



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-541

Appeal P-9300198

Ministry of the Attorney General



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ORDER

BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information relating to an investigation of an allegation of sexual harassment against the requester. The requester specifically sought access to the names of the individuals interviewed and their statements, the notes taken or received by the investigator, the reports submitted by the investigator and her superior, and any information provided to the Human Resources Branch of the Ministry and the individual who decided the matter.

The Ministry identified 16 records, comprising 86 pages, as being responsive to the request and provided full access to ten records (29 pages). Included in these records was a copy of the complaint, as well as several internal memorandum detailing some of the complainant's concerns.

Partial access was granted to three of the records - the investigation report and two internal memoranda. Six words of the investigation report were withheld from disclosure pursuant to section 49(b) of the Act. Portions of the memoranda were withheld pursuant to section 13(1) of the Act.

Access in total was denied to two pieces of correspondence pursuant to sections 49(b) and 21 and to the statements of the witnesses pursuant to section 49(b) of the Act.

The requester appealed the decision of the Ministry.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the Ministry was sent to the Ministry, the appellant and the complainant (the affected person). Representations were received from the Ministry, the appellant and the affected person.

In her representations, the affected person indicated that she consented to the disclosure of the two pieces of correspondence dated October 30, 1992 and November 5, 1992 respectively. As these records do not contain the personal information of any individuals other than the appellant and the affected person and no other mandatory exemptions apply, they should be disclosed to the appellant.

In its representations, the Ministry indicated that it was exercising its discretion to withhold certain parts of the records severed pursuant to section 13(1) of the Act under section 49(a). The Ministry also indicated that it had disclosed to the appellant the six words in the investigation report that it had initially withheld from disclosure.

The three records remaining in issue and the exemptions claimed by the Ministry for each may be described as follows:

1. Memorandum dated January 29, 1993 from the Manager Staff Relations to the Assistant Deputy Attorney General Finance and Administration: the last sentence

on page one to the end of the paragraph on page two including the three enumerated points on page 2;
Sections 13(1) and 49(a).

2. Memorandum dated February 11, 1993 from the Co-ordinator, Workplace Discrimination and Harassment Prevention to the Deputy Attorney General: first three bullet points, next two full paragraphs and last bullet point on page 2; Sections 13(1) and 49(a).
3. Witness statements: denied in full;
Section 49(b).

ISSUES:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies as "personal information" as defined in section 2(1) of the Act.
- B. If the answer to Issue A is yes, and the record contains the personal information of the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to Record 3.
- C. Whether the discretionary exemptions provided by sections 13(1) and 49(a) of the Act apply to Records 1 and 2.
- D. With respect to any exempt records, whether there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the exemption(s).

SUBMISSIONS/CONCLUSIONS:

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

"Personal information" is defined in section 2(1) of the Act, in part, as "... recorded information about an identifiable individual, ...".

Record 3 contains the personal information of the appellant, the affected person and other identifiable individuals. Records 1 and 2 contain solely the personal information of the appellant.

ISSUE B: If the answer to Issue A is yes, and the record contains the personal information of the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies to Record 3.

Under Issue A, I found that Record 3 contains the personal information of the appellant, the affected person and other identifiable individuals. Section 47(1) of the Act gives individuals a general right of access to personal information about themselves in the custody or under the control of an institution. 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 found in 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;

Section 49(b) introduces a balancing principle. The Ministry must look at the information and weigh the requester's right of access to his or her own personal information against the rights of other individuals to the protection of their personal privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the other individuals' personal privacy, then section 49(b) gives the Ministry the discretion to deny the requester access to the personal information.

In my view, where the personal information relates to the requester, the onus should not be on the requester to prove that disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the requester has a right of access to his/her own personal information, the only situation under section 49(b) in which he/she can be denied access to the information is if it can be demonstrated that disclosure of the information **would** constitute an unjustified invasion of another individual's privacy.

Sections 21(2), (3), and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Ministry submits that sections 21(3)(a), (d), and (h) apply to portions of Record 3. These sections read:

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

- (a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;
- (d) relates to employment or educational history;
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

I agree with the position of the Ministry that certain information in the witness statements falls within these presumptions. Information related to an individual's medical condition and subsequent visit to a physician for treatment clearly falls within section 21(3)(a). Other witness statements include information about their past positions with the government which, in my view, constitutes employment history within the meaning of section 21(3)(d). Reference to the sexual orientation and the religious beliefs of individuals named in Record 3 is subject to the presumption in section 21(3)(h).

In my view, the balance of Record 3 does not contain any of the types of information listed in section 21(3).

The only way in which a section 21(3) presumption may be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption (Order M-170).

I have considered section 21(4) of the Act and find that none of the personal information at issue in this appeal falls within the ambit of this provision.

The appellant has argued that the public interest override set out in section 23 of the Act applies. Because he has also argued that section 23 applies to Records 1 and 2 which have been exempted under section 13 of the Act, I will address all of the public interest arguments under Issue D.

Section 21(2) provides some criteria for the Ministry to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy. The Ministry submits that sections 21(2)(f) and (i) apply to the balance of Record 3 for which I have found no presumption to apply. The Ministry also appears to suggest that section 21(2)(g) should be considered. The affected person concurs, and submits that section 21(2)(h) is also a relevant consideration. The appellant contends that section 21(2)(d) is a factor to be considered. These sections read as follows:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

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- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (f) the personal information is highly sensitive;
- (g) the personal information is unlikely to be accurate or reliable; and
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

In their representations, the Ministry and the affected party explained their reasons for treating the personal information as highly sensitive and for believing that its disclosure may unfairly damage the reputations of some of the individuals referred to in Record 3. After a careful review of this record, I am of the view that sections 21(2)(f) and (i) of the Act are relevant considerations in respect of the personal information of individuals other than the appellant.

The appellant submits that section 21(2)(d) of the Act is relevant because the sexual harassment investigation regarding him culminated in disciplinary action which he is now disputing pursuant to The Public Servants Act. In order for section 21(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

- (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; **and**
- (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; **and**
- (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; **and**
- (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

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In my view, it is not clear that the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question. This is because the Ministry has released the entire summary of the investigation which details and analyzes all evidence relevant to the complaint revealed by the investigation. It summarizes the witness statements, indicating the information upon which the finding of sexual harassment was found to be substantiated. Therefore, I am unable to conclude that all four of the criteria required to establish the relevance of section 21(2)(d) have been met and I find that section 21(2)(d) is not a relevant consideration on the facts of this appeal.

Accordingly, I have found no factors in section 21(2) which weigh in favour of disclosure and two factors, sections 21(2)(f) and (i), which favour privacy. In addition, I have considered all of the circumstances arising in this appeal and find that, on balance, the disclosure of the personal information withheld from disclosure would constitute an unjustified invasion of personal privacy.

Section 49(b) is a discretionary exemption. The Ministry has provided representations regarding its decision to exercise discretion in favour of denying access in the circumstances of this appeal. I have reviewed these representations and find nothing improper in the Ministry's exercise of discretion, and would not alter it on appeal.

ISSUE C: Whether the discretionary exemptions provided by sections 13(1) and 49(a) of the Act apply to Records 1 and 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.

Section 13(1) was considered by former Commissioner Sidney B. Linden in Order 118, where he made the following observations:

In my view, advice for the purposes of section 13(1) of the Act 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 during the deliberative process.

I adopt this approach for the purposes of this appeal.

The Ministry submits that certain sentences in the text of Record 1 should be exempt from disclosure. I do not agree that all of this material is properly exempt under section 13(1). In my view, only the three enumerated recommendations on page 2 of the memorandum are

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recommendations of the type contemplated by section 13(1). The balance of the memorandum withheld from disclosure represents an assessment of the incidents as described in the investigator's report.

I agree with the Ministry's submissions on those portions of Record 2 which qualify for exemption pursuant to section 13(1) of the Act. The first three bullet points on page 2 repeat the recommendations outlined in Record 2. The severed information then goes on to describe another recommendation and the suggested course of action on how to implement the recommendations that have been accepted by the relevant individuals.

Because the portions of Records 1 and 2 that I have found to qualify for exemption pursuant to section 13(1) of the Act contain the personal information of the appellant, I must now consider the application of section 49(a) which 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; [emphasis added]

This section is a discretionary exemption which gives the head discretion to deny access to an individual's own personal information in instances in which one of the enumerated exemptions would apply. The Ministry has provided representations regarding its exercise of discretion to deny access to the records. Having reviewed these representations, I find nothing to indicate that the exercise of discretion was improper and I would not alter it on appeal.

ISSUE D: With respect to any exempt records, whether there is a compelling public interest in disclosure of the records which clearly outweighs the purpose of the exemption(s).

Section 23 of the Act states:

An exemption from disclosure of a record under sections **13**, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

Under Issue B, I found that all of Record 3 was exempt from disclosure pursuant to section 49(b) of the Act. This section is not referred to in section 23. However, in my discussion of the application of section 49(b) to Record 3, I necessarily made reference to the provisions of sections 21(2), (3) and (4) which provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of an individual's personal privacy.

Under Issue C, I found that the Ministry had properly exercised its discretion under section 49(a) of the Act in denying the appellant access to certain portions of Records 1 and 2. While section 49(a) is not referred to in section 23, reference is made in section 23 to section 13.

In my view, where an institution has properly exercised its discretion under section 49(b) of the Act, relying on the application of sections 21(2) and/or (3), an appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of another individual in which the personal information is considered under section 21. Were this not to be the case, an individual could theoretically have a lesser right of access to his or her own personal information than would the "stranger". This would result if section 23 could be used to override the exemption in section 21 of the Act, but not if the institution denied access to the information pursuant to section 49(b) as it contained the appellant's personal information, as well as that of other individuals.

The same approach should be taken in cases in which an institution has properly exercised its discretion under section 49(a) where the sections of the Act enumerated therein, namely 12, 13, 14, 15, 16, 17, 18, 19, 20 or 22, would apply to the disclosure of the personal information. If this were not the case, an individual would have a lesser right of access to records containing his or her personal information than to general records.

A similar rationale was applied by Commissioner Tom Wright in Order P-233, in which he considered sections 30 and 48(3) of the Act. Commissioner Wright found that under section 48, an "institution must use the same criteria as provided in section 30 when deciding whether to grant the method of access preferred by the requester". He stated that:

... it would be inconsistent with the spirit and purpose of the Act to interpret this section in such a way as to accord a lesser right of access to a person making a request for personal information than for someone making a request for general records.

In my view, the same general principle should apply in the circumstances of this appeal.

Accordingly, in this appeal, I will consider the application of section 23 to Records 1 and 2 for which I have upheld the Ministry's exercise of discretion pursuant to section 49(a) of the Act and Record 3 for which I have upheld the Ministry's exercise of discretion pursuant to section 49(b) of the Act.

There are certain requirements in section 23 of the Act which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question (Order 24).

The appellant alleges that the Ministry's actions that resulted from the finding of sexual harassment against him constitute "constructive dismissal". He maintains that he has not been provided with all of the "information" which is alleged to have established his "guilt",

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information which he maintains is necessary in order to effectively challenge the finding of harassment in his grievance hearing. Accordingly, he submits that:

... a compelling public interest exists in having persons such as [the appellant] treated in accordance with the principles of natural justice and the duty of fairness which, in this particular context, requires that full and fair disclosure be made.

While the burden of proof as to whether an exemption applies falls on the institution, the Act is silent as to who bears the onus of proof in respect of section 23. Where the application of section 23 to a record has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

Accordingly, I have reviewed the records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

In my view, there is no compelling public interest at stake in this appeal, only the appellant's "private interest" which relates specifically and particularly to the issues touching on his own harassment/employment situation addressed in the records at issue.

Having carefully considered the circumstances of this appeal and the representations of all parties, I am not satisfied that there is a compelling **public** interest in the disclosure of the records that outweighs the purpose of the exemptions in sections 13(1) and 21 of the Act.

ORDER:

1. I uphold the Ministry's decision not to disclose Record 3.
2. I order the Ministry to disclose Records 1 and 2 in accordance with the highlighted copy of these records which I have provided to the Freedom of Information and Privacy Coordinator with the copy of this order. The highlighted portions identify the parts of these records which should **not** be disclosed.
3. I order the Ministry to disclose the two pieces of correspondence dated October 30, 1992 and November 5, 1992 for which the consent of the affected person has been given.
4. I order the Ministry to disclose the records referred to in Provision 2 within 15 days following the date of this order.
5. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provisions 2 and 3, **only** upon request.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ September 28, 1993