



Information and Privacy
Commissioner/Ontario

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

ORDER P-959

Appeal P-9500184

Ministry of the Solicitor General and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of the Solicitor General and Correctional Services (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to two specific records pertaining to an investigation into a complaint of harassment. The Ministry actually identified four records (consisting of 10 pages) as being responsive.

In the course of making its decision regarding the request, the Ministry notified the complainant pursuant to section 28 of the Act. The complainant objected to disclosure of the requested records. The Ministry subsequently denied access to these records pursuant to sections 21 and 49(b) of the Act. The requester appealed the Ministry's decision to deny access.

A Notice of Inquiry was sent to the appellant, the Ministry and the complainant. Representations were received from the appellant and affected party. The Ministry chose to rely on its decision letter.

THE RECORD

The four records at issue in this appeal are:

- Record A - 1 page document entitled "Informal Complaint Process Report", dated November 1, 1994
- Record B - 4 page "Occurrence Report" dated November 8, 1994
- Record C - 1 page "Occurrence Report" dated November 5, 1994, signed by the complainant
- Record D - 4 page "Occurrence Report" dated October 26, 1994, signed by the complainant

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. I have reviewed the records and I am satisfied that they contain information about the appellant and the complainant, therefore satisfying the definition of "personal information" as set out in section 2(1) 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 exemptions to this general right of access. One such exemption is found in section 49(b), 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 own personal information against the rights of other individuals to the protection of their personal privacy. If the Ministry determines that 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 his own personal information.

In my view, where 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 own personal information, the only situation under section 49(b) in which he 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 another 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 appellant submits that section 21(3)(b) of the Act applies to allow disclosure. This section presumes an unjustified invasion of privacy and does not favour disclosure.

In its decision letter, the Ministry indicated that the presumption under section 21(3)(d) of the Act applies to all of the records at issue. This section reads:

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

relates to employment or educational history;

I have reviewed the records with respect to the invasion of privacy exemption. I find that section 21(3)(d) does not apply in the circumstances of this appeal. While these pages do contain information concerning employment-related incidents involving the appellant and the affected party, it is my view that this information cannot accurately be characterized as constituting the employment history of these individuals.

The Ministry indicated in its decision letter that the considerations under sections 21(2)(e), (f) and (h) of the Act, which favour non-disclosure, are relevant in the circumstances of this appeal. The affected party's representations may be characterized as raising the applicability of the considerations set out in section 21(2)(e) and (i) of the Act which also favour non-disclosure. The appellant has identified section 21(2)(d) as being a relevant factor in favour of disclosure.

Sections 21(2)(d), (e), (f), (h) and (i) 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,

- (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (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
- (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

With regard to section 21(2)(f), it is my view that when an allegation of workplace harassment is made and investigated, it is reasonable for the parties directly involved (the complainant and the respondent) to find the experience distressing and to restrict discussion of the subject with others. Accordingly, I find that section 21(2)(f) is a relevant factor.

Although, in my view, it is neither practical nor possible to guarantee complete confidentiality to each party during an internal investigation of an allegation of harassment in the workplace, I find that section 21(2)(h) is also a relevant consideration.

In support of her reliance on section 21(2)(e), the complainant indicates that disclosure of this record could set off a new round of harassment. In my view, I find the complainant's representations credible, and section 21(2)(e) is a relevant factor to consider in the circumstances of this appeal.

Additionally, the complainant's representations appear to refer to section 21(2)(i) as a factor favouring non-disclosure. Again, I find the complainant's representations credible and consider section 21(2)(i) as a relevant factor.

The appellant has concerns regarding the investigation. He questions whether he was treated fairly and whether he has grounds to pursue other actions as a result of this incident. I recognize these concerns, and the comments made in the appellant's representations give some weight to the appellant's reliance on section 21(2)(d) and weigh in favour of disclosure to the appellant.

Generally speaking, if the parties to a complaint are to have any confidence in the process, the respondent in such a complaint must be advised of what they are accused of and by whom to enable them to address the validity of the allegations. Equally, the complainant must be given enough information to enable them to ensure that their allegations were adequately investigated. Otherwise, others may be discouraged from advising their employer of possible incidents of harassment and requesting an investigation, which runs counter to the objective of promoting a fair and safe workplace.

Additionally, there are unique circumstances at work in this case, in that the complaint was investigated in one meeting which was held with both parties present. The appellant, being a participant, was aware of the allegations, the remedies sought and the outcome of the investigation. However, there was a lack of documentation provided to the appellant regarding this meeting, and clearly this has led to suspicion. Having considered and balanced all of the circumstances of this appeal, I find it would not be an unjustified invasion of the affected person's personal privacy to disclose certain records regarding this meeting. Therefore, I find that section 49(b) does not apply to those records which detail the meeting and its results.

I find that disclosure of the personal information in the remaining records **would** constitute an unjustified invasion of the affected party's personal privacy and I uphold the Ministry's decision to deny access to them.

ORDER:

1. I uphold the Ministry's decision to withhold Records A and D.
2. I order the Ministry to disclose the remaining records to the appellant within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

July 21, 1995