



**Information and Privacy
Commissioner/Ontario**

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

ORDER P-1544

Appeal P-9700351

Ontario Human Rights Commission



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BACKGROUND:

The appellant was a student enrolled in the School of Graduate Studies at the University of Toronto's Department of East Asian Studies in 1991. As part of the course requirements for the Masters program in which she was enrolled, she submitted a paper to her supervising professor. She was unhappy with the grade awarded and initiated the first level of what became a four-stage appeal process in accordance with the University's internal policies.

The appellant remained dissatisfied with the resolution of this process and in 1993 initiated a complaint to the Ontario Human Rights Commission (the OHRC) alleging that she had been treated in a discriminatory fashion by the University based on her race. Following a lengthy investigation and conciliation, the OHRC decided not to refer the appellant's complaint to a Board of Inquiry under the provisions of the Ontario Human Rights Code. The appellant's request for a reconsideration of this decision was denied on June 12, 1997 and the OHRC closed its file on the appellant's complaint.

NATURE OF THE APPEAL:

The appellant made a request to the OHRC under the Freedom of Information and Protection of Privacy Act (the Act) for access to the contents of her file. The OHRC located a large number of responsive records and, in its first decision letter, granted access to many of them, in whole or in part. Access to other responsive records or parts of records was denied, under the following exemptions contained in the Act:

- advice or recommendations - section 13(1)
- law enforcement - section 14(2)(b)
- invasion of privacy - section 49(b)

The appellant appealed the OHRC's decision to deny access to those records or parts of records which were not disclosed.

In a second decision letter, the OHRC advised the appellant that it also intended to rely on section 14(1)(c) (law enforcement) and section 20 (danger to safety or health) to deny access to some of the information contained in the records.

During the mediation of the appeal, the OHRC decided to disclose additional records, or parts of records, to the appellant.

This office provided a Notice of Inquiry to the appellant, the OHRC and to eight other individuals whose rights may be affected by the disclosure of the information contained in the records (the affected persons). Representations were received from the OHRC, the appellant and four of the affected persons. The OHRC did not make any submissions on the application of the section 14(2)(b) exemption to the records. As this is not a mandatory exemption, I will not further consider its application in this order.

At the inquiry stage of the appeal, the OHRC again disclosed additional records, or parts of records, to the appellant. Accordingly, only 100 pages of documents, in whole or in part, remain at issue. In this order, I will refer to the records using the numbering system used in an index which was provided to this office by the OHRC on January 30, 1998.

PRELIMINARY ISSUE:

LATE RAISING OF DISCRETIONARY EXEMPTIONS

In the Confirmation of Appeal notification sent by this office to the OHRC at the time that the appeal was received, it was advised that it would only be able to raise the possible application of discretionary exemptions other than those originally claimed in its November 6, 1997 decision letter until January 9, 1998. The OHRC did not advise the appellant of its intention to rely on sections 14(1)(c) and 20 until January 30, 1998.

In the Notice of Inquiry provided to the OHRC, it was asked to make submissions on the reasons why it is claiming discretionary exemptions beyond the date prescribed in the Confirmation of Appeal, as well as the reasons why the discretionary exemptions apply.

The OHRC has not provided me with any representations on these issues. The appellant objects to their inclusion as issues under consideration in this appeal.

I have reviewed the record, and parts of records for which the OHRC is claiming the application of sections 14(1)(c) and 20. In the circumstances of this appeal, and because of the sensitive nature of the information in these records, I am prepared to consider the application of these exemptions. I am not satisfied that the appellant will suffer any real prejudice should I do so. Particularly with respect to section 20 and because these records deal with very real security concerns, I am inclined to err on the side of caution to ensure that the health or safety of individuals is not put at risk through the disclosure of information which may properly qualify for exemption under these sections.

DISCUSSION:

PERSONAL INFORMATION

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 at issue in the present appeal and make the following findings:

1. The undisclosed portions of Records A-1 and Records A-2, A-12, A-13 and A-18 contain only the personal information of the appellant.
2. The undisclosed portions of Records A-5, A-6, A-7, A-10, B-20, B-21, B-23 and B-24, as well as Records A-4, B-22 and C-28 to C-42 contain the personal information of the appellant and other identifiable individuals.

3. The undisclosed portions of Record C-25 and Records A-3, C-26 and C-27 contain only the personal information of individuals other than the appellant.

INVASION OF PRIVACY

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 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 appellant access to that information. In this situation, the appellant is not required to prove that the disclosure of the personal information **would not** constitute an unjustified invasion of the personal privacy of another individual. Since the appellant has a right of access to his or her own personal information, the only situation under section 49(b) in which he or 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 personal privacy.

Where, however, the record contains only the personal information of other individuals, section 21(1) prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions 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 if 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 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 circumstances that are relevant to the appeal.

The OHRC submits that the presumption in section 21(3)(b) applies to the information contained in the severed portions of Records A-7, B-20, B-21 and C-25, as well as Records A-12, B-22, B-24, C-26 to C-42 because this information was compiled and is identifiable as part of an investigation into a possible violation of law, in this case, the Ontario Human Rights Code, and that its disclosure would result in a presumed unjustified invasion of the personal privacy of the affected persons under section 21(3)(b) of the Act, which reads:

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

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

I have reviewed the record, and find that the severed portions of Records A-7, B-20, B-21 and C-25 and Records B-22, B-24 and C-26 to C-42 fall within the ambit of the section 21(3)(b) presumption. Further, I find that section 21(4) has no application. The appellant is of the view that there exists a public interest in the subject matter of the records as their disclosure will assist her in publicizing what she perceives to be an injustice by the OHRC. In my view, however, there does not exist any "public interest" in the disclosure of these records within the meaning of section 23 which is sufficient to outweigh the privacy protection purpose of the exemption. I find that any interest which may exist in disclosure is purely a private one, belonging to the appellant.

The undisclosed portions of Record A-10 relate to certain security concerns expressed by staff of both the OHRC and the University regarding the appellant. In my view, the undisclosed information in this record falls squarely within the ambit of the consideration listed in section 21(2)(e) as its disclosure could reasonably be expected to result in harm to the individual(s) to whom the information relates. This is a significant factor weighing heavily in favour of privacy protection. The appellant has not made any specific submissions with respect to the undisclosed information in this document. In my view, the consideration weighing in favour of the protection of the personal privacy interests of other identifiable individuals outweighs any access right which the appellant may have to this information.

As I have found above that the undisclosed portions of Records A-7, A-10, B-20, B-21 and Records B-22, B-24 and C-28 to C-42 contain the personal information of the appellant and other identifiable individuals, they are exempt from disclosure under section 49(b). The undisclosed portion of Record C-25 and Records C-26 and C-27 are exempt under section 21(1) as they contain only the personal information of individuals other than the appellant.

In my view, however, Record A-12, which contains only the personal information of the appellant, was not compiled and is not identifiable as part of an investigation into a possible violation of law. As such, it is not exempt under section 49(b) of the Act. As no other mandatory exemptions apply to this information, it should be disclosed to the appellant.

The undisclosed portions of Record A1 also contains only the personal information of the appellant. This information cannot, therefore, qualify for exemption under sections 21(1) or 49(b). As no other exemptions apply to this information, it too should be disclosed to the appellant.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION

I have found that most of the remaining records contain the appellant's personal information.

Under section 49(a) of the Act, the OHRC has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states as follows:

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]

In order to determine whether the exemption provided by section 49(a) applies in this case, I will begin by considering the OHRC's claims that particular records qualify for exemption under sections 13(1), 14(1)(c) and 20, which are referred to in section 49(a).

ADVICE OR RECOMMENDATIONS

The OHRC has claimed the application of section 13(1) to Records A-2, A-3, A-4, A-5, A-6, A-13 and A-18. Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order 118).

The OHRC submits that Records A-2, A-3, A-4, A-5 and A-6 contain notations which relate to a suggested course of action to be taken with respect to the processing of the appellant's complaint. It also argues that Records A-13 and A-18 contain advice from staff to the Commission with respect to the disposition of the appellant's complaint.

I have carefully reviewed each of these records and find that Records A-2, A-4, A-5, A-6 and A-13 do not contain any information which qualifies for exemption under section 13(1). None of these records contain a suggested course of action to be accepted or rejected by its recipient during the deliberative process. Because no other exemptions have been claimed for Records A-6 and A-13 and no mandatory exemptions apply, the records should be disclosed to the appellant.

Records A-3 and a portion of Record A-18 do include a suggested course of action to be either rejected or accepted by the recipient of the communication. Accordingly, these records qualify for exemption under section 13(1), and are exempt under section 49(a) as they contain the personal information of the appellant. I have highlighted that portion of Record A-18 which is exempt under section 13(1). Because no mandatory or other exemptions apply to the remainder of Record A-18, it should be disclosed to the appellant.

DANGER TO HEALTH OR SAFETY

The OHRC has claimed the application of section 20 to Record A-4 and the undisclosed information in Records A-5 and B-23. Because of the nature of the information in these records and the submissions which were received from the OHRC, I am unable to describe them in great detail.

Section 20 provides:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

I have reviewed the submissions of the OHRC with respect to these documents and find that they qualify for exemption under section 20. In my view, the disclosure of this information could reasonably be expected to seriously threaten the safety of one or more individuals. Accordingly, because Records A-4, A-5 and B-23 contain the personal information of the appellant, they are exempt under section 49(a).

LAW ENFORCEMENT

The OHRC submits that Record A-2 is exempt from disclosure under section 14(1)(c). This section provides:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

It is well-established that the OHRC is an agency with a law enforcement mandate, under the provisions of the Ontario Human Rights Code (Orders P-89, P-330, P-973, P-1013 and P-1143).

I have reviewed Record A-2 and find that it does not contain any information whose disclosure would reveal investigative techniques or procedures. This document simply outlines the steps taken by the OHRC in responding to various matters raised by the appellant. As no other exemptions have been claimed for this document and no mandatory exemptions apply, it should be disclosed to the appellant.

ORDER:

1. I order the OHRC to disclose Records A-2, A-6, A-12, A-13, the undisclosed portion of Record A-1 and those portions of Record A-18 which are not highlighted on the copy which I have provided to the OHRC's Freedom of Information and Protection of Privacy Co-ordinator by **April 22, 1998** but not before **April 17, 1998**.
2. I uphold the OHRC's decision to deny access to the remaining records.

3. In order to verify compliance with the terms of this order, I reserve the right to require the OHRC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ March 18, 1998