



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

# **ORDER P-616**

**Appeal P-9300325**

**Ontario Human Rights Commission**



80 Bloor Street West,  
Suite 1700,  
Toronto, Ontario  
M5S 2V1

80, rue Bloor ouest  
Bureau 1700  
Toronto (Ontario)  
M5S 2V1

416-326-3333  
1-800-387-0073  
Fax/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

# ORDER

## BACKGROUND:

The requester filed a complaint with the Ontario Human Rights Commission (the OHRC) against a named company (the respondent). As part of the disclosure proceedings followed by the OHRC, the requester received copies of the respondent's reply to the complaint. In the reply reference was made to several attachments. These attachments were not provided to the requester by the OHRC. The requester subsequently submitted a request for access to these documents pursuant to the Freedom of Information and Protection of Privacy Act (the Act).

The OHRC located 20 responsive records, consisting of 43 pages, to which it denied access in total on the basis of the exemptions contained in sections 14(1)(a), (b) and 21(3)(b) of the Act.

The requester appealed the decision of the OHRC. In the letter of appeal, the appellant indicated that all references to third parties should be "blacked out". Therefore, the portions of four records containing the names of other individuals exempted by the OHRC on the basis of section 21(3)(b) of the Act are not at issue in this appeal.

During mediation the OHRC indicated that, in its view, section 49(a) of the Act applies to some of the records in this appeal.

Mediation was not successful and notice that an inquiry was being conducted to review the decision of the OHRC was sent to the OHRC and the appellant. Representations were received from the OHRC only.

After these representations were received, the OHRC was advised of an order of the Commissioner's office, Order M-202, which provided the most recent interpretation of section 8(1) of the Municipal Freedom of Information and Protection of Privacy Act, the equivalent to section 14(1) of the Act. A copy of this order was provided to the OHRC who was afforded the opportunity to supplement its representations which it had previously made. The OHRC submitted further representations which I have considered in making this order.

## THE RECORDS:

In its representations, the OHRC has indicated that Records 1, 2 and 3 (pages 1-4) are not responsive to the appellant's request as they are not documents attached to the respondent's reply to the appellant's OHRC complaint. I have reviewed these records and the appellant's request and agree with the position of the OHRC on this point. Accordingly, they will not be considered in this order.

The records remaining at issue and the exemption(s) claimed for each are more particularly described in Appendix A to this order.

## 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. Whether the discretionary exemptions provided by sections 14(1)(a) and/or (b) of the Act apply to the records.
- C. If the records contain the personal information of the appellant and the answer to Issue B is yes, whether the discretionary exemption provided by section 49(a) of the Act 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 states, in part:

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

Records 4, 5, 6, 7, 8, 14, 15, 16, 17, 18 and 19 generally describe medical and employment issues related to the appellant and to his complaint filed with the OHRC. In my view, these records contain information which satisfies the definition of "personal information" as defined in section 2(1) of the Act. The balance of the records do not contain personal information of any identifiable individual.

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

The OHRC claims that sections 14(1)(a) and (b) of the Act apply to all the records at issue. These sections 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;

"Law enforcement" is defined in section 2(1) of the Act as:

- (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);

It is clear that the records at issue in this appeal 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.

Past orders of the Commissioner's office have determined that investigations conducted by the OHRC into complaints made under the Code are properly considered law enforcement matters. These orders have also found 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 P-221, P-253, P-258, P-322 and P-330).

Accordingly, I conclude that the "law enforcement" component of sections 14(1)(a) and (b) of the Act has been satisfied.

The OHRC submits that the phrase "could reasonably be expected to" as found in sections 14(1)(a) and (b) should be interpreted as follows:

... in citing sections 14(1)(a) and (b) of the Act, the specific harm sought to be prevented or avoided is the interference, the meddling or intervention with our law enforcement process.

... By the mere fact of disclosure, an interference with our process takes place ...

In our respectful submission, the section in question does not require us to go beyond the interference and prove a specific impairment of our ability to investigate or conciliate a complaint. Once the interference is shown per sections 14(1)(a) and (b) ..., the statutory harm occurs and the institution is not required to show how such disclosure would impact on the law-enforcement process itself.

In my view, the exceptions to access set out in sections 14(1)(a) and (b) of the Act require that there exists a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the OHRC must establish a "clear and direct linkage between disclosure of the information and the harm alleged" (Orders M-202 and P-557).

**[IPC Order P-616/January 28, 1994]**

This "clear and direct linkage" standard was developed from the unreported decision of Mr. Justice Rothstein of the Federal Court Trial Division, November 19, 1992 in The Information Commissioner of Canada v. The Prime Minister of Canada. In that case Mr. Justice Rothstein discussed in detail the meaning of the phrase "reasonable expectation of probable harm" in the context of the application of section 14 of the federal Access to Information Act to a request for disclosure of public opinion polls relating to the national unity issue. The relevant portions of this decision are found on page 4 of Order P-534.

Subsequent orders of the Commissioner's office have applied the same interpretation to the phrase "could reasonably be expected to" as found in sections 18(1)(c), (d) and (g) (Orders P\_581 and P-590), 20 (Order P-588) and 49(d) (Order P-595) of the Act. It has also been used to interpret sections 11(1)(c) and (d) of the Municipal Freedom of Information and Protection of Privacy Act (Orders M-221 and M-242).

Accordingly, in my opinion, the "mere fact of disclosure" is not, as the OHRC suggests, sufficient to satisfy the application of the exemptions in sections 14(1)(a) and (b) of the Act.

The OHRC explains that documentary evidence of complainants is not submitted to respondents. Similarly, documentary evidence of respondents is not shared with complainants. The OHRC submits that an access request pursuant to the Act is not the appropriate place to justify the rationale for this practice which it maintains safeguards administrative fairness. The OHRC further submits that disclosure of the records in response to the freedom of information request would enable the appellant to circumvent the disclosure procedures of the OHRC.

The OHRC is an institution which is subject to the provisions of the Act. Accordingly, in situations in which it has denied access to a record it clearly bears the burden of proving that the record or part thereof falls within the exemptions claimed (section 53).

There is no provision contained in the Act which relieves an institution from complying with the provisions of the Act simply because it has in place alternative disclosure mechanisms.

Moreover, sections 14(1)(a) and (b) of the Act are **discretionary** exemptions. Accordingly, the OHRC must exercise its discretion with respect to the disclosure of **each** record requested and consider whether the disclosure of the information contained in that document could result in the harms enumerated in sections 14(1)(a) and/or (b).

The OHRC also states that information in records of the sort at issue in this appeal is not disclosed to complainants in human rights complaints because such materials may become relevant in assessing the credibility of the complainant. The OHRC submits that complainants in human rights situations may make statements inconsistent with information in documents of the sort being withheld and, therefore, such materials are useful in assessing complainants' credibility.

Of the 17 records at issue, I note that Records 4, 7, 8, 15, 16, 17 and 18 are correspondence to or from the appellant to officials of the company. In a letter dated March 30, 1993, the case co-

[IPC Order P-616/January 28, 1994]

ordinator of the OHRC advised the appellant of the nature of Records 15, 16, 17 and 18 and that "[these documents] should therefore already be available to you". The letter goes on to identify the author of Record 6 and the contents of this memorandum.

Records 9, 10, 11, 12 and 13 consist of job advertisements posted at the respondent's premises. Record 14 includes a list of these advertisements. Record 20 consists of three job descriptions and a job demands analysis of one of these positions. A reference to and a description of the contents of Record 5 is contained in the Respondent's Questionnaire which has been provided to the appellant as part of the OHRC's own disclosure procedures.

Given the nature of these records, it is my view that the representations of the OHRC fail to establish a clear and direct linkage between the disclosure of the **information** contained in them and the alleged harms. In addition, the evidence before me is insufficient to demonstrate that the probable harm which the OHRC contemplates (that disclosure of these records at this time would result in the complainant making statements different from those previously made) would reasonably be expected to occur if these records were released.

Nor have I been presented with any evidence to support the position of the OHRC that such disclosure would interfere with its process, other than the submission that "the harm relates to the integrity of our process and allows the complainant to circumvent rules set up for administrative efficiency".

With respect to the remainder of the records, I am satisfied that disclosure of the information contained in the responses to questions 4 and 5 in Record 19 could reasonably be expected to interfere with the complaint investigation and are, therefore, exempt from disclosure under sections 14(1)(a) and (b) of the Act.

**ISSUE C: If the records contain the personal information of the appellant and the answer to Issue B is yes, whether the discretionary exemption provided by section 49(a) of the Act applies.**

In Issues A and B, I found that the responses to questions 4 and 5 in Record 19 contain the personal information of the appellant and qualify for exemption under sections 14(1)(a) and (b) 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 an institution. However, this right of access is not absolute. Section 49 provides a number of exceptions to this right of access. One such exception is contained in section 49(a) of the Act 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]

Section 49(a) provides the head with the discretion to refuse to disclose to the appellant his own personal information where section 14 applies. In reviewing the head's exercise of discretion in favour of refusing to disclose those parts of Record 19 described above, I have found nothing to indicate that the exercise of discretion was improper and would not alter it on appeal.

**ORDER:**

1. I uphold the decision of the OHRC not to disclose the responses to questions 4 and 5 in Record 19.
2. I order the OHRC to disclose to the appellant the balance of the records at issue, within fifteen (15) days of the date of this order. The handwritten names, with the exception of that of the appellant, on Records 10, 11, 12 and 13 should not be disclosed as they are not responsive to the request.
3. In order to verify compliance with this order, I order the OHRC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: \_\_\_\_\_  
Anita Fineberg  
Inquiry Officer

\_\_\_\_\_  
January 28, 1994

## APPENDIX A

RECORD	PAGES	EXEMPTION(S)	DESCRIPTION
4	5-6	14(1)(a), (b) and 49(a)	Letter to complainant dated 07/09/76
5	7	14(1)(a), (b) and 49(a)	Letter from regional physician dated 22/07/87 respecting the appellant
6	8	14(1)(a), (b) and 49(a)	Memo from regional physician dated 15/03/88 respecting the appellant
7	9-10	14(1)(a), (b) and 49(a)	Memo to appellant
8	11	14(1)(a), (b) and 49(a)	Memo to appellant
9	12	14(1)(a) and (b)	Position advertisement
10	13-14	14(1)(a) and (b)	Position advertisement
11	15	14(1)(a) and (b)	Position advertisement
12	16-17	14(1)(a) and (b)	Position advertisement
13	18	14(1)(a) and (b)	Job Posting
14	19-20	14(1)(a) and (b)	Document prepared in response to investigation
15	21	14(1)(a), (b) and 49(a)	Letter from appellant dated 13/10/87
16	22-24	14(1)(a), (b) and 49(a)	Letter to appellant dated 13/06/88
17	25-26	14(1)(a), (b) and 49(a)	Letter to appellant dated 18/07/90
18	27-28	14(1)(a), (b) and 49(a)	Letter to appellant dated 14/09/90
19	29-33	14(1)(a), (b) and 49(a)	Part D - Respondent's Questionnaire
20	34-43	14(1)(a) and (b)	Part E - Respondent's Questionnaire