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

ORDER 208

Appeal 890314

Ontario Human Rights Commission

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O R D E R

INTRODUCTION:

On August 10, 1989, a request was received by the Ontario Human Rights Commission (the "institution") under the Freedom of Information and Protection of Privacy Act, 1987, as amended (the "Act"). The requester sought access to:

1. All intake documents relating to the complaint of [a named individual] against [a named company] and [two named employees], Ontario Human Rights Commission Complaint No. 10_618C.

2. All written statements of any person relating to the Complaint of [the named individual].

3. All notes of any interview with any person regarding the Complaint of [the named individual].

4. The investigation file relating to the complaint of [the named individual].

On September 28, 1989, the institution's Freedom of Information and Privacy Co_ordinator wrote to the requester denying access in the following manner:

1. access was denied to all intake documents pursuant to subsections 14(1)(a), (b), (c) and 14(2)(a) of the Act;

2. access was denied to all written statements of any person relating to the complaint pursuant to subsections 14(1)(a), (b), (c) and (d) and 21(1) of the Act;

3. access was denied to all notes of interviews pursuant to subsections 14(1)(a), (b), (c), (d), 14(2)(a) and 21(1) of the Act; and

4. access was denied to the investigation file pursuant to subsections 14(1)(a), (b), (c), (d), 14(2)(a) and 21(1) of the Act.

By letter dated October 10, 1989, the requester appealed the decision of the head pursuant to subsection 50(1) of the Act. This subsection gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head of an institution under the Act to the Commissioner. On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

Notice of the appeal was given to the institution and the appellant on October 13, 1989.

The Appeals Officer assigned to this appeal obtained and examined the records at issue in this appeal (428 pages in total).

On November 8, 1989, the institution claimed subsection 13(1) and section 19 as further grounds for denying access to the requested records.

As attempts to settle the appeal were not successful, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution on March 20, 1990. Enclosed with each notice letter was a report prepared by the Appeals Officer, intended to assist the parties

in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

Written representations were received from the institution and the appellant. I have considered all representations in making this Order.

PURPOSES OF THE ACT/BURDEN OF PROOF:

Before beginning my discussion of the specific issues in this case, I think it would be useful to briefly outline the purposes of the Act as set out in section 1. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record

falls within one of the specified exemptions in this Act lies with the head.

BACKGROUND:

The requested records form part of the institution's investigation file into a complaint of discrimination by a named individual against her employer. The appellant in this appeal is the employer's legal counsel.

The institution has been unable to conciliate a settlement of the complaint and therefore the matter will be submitted to the Commission for its consideration.

The appellant has indicated that he is not interested in records which he provided to or received from the institution. He is also not interested in records related to the processing of the investigation file for example, priority post slips, micro search forms and case opening statistical data sheets.

ISSUES/DISCUSSION:

A. Whether the exemptions provided by subsections 14(1)(a), (b), (c), (d) and 14(2)(a) of the Act apply to the requested records.

B. Whether the exemption provided by section 13 of the Act applies to the requested records.

C. Whether the exemption provided by section 19 of the Act applies to the requested records.

D. Whether the information contained in the requested records qualifies as "personal information" as defined in subsection 2(1) of the Act.

E. Whether the exemption provided by section 21 applies to the requested records.

ISSUE A: Whether the exemptions provided by subsections 14(1)(a), (b), (c), (d) and 14(2)(a) of the Act apply to the requested records.

The institution has relied on subsections 14(1)(a), (b), (c), (d) and 14(2)(a) of the Act to withhold the requested records in their entirety.

Subsections 14(1)(a), (b), (c), and (d) of the Act read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;

Subsection 14(2)(a) of the Act reads as follows:

> A head may refuse to disclose a record,

> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

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

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b);

In his representations the appellant submitted that:

> The Supreme Court of Canada has stated that human rights proceedings are not penal but compensatory. The goal of the legislation is not to punish wrongdoers but to compensate individuals who have suffered from discrimination. See Robichaud v. D.N.D..
>
> The remedial authority of a Board of Inquiry under the Human Rights Code is to provide compensation for the complainant. The Board can impose no penalty or sanction.
>
> This is especially so in this particular proceeding in which sexual harassment is alleged against the employer. Section 44 of the Code does not impose vicarious liability on an employer for contraventions

> of subsections 2(2), 4(2) and section 6 of the Code. These include sexual harassment.
>
> Furthermore subsection 40(4) of the Code limits the remedial authority of the Board to making an order against the employer only when there is a continuation of the harassment after the Board's first ruling.
>
> Therefore this particular investigation against the employer cannot result in a penalty or a sanction and is not "law enforcement".

The provisions of the Human Rights Code, 1981, S. O., c. 53 (the "Code") and the procedures used by the institution to fulfil its legislated mandate have been reviewed by Commissioner Sidney B. Linden in several Orders. For example, in Order 89 (Appeal Number 890024), dated September 7, 1989, Commissioner Linden stated:

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

The appellant submits that a board of inquiry under the Code does not have the power to impose a penalty or sanction.

Subsections 40(1) and (4) of the Code set out the powers of a board of inquiry. These subsection read as follows:

> (1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 8 by a party to the proceeding, the board may, by order,
>
> > (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
> >
> > (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish. 1981, c. 53, s. 40(1)
>
> (2), (3) Repealed: 1986, c. 64, s. 18(16)
>
> (4) Where a board makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2(2) or subsection 4(2) or conduct under section 6, and the board finds that a person who is a party to the proceeding,

> (a) knew or was in possession of knowledge from which he ought to have known of the infringement; and
>
> (b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,
>
> the board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 35(2), request the board to re-convene and if the board finds that a person who is a party to the proceeding,
>
> (c) knew or was in possession of knowledge from which he or she ought to have known of the repetition of infringement; and
>
> (d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,
>
> the board may make an order requiring the person to take whatever sanctions/or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.

Bill 34, An Act to provide Freedom of Information and Protection of Individual Privacy, was reviewed by the Standing Committee on the Legislative Assembly on a clause by clause basis. I note that during the discussion surrounding the definition of "law

enforcement" contained in Bill 34 (the same definition as in the current Act), the former Attorney General, Ian Scott stated:

> The purpose of the broad definition is to include within law enforcement the Ontario Human Rights Commission ...
> [June 25, 1986, p. M-6]

The word sanction is defined in the Websters Third New International Dictionary of the English Language Unabridged, 1986 as follows:

> The detriment, loss of reward, or other coercive intervention that is annexed to a violation of a law as a means of enforcing the law and may consist in the direct infliction of injury or inconvenience (as in the punishments of crime) or in mere coercion, restitution, or undoing of what was wrongly accomplished (as in the judgements of civil actions) or may take the form of a reward which is withheld for failure to comply with the law.

Having considered all of the above, I do not agree with the appellant's position. For the purposes of this Act, I find that investigations by the institution into complaints made under the Code lead or could lead to proceedings at a board of inquiry where a sanction could be imposed. Therefore, it is my view that the investigation which generated the records at issue in this appeal satisfies the definition of "law enforcement" found in subsection 2(1) of the Act.

As my determination centred upon the word "sanction" it is not necessary for me to deal with the word "penalty" as it appears in the definition of "law enforcement" contained in subsection 2(1) of the Act.

Having found that the investigation by the institution falls within the definition of "law enforcement", I must now decide whether disclosure of the records at issue in this appeal could reasonably be expected to interfere with this investigation.

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

As previously stated, the institution has not been able to conciliate a settlement of the complaint. Therefore, the matter will be put before the Commission for its consideration. It may decide not to appoint a board of inquiry pursuant to subsection 35(2) of the Code. Subsection 36(1) of the Code provides that the complainant may then request the institution to reconsider this decision. If the complainant in this case applies for reconsideration, then it is possible that further investigation of the complaint would be undertaken. On the other hand, the institution may decide to appoint a board of inquiry either upon its initial review of the matter, or following a reconsideration of an initial decision not to appoint a board of inquiry, pursuant to subsection 35(1) of the Code. I reiterate the view I expressed in a previous Order that until either a board of inquiry has been

appointed or the reconsideration process has been completed, it is not possible to categorically state that the institution's investigation has been completed. [See Order 178 (Appeal Number 890112), dated June 12, 1990.]

It is my view that disclosure of the requested records in this case (the investigation file excluding the portions the appellant no longer wishes), could reasonably be expected to interfere with the institution's investigation of the complaint. Therefore, the requested records at issue in this appeal qualify for exemption under subsections 14(1)(a) and (b) of the Act.

Section 14 of the Act provides the head with the discretion to disclose records even if they meet the test for an exemption. I find nothing improper in the way in which the head has exercised her discretion.

Because I have found that the exemption provided by subsections 14(1)(a) and (b) of the Act apply to the records at issue in this appeal, it is not necessary for me to consider the application of the other exemptions that were raised by the institution.

ORDER:

I uphold the head's decision to withhold the requested records at issue in this appeal pursuant to subsections 14(1)(a) and (b) of the Act.

Original signed by: December 4, 1990
Tom A. Wright Date
Assistant Commissioner