



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

ORDER P-449

Appeal P-9200633

Ontario Human Rights Commission



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ORDER

BACKGROUND:

The Ontario Human Rights Commission (the OHRC) received a request for access to all information regarding the human rights complaint initiated by the requester. The OHRC provided partial access to the records. Access was denied, in full or in part, to 49 pages pursuant to sections 13(1), 14(1)(a) and (b), 14(2)(a), 19, 21(3)(b) and 49(a) of the Freedom of Information and Protection of Privacy Act (the Act). The requester appealed the OHRC's decision.

During mediation, the appellant abandoned his request with respect to some of the records. The appellant also agreed to withdraw his appeal, pending a decision by the OHRC respecting his request for a reconsideration of his complaint. The appeal was re-opened when the OHRC affirmed its earlier decision to not appoint a Board of Inquiry.

Notice that an inquiry was being conducted to review the OHRC's decision to deny access was sent to the appellant and the OHRC. Written representations were received from both the OHRC and the appellant. In its representations, the OHRC cited section 49(b) as an additional exemption claim. During the inquiry stage, the appellant obtained a copy of what had been Record 4 in this appeal.

The records remaining at issue in this appeal, together with the corresponding exemptions claimed by the OHRC, are as follows:

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| 1. | Legal Memorandum
(Pages 14-20) | Sections 19, 14(2)(a) |
| 2. | Internal Memo
(Page 22) | Sections 13(1), 14(1)(a) and (b) |
| 3. | Case Disposition Sheet
(Page 23) | Sections 13(1), 14(1)(a) and (b),
14(2)(a) |
| 5. | Reports on Interviews
with Witnesses
(Pages 43-52 and 59-62) | Sections 13(1), 14(1)(a)
and (b), 14(2)(a), 21(3)(b) |
| 6. | Record of Investigation
(Pages 63-69) | Sections 14(1)(a) and (b),
14(2)(a) and 49(b) |
| 7. | Record of Intake Report
(Pages 204-208) | Sections 14(2)(a), 49(a) and 49(b) |

ISSUES:

The issues arising in this appeal are:

- A. Whether any of the information contained in the records qualifies as "personal information", as defined by section 2(1) of the Act.
- B. Whether the discretionary exemption provided by section 19 of the Act applies to Record 1.
- C. Whether the discretionary exemptions provided by sections 14(1)(a) and/or (b) of the Act applies to the records.
- D. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to the records.
- E. Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.
- F. Whether the discretionary exemption provided by section 49(a) of the Act applies to the records.
- G. Whether the discretionary exemption provided by section 49(b) applies to of the Act the records.

SUBMISSIONS/CONCLUSIONS:

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

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

"personal information" means recorded information about an identifiable individual ...

In my view, all of the records contain the personal information of the appellant. Record 5 and pages 4 and 5 of Record 7 also contain the personal information of other identifiable individuals.

ISSUE B: Whether the discretionary exemption provided by section 19 of the Act applies to Record 1.

Section 19 reads as follows:

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 a governmental institution 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).

The OHRC claims that Record 1 qualifies for exemption under Branches 1 and 2 of section 19.

In order to qualify for exemption under 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]

Record 1 is a memo from legal counsel to the OHRC's Chief Commissioner as to whether the OHRC Commissioners should call for the appointment of a Board of Inquiry to hear the appellant's complaint.

According to the OHRC, Record 1 satisfies all four criteria under Branch 1;

- (a) the record is a written communication;

- (b) the record is from a legal advisor (OHRC counsel) to a client (the OHRC);
- (c) the communication is of a confidential nature and was intended solely for the benefit of the OHRC Commissioners to assist them in deciding whether to recommend the appointment of a Board of Inquiry;
- (d) the communication is directly related to the formulating and giving of legal advice on the state of evidence and on whether a Board of Inquiry is warranted in the circumstances of the case.

Based on the record and the representations provided by the OHRC, I am satisfied that Record 1 falls within the first branch of section 19. Having found that Record 1 qualifies for exemption under Branch 1, I need not consider the application of the Branch 2 test.

I have reviewed the OHRC's representations on its exercise of discretion and I find nothing improper and would not alter this decision on appeal.

ISSUE C: Whether the discretionary exemptions provided by sections 14(1) (a) and/or (b) of the Act applies to the records.

The OHRC has claimed sections 14(1)(a) and (b) in respect of Records 2, 3, 5 and 6.

Sections 14(1)(a) and (b) 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;

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 Ontario Human Rights Code (the Code) which may lead to proceedings before a Board of Inquiry.

It has been found in previous orders that investigations conducted by the OHRC into complaints made under the Code may be properly considered law enforcement matters, and that because these investigations may lead to proceedings before a Board of Inquiry under the Code, they may

be characterized as law enforcement proceedings [Orders 89, 178, 200, P-221, P-253, P-258 and P-322].

The OHRC submits that sections 14(1)(a) and (b) apply, notwithstanding that the investigation and reconsideration of the appellant's case has concluded.

... it is our view that any prospect of public disclosure even after the investigation of the case, would inevitably erode that vital cooperation and good faith upon which [the effectiveness] of Code enforcement depends. It will send a message to employees already fearful of their continued employment status or of persons beholden to a complainant, not to get involved or at most be circumspect about their statements, because what they say may one day be open to public scrutiny. It will send a message to the respondent community who have become increasingly resistant to human rights investigations, not to cooperate in the sharing of their files because any document, no matter how confidential it may be, given to the OHRC could some day be accessed through the Act.

The word "interfere" in sections 14(1)(a) and (b) contemplates a situation where the particular investigation or law enforcement matter is still ongoing [Orders P-285, P-316 and P-403].

In this case, the appellant's complaint has been investigated and made subject to a reconsideration. There remain no further steps in the OHRC's process available to the appellant. Therefore, I am unable to conclude that disclosure of the records could reasonably be expected to interfere with a law enforcement matter or investigation. I would also point out, in addressing the OHRC's representations, that the Commission has claimed additional exemptions in respect to these records, whose applicability I will consider later in this order. To conclude, I find that the records do not qualify for exemption under sections 14(1)(a) and (b) of the Act.

ISSUE D: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies to the records.

The OHRC submits that section 14(2)(a) applies to Records 1, 3, 5, 6 and 7. As Record 1 has been found exempt under section 19, I will confine my discussion of section 14(2)(a) to Records 3, 5, 6 and 7.

Section 14(2)(a) states:

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 to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact [Order 200].

The OHRC submits that Record 3, the Case Disposition Sheet, falls within the definition of a report, as it contains an analysis of information which has been gathered respecting the appellant's case. This document contains brief background information, including the appellant's and respondent's names, the nature of the alleged grounds for discrimination and the section of the Code upon which the complaint is based. It also includes the staff recommendation as to whether the evidence warrants the appointment of a Board of Inquiry, together with reasons for the particular recommendation and indicates the final disposition of the appellant's case. In my opinion, Record 3 does contain an analysis of the results of the investigation and is a "report" prepared in the course of law enforcement as contemplated by section 14(2)(a).

I have reviewed the OHRC's representations on its exercise of discretion and I find nothing improper and would not alter this decision on appeal.

With respect to Record 5, the OHRC refers to this document as a "Report on Interviews with Witnesses" and makes the following comments:

In our view, if these records were simply a recording of facts, then there should be a more detailed notation of questions and answers. One must view them not as separate documents, but, together with the record of investigation form [i.e. Record 6], as constitutive parts of an integrated law enforcement report. Ideally, these notes would be collated and attached to the record of investigation and the whole package would constitute staff's investigation report to senior management. It is unfortunate that in this particular investigation file, the officer did not appear to have collated the various parts of the record of investigation into the one integrated whole they were meant to be. In fact, the entries in the record of investigation stops on a particular date when clearly investigation activities continue long thereafter. Yet these shortcomings do not

alter the nature of these records and the fact that they were used in accordance with their purpose and nature.

And with respect to Records 6 and 7, the OHRC makes the following representations:

The [Record of Investigation] and the [Record of Intake] were created for the purpose of providing an officer, historically overloaded with cases, a convenient form to fill up with data gathered in the course of the intake and investigation process. The more detailed and analytical its contents, the better able such documents can satisfy the needs of various audiences. Thus, it helped the officer in determining the direction of investigation. It enabled the supervisor to monitor the activities of the officer. It provided the director with up-to date-information on the status of the case without awaiting a more formal communication from the supervisor. It enabled the legal counsel to assess the adequacy or inadequacy of the evidence without awaiting a report from field staff, etc.

Some officers may simply enter in these forms, a running list of dates and activities, simply making a reference to their notes attached to this record. Others are more meticulous in terms of recording data and including some brief analysis. But regardless of the manner and extent of entries, these records were meant to be reports of investigation.

Looking at Record 5 in conjunction with Record 6, I am of the view that both records, even when read together, fail to meet the definition of a "report". Records 5 and 6 do not contain an analysis of the results of the investigation. Rather, they are notes of telephone conversations and interviews with various individuals. Consequently, I find that neither Record 5 nor 6 qualify for exemption under section 14(2)(a).

Record 7, the "Record of Intake" outlines the appellant's complaint and the documentation provided to the OHRC by the appellant at the time he filed his complaint. Given that this record contains information pertaining to the preliminary stage of the OHRC's handling of the appellant's complaint, it cannot be considered to contain a formal statement or account of the results of the collation and consideration of information. Accordingly, I find that Record 7 does not qualify for exemption under section 14(2)(a).

In summary, I conclude that Record 3 satisfies the requirements for exemption under section 14(2)(a) and that Records 5, 6 and 7 fail to qualify for exemption under section 14(2)(a).

ISSUE E: Whether the discretionary exemption provided by section 13 of the Act applies to the records.

The OHRC has claimed section 13 in respect of Records 1, 2, 3 and 5.

I have already found that Record 1 is exempt under section 19, and that Record 3 is exempt under section 14(2)(a). Although, the OHRC has cited section 13(1) in relation to Record 5, it

has not offered any representations in this regard. Accordingly, I will not deal with section 13(1) in the context of Record 5 and will limit my discussion of section 13 to Record 2.

Section 13 (1) of the Act states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. Generally speaking, "advice" pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient in the deliberative process [Orders 118, P-304, P-348, P-356 and P-402]. "Recommendations" should be viewed in the same vein [Orders 161, P-402, P-428, P-348 and P-356].

Record 2 is an OHRC memo from a Regional Manager to the Director of Compliance pertaining to whether the OHRC Commissioners should recommend the appointment of a Board of Inquiry. The memo also contains a brief request from the Director of Compliance to the Legal Branch for a legal opinion.

I am satisfied that the first paragraph of Record 2 contains information which, if released, would reveal the recommendations of OHRC staff. However, the introductory portion of the memorandum and the note from the Director of Compliance in requesting a legal opinion, falls outside the ambit of "advice" or "recommendations" contemplated by section 13(1). Accordingly, these parts of Record 2 does not qualify for exemption and should be released to the appellant.

I have reviewed the OHRC's representations on its exercise of discretion and I find nothing improper and would not alter this decision on appeal.

ISSUE F: Whether the discretionary exemption provided by section 49(a) of the Act applies to the records.

Under Issues B, D and E, I found that Record 1 qualifies for exemption under section 19, part of Record 2 qualifies for exemption under section 13, and Record 3 qualifies for exemption under section 14 (2)(a). Because I have also concluded in my analysis of Issue A that these documents contain the personal information of the appellant, it is necessary for me to consider the wording of section 49(a) of the Act. This provision states:

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;

Section 49(a) provides an exception to the general rule that a requester has a general right of access to his or her own personal information in the custody or control of a government institution. In this case, the section provides the OHRC with the discretion to disclose to the appellant his own personal information where sections 13, 14 or 19 apply.

In reviewing the OHRC's exercise of discretion in favour of refusing to disclose Records 1, 2 and 3, I have found nothing to indicate that the exercise of discretion was improper and, accordingly, I will not alter this decision on appeal.

ISSUE G: Whether the discretionary exemption provided by section 49(b) applies to the records.

Under Issue A, I found that Record 5 and pages 4 and 5 of Record 7 contain the personal information of the appellant and other identifiable individuals.

Section 49(b) also provides an exemption to an individual's general right of access to any personal information about that individual in the custody or under the control of an institution. Section 49(b) of the Act states:

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;

Section 49(b) of the Act introduces a balancing principle. The OHRC must look at the information and weigh the appellant's right of access to his/her own personal information against another individual's right to the protection of his/her personal privacy. If the OHRC determines that release of the information would constitute an unjustified invasion of the other individual's personal privacy, section 49(b) gives the OHRC discretion to deny access to the personal information of the requester.

Sections 21(2) and 21(3) of the Act provide guidance in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. In its representations, the OHRC specifically relies on section 21(3)(b) to exempt Record 5 from disclosure. Section 21(3)(b) reads as follows:

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 Record 5 contains information that was "compiled as part of an investigation into a possible violation of law", thereby meeting the requirements for a presumed unjustified invasion of personal privacy.

Once it has been determined that section 21(3) applies, I must then consider whether any other provision of the Act comes 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 records do not contain any information to which section 21(4) could apply.

I have also carefully considered the various components of section 21(2) and, in my view, there is no combination of factors listed in section 21(2) which would operate to rebut the presumption of an unjustified invasion of personal privacy. In his representations, the appellant did not raise any of the factors contained in section 21(2) which would weigh in favour of disclosure. Therefore, the presumption raised by section 21(3)(b) of the Act applies. Disclosure of the information contained in Record 5 would constitute an unjustified invasion of the personal privacy of the individuals other than the appellant, and should not be released.

I will now turn to pages 4 and 5 of Record 7. In my view, some of the information found in these pages constitutes the personal information of both the appellant and the other identifiable individuals. The file indicates, however, that this information was provided to the OHRC by the appellant during the filing of his complaint. Based on this consideration, I find that the release of pages 4 and 5 of Record 7 would not constitute an unjustified invasion of the personal privacy of these other individuals.

ORDER:

1. I order the OHRC to disclose Records 6, 7 and the highlighted copy of Record 2 which I have provided to the OHRC to the appellant within 15 days of the date of this order. The highlighted portion identifies the part of Record 2 which should not be released.
2. I uphold the OHRC's decision not to disclose Records 1, 3, 5 and the highlighted portion of Record 2.
3. In order to verify compliance with the order, I order the OHRC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon my request.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ April 29, 1993