



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

ORDER P-692

Appeal P-9300081

Ministry of Consumer and Commercial Relations



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ORDER

BACKGROUND:

The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for records relating to the investigation of a harassment complaint made in 1991 against the requester under the Ontario Public Service Policy on Sexual Harassment which was then in effect. In particular, the requester sought access to all correspondence, including two specific letters, between a named individual (the complainant's solicitor) and the Ministry, and all interview notes made by the investigator during the investigation of the complaint.

The Ministry notified the complainant's solicitor pursuant to section 28(1) of the Act. The solicitor informed the Ministry that he objected to the disclosure of the requested records on his own behalf and on behalf of the complainant.

The Ministry provided access to a number of records, including the complete Investigation Report and the interview notes made during the requester's interview with the investigator. Access to the remaining records was denied pursuant to sections 49(b) and 21 of the Act. The requester appealed the denial of access.

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

RECORDS:

The records at issue consist of 24 pages of interview notes of the complainant and 12 witnesses taken by an investigator during the course of the harassment investigation, and two letters from the solicitor for the complainant to the Deputy Minister regarding the complaint.

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. If the answer to Issue A is yes, and the personal information relates to the appellant and other individuals, whether the discretionary exemption provided by section 49(b) of the Act applies.

DISCUSSIONS/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, that "personal information" means "recorded information about an identifiable individual, ...".

I have carefully reviewed all of the records at issue and find that all of them contain recorded information about the appellant and one or more identifiable individuals.

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

Under Issue A, I found that the records contain the personal information of the appellant and other 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 exceptions to this general right of access. One such exception 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 (Order 37).

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.

In its representations, the Ministry submits that section 21(3)(g) of the Act applies to the information contained in the interview notes. The appellant also refers to section 21(3)(g). This provision provides:

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

consists of personal recommendations or evaluations, character references or personnel evaluations;

I have carefully reviewed the investigator's notes. In a broad sense, it could be argued that the comments of the authors of the records are "evaluations" or "references" of the appellant and the complainant. However, in my view, it is not possible to characterize these comments as "personal evaluations", "personnel evaluations" or "character references" of these individuals. The records were created during an investigation to determine whether the appellant's actions were in violation of the Ministry's workplace harassment policy. The conclusions reached as a result of the investigation are based on whether this policy has been complied with, and have no "personal" or "personnel" component, as required by section 21(3)(g) (Order M-82). Accordingly, in my view, section 21(3)(g) does not apply to the information contained in the records.

In my view, none of the presumptions under section 21(3) are relevant in the circumstances of this appeal. I also find that section 21(4) of the Act is not relevant to 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. The Ministry submits that sections 21(2)(f) and (h) of the Act apply to the information contained in the records. These sections provide:

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;

In her representations, the appellant outlined her views regarding the manner in which the harassment investigation was conducted. Although she makes reference to a number of

provisions in sections 21(2) and (3), her submissions provide no evidence to support any factors which weigh in favour of disclosure of personal information.

Following my review of the information contained in the records and the representations of the parties, I am of the view that the information contained in witness statements may be considered as "highly sensitive" within the meaning of section 21(2)(f). It is also my view that in the circumstances of this investigation, the individuals who provided statements did so with an expectation of confidentiality (section 21(2)(h)).

The information contained in the solicitor's letters relates primarily to the complainant and the status of the complainant's action, and only very peripherally to the appellant. In my view, the same considerations are relevant to the information contained in these records in the circumstances of this appeal.

The Ministry did not raise the applicability of section 21(2)(e) of the Act to the information contained in the records. However, in my view, there exists a reasonable likelihood that the individuals identified in the records would be exposed unfairly to harm should the personal information contained in the records be disclosed. I, therefore, find that section 21(2)(e) is a relevant consideration.

A number of previous orders have addressed the issues raised in appeals relating to workplace harassment investigations. It has been recognized in these orders that in order to ensure confidence in the process, respondents must be provided with sufficient information to allow them to address the validity of the allegations (Order M-82).

The appellant was provided with the complaint, the investigation report, correspondence from her union, an internal memorandum and a copy of the notes made during her interviews in their entirety. In my view, the degree of disclosure the appellant has received in response to her request is a relevant consideration in the circumstances of this appeal, which weighs in favour of privacy protection.

In my view, the factors present in favour of the privacy protection of the individuals named in the records outweigh the appellant's right of access to this information.

Section 49(b) is a discretionary exemption. I have reviewed the Ministry's representations on its exercise of discretion in refusing to grant access to the appellant to her own personal information. I find nothing improper in this exercise and would not alter it on appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____ May 27, 1994

Laurel Cropley
Inquiry Officer