fair and suitable under the circumstances.

Taking all of the above into account, it is our view that MBS took reasonable steps to ensure that the complainant's personal information was accurate and up to date, in accordance with section 40(2) of the Act, before using it to write the second and third investigation reports.

Conclusion: MBS took reasonable steps to ensure the complainant's personal information was accurate and up to date before using it to write the second and third harassment investigation reports, in accordance with section 40(2) of the Act.

Other Matters

During the course of this investigation the following matters were identified which we believe should be brought to the institution's attention:

Breach of Authorization

In May 1992, MBS applied to the Office of the Information and Privacy Commissioner and was granted the authorization to indirectly collect personal information for its WDHP Program. The authorization was limited by a number of terms and conditions. It is our view that the terms of the authorization were breached by MBS in the following ways:

The third investigation file was stored at the Investigator's home for several months after the investigation was completed. While from time to time there may be an unusual case where an investigator may be required to store documents overnight at his/her home, it is our view that the above-noted long term storage was contrary to the terms of the authorization, which states:

6. All Program co-ordinators, advisors, investigators, supervisors, managers and other management representatives who are called upon to resolve complaints of discrimination or harassment will keep all records pertaining to a particular complaint of discrimination or harassment in a secure filing system, with access restricted to authorized individuals only, pursuant to section 4(2) of Ontario regulation 516/90;

The third investigation report identified both the complainant and the aggrieved employee by name, contrary to the terms of the authorization, which states:

7. Complainants, respondents and witnesses will not be identified by name in investigation reports, under both the formal and informal complaints resolution processes;

Regular Procedures

MBS did not appear to be following its regular procedures as set out in the Directive, with respect to the third investigation. For example, the third investigation report, rather than being forwarded to the WDHP Co-ordinator, was sent by the Investigator to MBS Legal Counsel. Legal Counsel forwarded the report to the MBS Deputy Minister.

The Co-ordinator, whom we understand is the extended team supervisor, was not involved in the third investigation, and therefore, neither directed the investigation nor reviewed the report to ensure they reflected WDHP practices and complied with the terms of the authorization. The third investigator indicated that he/she was unsure of the procedure to follow since this was the first time he/she had done an investigation on behalf of the WDHP unit.

It is our understanding that although the regular procedure that MBS has adopted is for the investigation file to be returned to the home Ministry when an investigation is completed, the third investigation file remains at the Investigator's workplace.

SUMMARY OF CONCLUSIONS

- The records in question contained the complainant's "personal information", as defined in section 2(1) of the Act.
- The complainant's personal information in the second harassment complaint was disclosed to the Investigator, WDHP Co-ordinator, Legal Counsel, and Assistant Deputy Minister in accordance with section 42 of the Act.
- The complainant's personal information in the third harassment complaint was disclosed to the Investigator, Legal Counsel and the Assistant Deputy Minister in accordance with section 42 of the Act.
- The complainant's personal information in the second investigation report was disclosed to the Co-ordinator, Legal Counsel and Deputy Minister in accordance with section 42 of the Act.
- The complainant's personal information in the third investigation report was disclosed to Legal Counsel and the Assistant Deputy Minister in accordance with section 42 of the Act.
- MBS did not disclose the complainant's personal information in the letter from the third investigator.
- MBS took reasonable steps to ensure the complainant's personal information was accurate and up to date before using it to write the second and third harassment investigation reports, in accordance with section 40(2) of the Act.

RECOMMENDATIONS

We recommend that MBS incorporate the following points into its procedures:

1. that all WDHP staff and extended staff be advised of the terms and conditions of the authorization issued by the Office of the Information and Privacy Commissioner;
2. that WDHP investigation files, including the third investigation file, be forwarded in a confidential manner to the home Ministry, in accordance with current MBS procedures;
3. that extended staff be advised of the correct reporting relationships in advance of conducting an investigation on behalf of the WDHP unit.

Within six months of receiving this report, MBS should provide the Office of the Information and Privacy Commissioner with proof of compliance with the above recommendations.

Original signed by: _____
Ann Cavoukian, Ph.D.
Assistant Commissioner

June 8, 1994

Date