



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

ORDER P-403

Appeal P-910100

Ontario Human Rights Commission



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INTERIM ORDER

BACKGROUND:

The Ontario Human Rights Commission (the OHRC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records related to a complaint against the requester, including the written complaint, the investigator's notes, the OHRC's counsel's notes, and the transcript of the hearing relevant to the complaint. The OHRC granted access to a typewritten version of the complaint, and denied access to the remaining records pursuant to sections 14(1)(a) and (b), 14(2)(a) and 19 of the Act. The requester appealed the OHRC's decision.

Mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the OHRC's decision was sent to the OHRC, the appellant, the person who made the complaint (the named individual), and a representative of other individuals named in the records (the representative). Written representations were received from the OHRC, the appellant, and the representative. In its representations, the OHRC also cited exemptions under sections 49(a) and (b) of the Act.

The representative provided written consent from six individuals to disclosure of any information pertaining to them in the records to the appellant. In addition, the representative consented to disclosure of any information relating to a named police service in the records to the appellant.

In his representations, the appellant narrowed the scope of his request to include only the following information:

1. [The named individual's] written complaint. ["Written" was clarified by the appellant to mean handwritten] ...
2. [OHRC investigator]'s investigative notes pertaining to [the appellant] [including notes taken at a hearing held in November, 1990] ...
3. Solicitor G. Sanson's notes which were compiled at the hearing in November, 1990.

I have reviewed the records, and it is my view that the following pages are not within the scope of the narrowed request and, therefore, are not at issue in this appeal: 9-17, 21-26, 32-34, 55, 61-65, 67-94, 96, 98, 105, 114, 120-121, 123-125, 129, 134-144, 154-155, 158-161, 168-170, 174-176, 182-184, 194-197, 201, 335-449, 452, 454-459, 461-463, 465-473, 477-484, 488-491, 525, 531-541 (Case Summary), 550-551, 568, and 570-577. In addition, any pages of the investigator's notes which I find not to contain the personal information of the appellant are not responsive to the request and are not at issue in this appeal.

The OHRC's index which accompanied the records cites section 13(1) of the Act as an exemption for pages 107-112. However, in its decision letter the OHRC does not claim this

section as an exemption nor have any representations been provided on this issue. Accordingly, section 13(1) of the Act will not be considered in the context of this appeal.

ISSUES:

The issues arising in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. Whether the records qualify for exemption under section 14(1)(a) or (b) of the Act.
- C. Whether Records 1, 2 and/or 3 qualify for exemption under section 14(2)(a) of the Act.
- D. Whether the records qualify for exemption under section 19 of the Act.
- E. Whether the discretionary exemption provided by section 49(a) applies.
- F. Whether the discretionary exemption provided by section 49(b) applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.

Section 2(1) of the Act defines "personal information", in part, as "... recorded information about an identifiable individual ...". The OHRC claims that all of the pages at issue contain personal information.

I have examined the records, and I do not completely agree with the OHRC. In my view, pages 28-29, 35, 45, 52, 59-60, 97, 101, 103-104, 112, 115, 117, 119, 132-133, 145-146, 180, 186-187, 189-190, 192-193, 204, 206, 209, 450, 453-454, 460 485, 487, 492, 521, 524, 529, 549, 552-556, 558 and 561 do not contain personal information of any identifiable individual.

I find that only the following pages or parts of pages contain information which satisfies the requirements of the introductory wording of the definition of "personal information" and qualifies as personal information of the appellant and other individuals: pages 1 (in part), 18-20, 27, 30, 31, 41 (in part), 43, 46, 48, 49 (in part), 51, 53-54, 56 (in part), 108-109 (in part), 110-111, 208 (in part), 475-476 (in part), 505-520, 527-528, 552, 562 (in part), and 578-628 (double-sided). These pages can be described as:

1. Complainant's hand written complaint - pages 18-20.
2. Investigator's handwritten notes regarding contacts with various individuals during the investigation (includes witness statements and telephone conversations) - pages 1 (Record of Intake), 27, 30, 31, 41, 43, 46, 48, 49, 51, 53-54, 56 (Record of Investigation), 108-111 (Case Plan), 208, 475-476, 527-528, 552 and 562.
3. Investigator's notes taken during a hearing in November 1990 - pages 505-520.
4. Solicitor's notes taken during the hearing in November 1990 - pages 578-628 (double-sided).

ISSUE B: Whether the records qualify for exemption under section 14(1)(a) or (b) of the Act.

The OHRC submits that sections 14(1)(a) and (b) of the Act apply to all of the records at issue. Sections 14(1)(a) and (b) state:

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;

I have reviewed the records, and it is clear that they were generated in the course of the OHRC's investigation of a complaint under the Code, which may lead to proceedings before a Board of Inquiry.

Former Commissioner Sidney B. Linden, Commissioner Tom Wright and Assistant Commissioner Tom Mitchinson have all found in previous orders that investigations conducted by the OHRC into complaints made under the Code are properly considered law enforcement matters, and that because these investigations may lead to proceedings before a Board of Inquiry under the Code, they are properly characterized as law enforcement proceedings (Orders 89, 178, 200, P-221, P-253, P-258, and P-322). I agree.

As to whether it is reasonable to expect that disclosure of the records at issue would interfere with "a law enforcement matter" or "an investigation undertaken with a view to a law

enforcement proceeding or from which a law enforcement proceeding is likely to result", the OHRC submits:

The investigation of this case has been "administratively closed." This means that the decision to terminate the process was made at the staff level and not the Commissioners. Such closure was deemed necessary due to the disappearance of the complainant which rendered attempts to resolve the personal aspects of the case well-nigh impossible. Hence staff merely proceeded to settle the systemic aspect of the case. Technically, the case can be re-opened should the complainant re-appear and request further consideration of his complaint. For this reason, it cannot be said that the law enforcement process has been concluded definitively.

In my view, the purpose of sections 14(1)(a) and (b) is to provide the OHRC with the discretion to preclude access to records in circumstances where disclosure would interfere with an ongoing law enforcement matter or investigation. In view of the length of time this investigation has been inactive (since May 11, 1992) and the nature of the information contained in the records, I am not satisfied that disclosure of the records could reasonably be expected to interfere with a law enforcement matter or investigation. Accordingly, I find that the records do not qualify for exemption under sections 14(1)(a) and (b) of the Act.

ISSUE C: Whether Records 1, 2 and/or 3 qualify for exemption under section 14(2)(a) of the Act.

The OHRC submits that section 14(2)(a) applies to Records 1, 2 and 3. Section 14(2)(a) reads:

A head may refuse to disclose a record,

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 OHRC must satisfy each part of the following three-part test in order to properly exempt a record under section 14(2)(a):

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

[Order 200]

In Order 200, Commissioner Wright determined that in order to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information and that, generally speaking, results would not include mere observations or recordings of fact.

Having reviewed the information contained in Records 1, 2 and 3, I am of the opinion that none fall within the definition of "report". The information contained in these records consists of the complainant's handwritten complaint, notes of telephone conversations and interviews conducted by the human rights officer who investigated the complaint, the officer's "plan" regarding the steps to be taken during the investigation of the complaint, and notes taken by the officer during a hearing held in November, 1990. They do not contain "a formal statement or account of the results of the collation and consideration of information", and I find that they do not qualify as "reports" for the purposes of section 14(2)(a). Accordingly, I find that the discretionary exemption provided by section 14(2)(a) does not apply to these records.

ISSUE D: Whether the records qualify for exemption under section 19 of the Act.

The OHRC submits that section 19 of the Act applies to all of the records at issue. Section 19 reads:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide the OHRC with the discretion to refuse to disclose:

- (1) a record that is subject to the common law solicitor-client privilege (Branch 1); and
- (2) a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the OHRC must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

- (b) the communication must be of a confidential nature, **and**
- (c) the communication must be between a client (or his agent) and a legal adviser, **and**
- (d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

- 2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to the Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

- 1. the record must have been prepared by or for Crown counsel; and
- 2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

Records 1 and 2

With respect to the handwritten complaint and the notes taken by the investigator, the OHRC submits:

The investigation file was created in part for the purpose of enabling counsel to monitor the investigation, anticipate legal problems and provide legal advice. Of course the file was also created for the ultimate purpose of determining whether there would be sufficient evidence to warrant a public inquiry and whether such procedure would be appropriate per section 36(1) of the Human Rights Code.

Page 43 is the human rights officer's handwritten note of a conversation with counsel for the OHRC, in which legal advice was sought. The OHRC submits that there has been no waiver of confidentiality. Therefore, I find that the requirements of the first part of the first branch of the section 19 exemption has been satisfied with respect to this page.

With respect to Record 1 and the remaining pages of Record 2, it is my view that these parts of the records do not qualify for exemption under either part of the section 19 exemption. These records are not, nor do they make reference to, communications with a legal advisor. In addition, these records do not include the seeking, formulating, or giving of legal advice. These records were compiled during the normal course of investigating a complaint under the Ontario Human Rights Code. In my view, these records were created for the investigator's use in determining whether there would be sufficient evidence to warrant a public inquiry, and whether such procedure would be appropriate. I do not accept that these records were created especially for the lawyer's brief for existing or contemplated litigation.

Record 3

Record 3 is the notes taken by the investigator during the hearing held in November 1990. The OHRC does not make specific reference to this record in its submissions in support of section 19. Having reviewed this record, I find that it is not, and does not make reference to, confidential communications between a client and a legal advisor, and I do not accept that this record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

Further, in my view, Records 1, 2 and 3 were not prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation, and section 19 does not apply.

Record 4

Record 4 is the notes taken by counsel for the OHRC during the hearing held in November 1990. The purpose of this hearing was to obtain the evidence of the complainant in the event he would be unable to attend a Board of Inquiry, should one have been deemed necessary, due to his deteriorating medical condition. The appellant was present at the hearing and a transcript was made and is available to him. The OHRC submits:

We also particularly invite your attention to pages E.571-628 which are not part of the investigation file but constituted the notes of legal counsel prepared for and during the examination of complainant to preserve his evidence. There would be no doubt that these are covered by the common-law privilege of solicitor/client and the second part of section 19.

As you have indicated in a series of orders (49, 52, 56, 123) papers and materials created specially for the lawyer's brief for litigation, whether existing or contemplated, are privileged.

In my view, the notes taken by counsel for the OHRC represent a record which was prepared by Crown Counsel for the purposes of "giving legal advice, or in contemplation of litigation, or for use in litigation" and, therefore, satisfies the second branch of the section 19 exemption.

In summary, I find that the discretionary exemption provided by section 19 applies to page 43 of Record 2 and all of Record 4.

ISSUE E: Whether the discretionary exemption provided by section 49(a) applies.

In Issue A, I found that the records at issue contain the personal information of the appellant. In Issue D, I found that page 43 of Record 2 and all of Record 4 qualify for exemption under section 19 of the Act.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of the OHRC. However, this right of access is not absolute. Section 49 provides a number of exemptions to this general right of access. One such exemption is contained in section 49(a) of the Act, which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) provides the OHRC with the discretion to refuse to disclose to the appellant his own personal information where section 19 applies. In any case in which the OHRC has exercised discretion under section 49(a), I look very carefully at the manner in which the OHRC has exercised this discretion. Provided that this discretion has been exercised in accordance with established legal principles, in my view, it should not be disturbed on appeal.

In reviewing the OHRC's exercise of discretion in favour of refusing to disclose page 43 of Record 2 and all of Record 4, I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

ISSUE F: Whether the discretionary exemption provided by section 49(b) applies.

The OHRC submits that the disclosure of the remaining records to the appellant would constitute an unjustified invasion of privacy of another individual. In Issue A, I found that all of the records at issue contained the personal information of the appellant as well as other individuals. Accordingly, these records will be considered in the context of section 49(b) of the Act, which reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where the disclosure would constitute an unjustified invasion of another individual's personal privacy;

Under Issue E, I found that the exemption provided by section 49(a) of the Act applies to page 43 of Record 2 and all of Record 4, and it is therefore not necessary for me to consider the application of section 49(b) to page 43 and Record 4.

As has been stated in a number of previous orders, section 49(b) introduces a balancing principle. The OHRC must look at the information and weigh the requester's right of access to his or her own personal information against other individuals' right to the protection of his or her privacy. If the OHRC determines that the release of the information would constitute an unjustified invasion of the other individual's personal privacy, then section 49(b) gives the OHRC the discretion to deny the requester access to the personal information (Order 37).

Six of the individuals whose personal information appears in the records have consented to the disclosure of their personal information to the appellant. Accordingly, it is my view that the disclosure of this information to the appellant would not constitute an unjustified invasion of the personal privacy of these six individuals, and section 49(b) does not apply.

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Specifically, section 21(3)(b) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

In my view, all of the remaining pages of the records were compiled as part of an investigation into a possible violation of law, namely the Ontario Human Rights Code, and I find that disclosure of the personal information of other individuals appearing in the records at issue would constitute an presumed unjustified invasion of personal privacy under section 21(3)(b).

Once it is determined that the requirements for a presumed unjustified invasion of personal privacy under section 21(3) have been met, I must consider whether any other provisions of the Act come into play to rebut this presumption. Section 21(4) outlines a number of circumstances which, if they exist, could operate to rebut a presumption under section 21(3). In my view, the circumstances listed in section 21(4) are not present in this appeal.

Section 21(2) of the Act provides some criteria to be considered in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy. A combination of listed and/or unlisted factors weighing in favour of disclosure might be so compelling as to outweigh a presumption under section 21(3); however, such a case would be extremely unusual.

In his representations, the appellant has not made reference to the application of any of the factors listed in section 21(2) which weigh in favour of disclosure, and I find that none of these considerations are relevant in the circumstances of this appeal.

In his representations, the appellant has identified three factors, one relevant to each of the three records remaining at issue, which he believes weigh in favour of disclosure of the pages of the records.

The appellant submits that, with respect to Record 1, the complainant's handwritten complaint, a typewritten version of this complaint has already been provided to him by the OHRC in response to his request under the Act. I have reviewed both the typewritten and handwritten versions of these two documents and, in my view, the personal information contained in them is essentially the same. In my view, this is a relevant consideration in the circumstances of this appeal, however, this factor alone is not sufficient to rebut the presumption contained in section 21(3)(b).

With respect to Record 2, the appellant submits that the notes are his own personal information. In Issue A, I found that Record 2 contains the personal information of both the requester and other individuals. While the requester's right to access his own personal information is a relevant consideration, it is balanced by the privacy right of the other individuals whose personal information also appears in the records.

With respect to the Record 3, the investigator's notes taken during the hearing in November 1990, the appellant submits that he was present during the entire hearing. Even if I were to find that this factor was a relevant consideration weighing in favour of disclosure of the records, this factor alone is not sufficient to rebut the presumption contained in section 21(3)(b).

In summary, it is my view that the presumption of an unjustified invasion of personal privacy has not been rebutted and, therefore, these records qualify for exemption under section 49(b) of the Act.

Section 49(b) is a discretionary exemption. I have reviewed the OHRC's representations and, with the exception of the decision to withhold Record 1, I find nothing to indicate that it was improper.

With respect to its decision to exempt Record 1, the OHRC submits:

... it is our view that simply because a formal complaint was served upon a respondent as a requirement of natural justice in an investigation, it does not follow that the source document submitted in confidence by a complainant should be released under the Act.

However, in response to the appellant's request under the Act, the OHRC granted access to the typewritten version of the complaint.

I have found that Record 1 satisfies the requirements for a presumed unjustified invasion of privacy under section 21(3)(b), and the presumption has not been rebutted. However, in reviewing the OHRC's reasons for denying access to Record 1, I have been given no indication that the OHRC considered the fact that similar personal information, contained in the typewritten complaint, was released by the OHRC under the Act. Accordingly, I find that the OHRC has not properly exercised its discretion under section 49(b) in respect of Record 1.

ORDER:

1. I order the OHRC to reconsider the exercise of discretion under section 49(b) with respect to Record 1 and to provide me with representations as to the factors considered in doing so within twenty (20) days of the date of this Interim Order. I remain seized of this matter. The representations concerning the exercise of discretion should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.
2. I uphold the OHRC's decision not to disclose pages 30, 31, 41, 43, 53-54, 208, 475, 476, 527-528, and 562 of Record 2 and Records 3 and 4 to the appellant.
3. I order the OHRC to disclose to the appellant pages 27, 46, 48, 51 and 552 of Record 2 in their entirety. I also order the OHRC to disclose to the appellant pages 1, 49, 56 and 108-111 of Record 2, in accordance with the highlighted copy of these parts of the record which I have provided to the Freedom of Information and Privacy Coordinator with this copy of the Order. The highlighted portions identify the parts of these documents which should not be disclosed.
4. I order the OHRC to disclose the records referred to in Provision 3 within 35 days following the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.
5. In order to verify compliance with the provisions of this order, I order the OHRC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3, **only** upon my request.

Original signed by:
Holly Big Canoe
Inquiry Officer

January 21, 1992