



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

ORDER P-524

Appeal P-9300147

Ministry of Health



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ORDER

BACKGROUND:

The Ministry of Health (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for an investigation record concerning a sexual harassment investigation. The requester also requested hand-written records of interviews in the investigation.

The Ministry provided access to four records and partial access to 14 others with severances pursuant to section 21(1) of the Act. The requester appealed the Ministry's decision.

During mediation, the appellant indicated his belief that additional responsive records (witness statements) exist that were not dealt with in the Ministry's decision. The Ministry was informed of the appellant's belief as to the existence of additional witness statements but was unable to conclusively indicate whether such additional responsive statements exist or not during the mediation stage of the appeal.

Mediation was not successful, and notice that an inquiry was being conducted to review the Ministry's decision was sent to the Ministry and the appellant. Representations were received from both parties.

RECORDS:

The records at issue consist of 14 records comprising 45 pages of handwritten notes of statements by various individuals, some of which contain typewritten questions.

ISSUES:

- A. Whether the Ministry's search for records responsive to the request was reasonable.
- B. Whether the information contained in the record qualifies as "personal information" as defined in section 2(1) of the Act.
- C. If the answer to Issue B is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the Ministry's search for records responsive to the request was reasonable.

The Ministry has provided letters from persons with personal knowledge of the records being requested who personally performed the searches to locate the records responsive to the request. These materials and the representations of the Ministry specifically describe the steps taken to search for responsive records.

In his representations, the appellant indicates that some responsive records exist in tape-recorded form. The appellant's request specifies certain records in hand-written or typewritten form only. Tape-recorded records are therefore not responsive to the request in this appeal.

Having reviewed the representations and the letters submitted to me, I am satisfied that the search conducted by the Ministry for records responsive to the appellant's request was reasonable in the circumstances.

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

The Ministry submits that the withheld portions of 14 records contain personal information. Personal information is defined in section 2(1) of the Act, in part, as follows:

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

The records are statements of various individuals concerning an allegation that the appellant had sexually harassed a co-worker. In my view, the information contained in the records constitutes personal information of the appellant and other identifiable individuals.

ISSUE C: If the answer to Issue B is yes, whether the discretionary exemption provided by section 49(b) of the Act applies.

Under Issue B, I found that the records contain the personal information of the appellant and other identifiable individuals. 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 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 personal information against the rights of other individuals to the protection of their privacy. If the Ministry determines that the release of the information would constitute an unjustified invasion of the personal privacy of other individuals, 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. Generally speaking, if a record contains information of the type described in section 21(4), disclosure of the information would not constitute an unjustified invasion of privacy (Order M-23). The information at issue in this appeal is not one of the types of information listed under section 21(4); therefore, I find that this section is not applicable in the circumstances of this appeal.

Section 21(2) provides a non-exhaustive list of criteria for the Ministry to consider in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy, while section 21(3) identifies specific types of personal information, the disclosure of which is presumed to constitute an unjustified invasion of personal privacy.

The Ministry submits that sections 21(2)(f) and (h) apply to the information severed from the records. These sections read:

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,

- (f) the personal information is highly sensitive;
- (h) the personal information has been supplied by the individual to whom the information relates in confidence;
and

In its representations, the Ministry explained its reasons for treating the personal information at issue as highly sensitive and for believing that it was supplied by the individuals to whom it relates in confidence.

The degree of disclosure the appellant has received in response to his request is substantial. In my view, the Ministry has correctly decided that sections 21(2)(f) and (h) are relevant considerations in respect of the information withheld from disclosure in the circumstances of this appeal.

I have considered all of the circumstances arising in this appeal and find that, on balance, the disclosure of the personal information severed from the records at issue would constitute an unjustified invasion of personal privacy.

Section 49(b) is a discretionary exemption. The Ministry has provided me with representations regarding its exercise of discretion in favour of withholding the severed information. I have found nothing improper, and would not alter it on appeal.

ORDER:

I uphold the head's decision.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ August 27, 1993