



Information and Privacy  
Commissioner/Ontario

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

# ORDER P-903

Appeal P-9400759

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/Télééc: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). In March, 1993, a complaint was filed against the appellant under the Ontario Public Service Workplace Discrimination and Harassment Prevention Policy (WDHP). The complaint was received by the WDHP Unit of Management Board Secretariat (MBS). Consequently, MBS initiated an investigation into the complaint. In preparing his report, the investigator contacted the complainant, the appellant (the respondent in the complaint investigation), and a number of witnesses. The complainant and the appellant are both employees of the Ontario Human Rights Commission (the OHRC). As part of the investigation process, the appellant was provided with a copy of the complaint, the draft investigation report and the final report. Settlement was effected between the appellant and the complainant and no further action was taken regarding the complaint.

The appellant, through his counsel, submitted a multi-part request to MBS for specified information relating to the investigation of the complaint. MBS transferred the request to the OHRC as it had a greater interest in the records. The OHRC granted access to records pertaining to parts of the request, advised the appellant that no records exist with respect to some other parts of the request and denied access to records responsive to the remaining parts pursuant to sections 21(1) and 49(b) of the Act (invasion of privacy).

During mediation, the appellant's counsel agreed to limit the appeal to the following records:

- witness statements and any statements of the complainant prepared by a named investigator or any other investigators during the investigation of the complaint; (section 49(b))
- information recorded on the investigator's portable computer during interviews of potential witnesses and the complainant; (sections 21(1) and 49(b)) and
- any documentation with respect to directions that the named investigator received prior to, during and after the investigation of the complaint, and in particular from a named individual or any other individual at MBS, after June 28, 1994 (no records exist).

There are a number of affected persons who were notified of this appeal. These individuals are the complainant in the investigation and 14 other witnesses who gave statements or who were interviewed by the investigator (the witnesses).

Notice of Inquiry was provided to the OHRC, the appellant's counsel, the complainant and the witnesses. Representations were received from the OHRC, the complainant and five witnesses. The appellant submitted his representations on his own behalf and indicated that his counsel no longer represented him in this matter. In his representations, the appellant states:

I am requesting in this inquiry that my request should be limited to the following records:

witness statement and any statements of the complainant prepared by the named investigator or any other investigators during the investigation of the complaint.

He further indicates that he is not interested in receiving access to the names of the witnesses where they appear with other personal information of the witnesses or where disclosure of the names would reveal other personal information about the witnesses.

The records in this appeal originally included one witness statement, 15 interview notes and five other notes made to the file. As a result of the appellant's clarification in his representations, the records at issue now consist of the witness statement (Record 6) and the 15 interview notes (Records 7 - 21).

The OHRC included with its representations, the sworn affidavits of the investigator and the Acting Freedom of Information and Privacy Co-ordinator. These affidavits were provided to support the OHRC's position that no other records exist. As the appellant no longer wishes to pursue this issue, it is not necessary for me to consider it in this appeal.

The sole issue in this appeal is whether the discretionary exemption in section 49(b) of the Act applies to the records at issue.

## **DISCUSSION:**

### **INVASION OF PRIVACY**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual. I have reviewed the records and I find that all of them contain personal information which relates to the appellant and other individuals. Even with the names of the witnesses removed from the records, I find the remaining information in the records would reveal their identities as well as information about them, and thus constitutes their personal information.

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other individuals and the OHRC determines that the disclosure of the information would constitute an

unjustified invasion of another individual's personal privacy, the OHRC has the discretion to deny the requester access to that information.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the OHRC must consider the application of the factors listed in section 21(2) of the Act, as well as all other considerations that are relevant in the circumstances of the case.

In its representations, the OHRC states that the following presumptions apply to parts of the records:

- medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation - section 21(3)(a) (Records 8, 10, 12, 13, 14, 15, 18 and 21)
- employment or educational history - section 21(3)(d) (Records 6 - 21)
- describes an individual's finances - section 21(3)(f) (Record 21)
- consists of personal recommendations or evaluations, character references or personnel evaluations - section 21(3)(g) (Records 7 - 21)
- indicates the individual's racial or ethnic origin - section 21(3)(h) (Records 6 - 21).

The OHRC further states that there are a number of factors under section 21(2) which favour non-disclosure of the personal information in all of the records, as follows:

- the individuals to whom the personal information relates will be exposed unfairly to pecuniary or other harm - section 21(2)(e)
- the information is highly sensitive - section 21(2)(f)
- the information is unlikely to be accurate or reliable - section 21(2)(g)
- the information was supplied in confidence - section 21(2)(h)
- disclosure may unfairly damage the reputation of individuals referred to in the records - section 21(2)(i).

The affected persons each support one or more of the factors identified by the OHRC in objecting to disclosure of the requested records. In particular, the affected persons indicate that the appellant is still employed at the OHRC, and express serious concern that disclosure of their personal information would expose them to reprisals from the appellant in both their employment and personal capacities.

The appellant submits that disclosure of the information is necessary to ensure a fair determination of his rights (section 21(2)(d)). The appellant states further that there is a compelling public interest in disclosure of the record which clearly outweighs the purpose of the exemption (section 23). He indicates that in his view the investigation into the complaint was biased, inaccurate and incomplete and resulted in erroneous and unsupported findings. He suggests that the procedures followed by the investigator were flawed in that the investigator refused to interview him or anyone supportive of his position. As a result of this investigation, the appellant states that he was demoted.

With respect to the appellant's submission that he was denied procedural fairness in the investigation of the complaint, the OHRC provides documentary evidence which indicates that the appellant was contacted by the investigator but advised that he did not wish to meet with him to discuss the complaint.

With respect to the appellant's demotion, the OHRC indicates in its representations that following receipt of the final report, the appellant requested that the OHRC remove him from the position he held at that time, and place him in a comparable position within the OHRC or Ontario Public Service. The appellant was subsequently moved to another position within the OHRC with the same salary and position level as he had previously held. The OHRC states that no further action was taken against the appellant.

In previous orders of the Commissioner's office it has been determined that 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.

[Orders P-312, P-375 and P-387]

The appellant makes no specific mention of a proceeding that is currently in process or which is contemplated. The OHRC and the complainant state that the matter relating to the investigation has been completed and that no further action is anticipated. Although the appellant has indicated dissatisfaction with the investigation he has not provided sufficient evidence that the disclosure of the personal information contained in the records at issue has any bearing on the determination of the right in question. Accordingly, I find that section 21(2)(d) does not apply.

With respect to the remaining issues in this appeal, I make the following findings:

- (1) Records 6 - 21 contain references to the witnesses' and/or other individuals' racial and/or ethnic origin, Records 8, 10, 12, 13, 14, 15, 18 and 21 contain information relating to medical condition or disability, and Record 21 contains a reference to an individual's financial situation. I find that disclosure of this information would constitute a presumed unjustified invasion of privacy pursuant to sections 21(3)(a), (h) and (f) respectively.
- (2) I find that the presumptions in sections 21(3)(d) (employment history) and 21(3)(g) (character recommendations) do not apply to the information in the records.
- (3) Based on my review of the records and the representations, I find that disclosure of the personal information contained in the records could unfairly expose the complainant and witnesses to harm (section 21(2)(e)).
- (4) Many past orders of the Commissioner's office have considered the application of sections 21(2)(f) and (h) of the Act in the context of personal information generated as a result of workplace and/or sexual harassment investigations (Orders P-656 and P-738). In many of these orders, the withholding of information which directly addresses the substance of the complaints has not been upheld under these two sections. The general principle underlying the approach taken in past orders ensures that when, as in this appeal, the respondent in a harassment complaint seeks information, he/she is advised of the substance of the accusations and the identity of the complainant. In order to achieve this result, the respondent needs access to information which he or she has provided to the investigator as well as information provided by the complainant and information from other witnesses directly related to the complaint.

While the principles enunciated in past orders are valuable guidelines to determine the degree of disclosure of personal information in harassment cases, the circumstances of each case must be considered to ascertain if such disclosure would result in an unjustified invasion of the personal privacy of individuals other than the requester.

In this case, the appellant is aware of the identity of the complainant, the specifics of the complaint and the results of the harassment investigation. Given the unique circumstances of this case, I

believe that sections 21(2)(f) and (h) are factors which weigh in favour of non-disclosure of any additional personal information.

- (5) I am not satisfied that the information contained in the records is unlikely to be an accurate or reliable reflection of the information provided by the witnesses in their statements. In my view, the accuracy of the information vis a vis the appellant is not at issue in this appeal. I find, therefore, that section 21(2)(g) does not apply.
- (6) I am also not satisfied that disclosure of the information contained in the records would unfairly damage the reputation of the individuals referred to in the records, and, therefore, section 21(2)(i) does not apply.
- (7) Section 21(4) does not pertain to any of the information in the records.
- (8) I find that section 23 does not apply in the circumstances of this appeal, since I am not persuaded that there is a compelling public interest in disclosure which outweighs the purpose of the section 21 exemption.

To summarize, I find that the presumptions in sections 21(3)(a), (f) and (h) apply to portions of the records. Further, given the unique circumstances of this appeal, I find that sections 21(2)(e), (f) and (h) are factors which weigh in favour of privacy protection of the personal information of the complainant and affected persons. I have found that no factors favouring disclosure have been established. Accordingly, disclosure of the complainant's and affected persons' personal information would result in an unjustified invasion of their personal privacy and section 49(b) of the Act applies to exempt the records from disclosure.

**ORDER:**

I uphold the OHRC's decision.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ April 11, 1995