



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

INVESTIGATION REPORT

INVESTIGATION I94-029P

MINISTRY OF COMMUNITY AND SOCIAL SERVICES



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

INTRODUCTION

Background of the Complaint

This investigation was initiated as a result of a complaint concerning the Ministry of Community and Social Services (the Ministry).

The complainant is an employee of a facility operated by the Ministry. Another employee at the facility initiated a grievance proceeding against the Ministry, stating that administration and management had been discriminating against him and harassing him at his workplace.

A hearing was held before the Grievance Settlement Board (the GSB). The complainant, who was not a party to the grievance, was subpoenaed by the grievor to attend this hearing. At the GSB hearing, the first witness to testify on behalf of the grievor was a representative of the union to which the grievor belonged.

During cross-examination, the witness was asked by the Ministry's counsel (the Counsel) if the complainant had been convicted of mischief for a certain reason. The witness responded affirmatively. The Counsel had been advised of this information by management's representative. At a subsequent GSB hearing regarding the same matter, the Counsel again asked a witness about the complainant's criminal conviction. The witness confirmed that the complainant had been convicted.

The complainant was concerned that the management representative, who was the Assistant Administrator at the facility where the complainant was employed, had accessed his personnel file prior to the GSB hearing, without his knowledge or consent. The complainant was also concerned that the disclosure of his personal information by the Assistant Administrator to the Counsel and the disclosure of the criminal conviction information by Counsel at the GSB hearing was contrary to 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) Did the Assistant Administrator access the complainant's personnel file prior to the GSB hearing, in compliance with Ontario Regulation 460?
- (C) Was the Assistant Administrator's disclosure of the complainant's personal information to the Counsel, in compliance with section 42 of the Act?
- (D) Was the Counsel's disclosure of the criminal conviction information at the GSB hearing prohibited by the Act?

RESULTS OF THE INVESTIGATION

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

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

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

- (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 found in the complainant's personnel file, specifically the fact that the complainant had been convicted of mischief for a particular reason.

It is our view that this information met the requirements of paragraph (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: Did the Assistant Administrator access the complainant's personnel file prior to the GSB hearing, in compliance with Ontario Regulation 460?

In his comments on the draft report, the complainant expressed his concern that the Assistant Administrator had accessed his personnel file and the criminal conviction information contained therein, contrary to the Act.

Section 4(2) of Ontario Regulation 460 states that:

Every head shall ensure that only those individuals who need a record for the performance of their duties shall have access to it.

The Ministry advised that, as part of his management responsibilities, the Assistant Administrator had previously reviewed the complainant's personnel file, including the criminal conviction information, further to complaints and grievances filed by the complainant himself. Consequently, the Assistant Administrator was already familiar with the contents of the complainant's personnel file prior to the grievance in question. The Ministry further stated that the Assistant Administrator was also aware of the complainant's criminal conviction because it was general knowledge throughout the facility.

However, the Ministry advised that prior to being interviewed by the Counsel for the grievance in question, the Assistant Administrator had accessed the complainant's personnel file, for information which related to the GSB hearing. According to the Ministry, the complainant was either a witness to or had knowledge of various incidents raised by the grievor in his grievance. The Ministry stated that the Assistant Administrator accessed the complainant's personnel file in

order to prepare for his interview with the Counsel and, ultimately, to assist the Counsel in preparing the Ministry's testimony at the hearing itself.

It is our view that the Assistant Administrator's duties included testifying at the GSB hearing and briefing the Counsel for that purpose. In order to perform these duties adequately, the Assistant Administrator needed to obtain any information that might be related to the GSB hearing. Accordingly, it is our view that the Assistant Administrator accessed the complainant's personnel file in compliance with section 4(2) of Ontario Regulation 460.

Conclusion: The Assistant Administrator accessed the complainant's personnel file prior to the GSB hearing in compliance with Ontario Regulation 460.

Issue C: Was the Assistant Administrator's disclosure of the complainant's personal information to the Counsel, in compliance with the section 42 of the Act?

In his comments on the draft report, the complainant expressed his concern that the Assistant Administrator had disclosed his personal information from his personnel file to the Counsel.

The Ministry advised that the Assistant Administrator disclosed the complainant's personal information during his interview with the Counsel, for the purpose of providing the Counsel with any information that would assist her in preparing for the GSB hearing.

Section 42(d) of the Act states that an institution shall not disclose personal information in its custody or under its control except,

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;

It is our view that one of the Ministry's functions as an employer is to respond to grievances made by one of its employees, and to participate as a party to any litigation (such as a GSB hearing) arising from such grievances.

The Counsel was the Ministry employee who was responsible for representing the Ministry's interests at the GSB hearing. The Ministry took the position that in order to adequately prepare and determine what testimony should be presented at the GSB hearing, the Counsel had to be aware of any information which might be related to the hearing.

We accept the Ministry's submissions, and, as a result, it is our view that section 42(d) of the Act applies in the circumstances of this case. The Assistant Administrator disclosed the complainant's personal information to the Counsel, an employee of the Ministry, who needed this information in the performance of her duties, and the disclosure was necessary and proper in the discharge of one of the Ministry's functions, i.e., participating in a grievance hearing to which it was a party.

Conclusion: The Assistant Administrator's disclosure of the complainant's personal information to the Counsel, was in compliance with section 42 of the Act.

Issue D: Was the Counsel's disclosure of the criminal conviction information at the GSB hearing prohibited by the Act?

The Ministry has relied upon section 64(1) of the Act for its authority to disclose the criminal conviction information at the GSB hearing. The full text of section 64 states:

- (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.

We have reviewed the Ministry's submission regarding the application of section 64(1) of the Act. In this case, since the information was disclosed during the course of a witness's testimony, we believe that section 64(2) of the Act is the more relevant section to consider. Consequently, we have examined the application of section 64(2) of the Act, in the circumstances of this complaint.

In order for section 64(2) of the Act to apply, the tribunal, in this case the GSB, must have the power to compel a witness to testify. The Crown Employees Collective Bargaining Act (the CECBA) sets out the powers of the GSB. Section 19(2) of the CECBA states that the GSB has the same powers as a board of arbitration under section 11(11) of the CECBA. Section 11(11) of the CECBA states, in part:

A board has all the powers of the Tribunal,

- (a) to summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath or affirmation;
- ...
- (c) to accept or exclude any oral testimony, document or other thing.

Therefore, the GSB has the statutory power to compel a witness to testify at a GSB hearing. Section 64(2) of the Act states that the Act does not affect this power.

In this case, the complainant's personal information was disclosed by the Counsel in the form of a question and confirmed by the witness. The Counsel had asked the question for the purpose of bringing the fact of the complainant's conviction to the attention of the GSB. In our view, by confirming the information contained in the Counsel's question, the disclosure became part of the witness's testimony. Since section 64(2) of the Act states that the Act cannot affect the power of a tribunal to compel a witness to testify, it is our view that, in this case, the Ministry's disclosure of the complainant's personal information during the GSB hearing did not violate the provisions of the Act.

Thus it is our view that section 64(2) of the Act applies in the circumstances of this case, and that the disclosure was not prohibited by the Act.

The complainant also questioned how the fact of his conviction was relevant to the matter being heard by the GSB. However, since we have found that section 64(2) applies to the disclosure of the complainant's personal information at the hearing, it is our view that we cannot make a determination under the Act regarding the relevance of the personal information to the issues in the proceedings before the GSB.

Conclusion: The disclosure of the complainant's personal information by the Counsel at the GSB hearing was not prohibited by the Act.

Other Matters

During the course of this investigation, the following matters were identified which we would like to bring to the Ministry's attention.

Record of Disclosure/Use - Sections 45 and 46

In his comments on the draft report, the complainant expressed his concern that no notation had been made in his personnel file stating that: his personal information had been accessed and by whom, what information had been removed, and for what purpose.

Section 46(1) of the Act states that a head shall attach or link to personal information in a personal information bank,

- (a) a record of any use of that personal information for a purpose other than a purpose described in clause 45(d); and
- (b) a record of any disclosure of that personal information to a person other than a person described in clause 45(e).

Section 2(1) of the Act states that the term "personal information bank" means a collection of personal information that is organized and capable of being retrieved using an individual's name or an identifying number or particular assigned to the individual. It is our view that the complainant's personnel file is a such a bank.

In this case, the Assistant Administrator disclosed the complainant's personal information to the Counsel so that Counsel could use the information to prepare the Ministry's testimony at the hearing. In compliance with section 46(1)(b) of the Act, the Ministry must attach a record of any disclosure to a person other than a person described in clause 45(e). Clause 45(e) states that the responsible minister shall publish at least once each year an index of all personal information banks, setting forth in respect of each personal information bank,

- (e) to whom the personal information is disclosed on a regular basis;

The Ministry advised our Office that the personal information bank in the "index", i.e. the "Directory of Records", which included the personal information in question was the bank entitled Performance Management (page 18 of the 1994/95 Directory). Specifically, the bank states that an employee's name, performance contract, and appraisal of work performance may be used to manage employees' performance, and identify staff training needs. The information may be used by personnel/human resources staff, training and Employment Equity staff, line managers, and auditors. The Ministry stated that since the personal information maintained in this bank could be disclosed to line managers, it could be disclosed to the Assistant Administrator. However, the Assistant Administrator disclosed the personal information to the Counsel who, in our view, was not a person to whom the personal information was disclosed on a regular basis as indicated in the index.

In addition, section 46(3) states:

Where the personal information in a personal information bank under the control of an institution is used or disclosed for a use consistent with the purpose for which the information was obtained or compiled by the institution but the use is not one of the uses included under clauses 45 (d) and (e), the head shall,

- (a) forthwith notify the responsible minister of the use or disclosure, and
- (b) ensure that the use is included in the index.

In this case the complainant's personal information was disclosed to the Counsel so that Counsel could use the information to prepare the Ministry's testimony at the hearing. The complainant's personal information was obtained or compiled by the Ministry for the purpose of administering its employees. It is thus our view that the complainant's personal information was disclosed for a use consistent with the purpose for which the information was obtained or compiled, but the use was not one of the uses included under clauses 45(d) or (e) of the Act. Therefore, in our view, the Ministry should have attached a record of the disclosure to the complainant's personnel file, in accordance with section 46(1)(b) of the Act.

Disclosure Violates Spirit of the Act

While we have found that the disclosure at the GSB hearing was not prohibited by the Act, it is our view that the disclosure of this type of sensitive personal information in the context of a hearing, where the subject of the information was not a party to the litigation but rather a witness who was compelled to testify, violates the "spirit" of the privacy provisions of the Act.

Facsimile Transmission

We also wish to draw the Ministry's attention to its transmission of personal information by facsimile (fax). When responding to this complaint, the Ministry sent its submission to our Office by fax. Since this response contained personal information, we wished to remind the Ministry of the procedures recommended in our fax guidelines. Accordingly, in our draft report, we enclosed a copy of our two papers: "Guidelines on Facsimile Transmission Security, June

1989" and "Update on 1989 Guidelines on Facsimile Transmission Security, June 1990". We recommend that the Ministry review these guidelines and consider incorporating them into its daily practices.

SUMMARY OF CONCLUSIONS

- The information in question was personal information as defined in section 2(1) of the Act.
- The Assistant Administrator accessed the complainant's personnel file prior to the GSB hearing, in compliance with Ontario Regulation 460.
- The Assistant Administrator's disclosure of the complainant's personal information to the Counsel was in compliance with section 42 of the Act.
- The disclosure of the complainant's personal information by the Counsel at the GSB hearing was not prohibited by the Act.

RECOMMENDATIONS

We recommend that,

1. As an interim measure, the Ministry attach or link the following to the complainant's and other employees' personal information in their personnel files: a record of any disclosure of personal information to a person other than one described in clause 45(e), in compliance with section 46(1) of the Act. Thus, until such time as this "new" use is included in the Directory of Records (see below), whenever personal information from an employee's personnel file is disclosed for the purpose of aiding the Ministry in preparing a response to a grievance or for other litigation matters, the Ministry shall attach a record of that disclosure.
2. The Ministry notify the responsible minister of the disclosure, and ensure that the "new" use is included in the 1995/96 Directory of Records, in compliance with section 46(3) of the Act.

Within six months of receiving this report, the Ministry 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

November 30, 1994

Date

- 8 -
