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

ORDER PO-2256

Appeals PA-030319-1 and PA-030320-1

Ontario Human Rights Commission

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NATURE OF THE APPEAL:

The Ontario Human Rights Commission (the OHRC) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

1. The number of cases that were presented to the OHRC Commissioners, and the corresponding number of cases referred to the Board of Inquiry for 3 Sessions.

The requester identified the dates of the sessions referred to and the information he was seeking.

2. The materials related to my Complaints that were placed before the OHRC Commissioners at the same sessions.

The requester then identified specifically the three files requested, comprising two complaints and a reconsideration of one of the complaints.

The OHRC issued two separate decisions with respect to each complaint and the accompanying reconsideration cited in the request describing the number of cases heard and referred first on March 25 and second on March 27 and April 17, 2001. The OHRC granted partial access to the materials related to the complaints and reconsideration. Part of the responsive information was withheld pursuant to section 13(1) of the *Act* (advice or recommendations). The requester (now the appellant) appealed the OHRC's decisions.

This office opened Appeal Number PA-030319-1 to address the appeal relating to one of the complaints set out in the request and Appeal Number PA-030320-1 for the appeal relating to the complaint and subsequent reconsideration described in the request. This order will dispose of both appeals.

During the mediation stage of the appeals, the OHRC issued a revised decision whereby additional information was disclosed to the appellant from the responsive records that had been withheld in the original decisions. The OHRC indicated that it relied on sections 49(a) and 13(1) of the *Act* to withhold the remainder of the information. The appellant advised that he wished to pursue access to all of the withheld portions of the records.

Also during mediation, the appellant raised some additional issues regarding these appeals. The appellant asked the OHRC to provide him with a list of all the records relating to the complaints and reconsideration in which he was involved. The OHRC would not agree to produce such a list on the basis that, since access to all of the records had been granted, with the exception of the severed information, it was not obliged to do so. Accordingly, the production of a list of records was added as an issue in these appeals.

Finally, the appellant took issue with the fact that he was charged for and paid $27.80 for what he describes as two sets of identical records. In response, the OHRC explained that the duplicate copies of records is a reflection of the fact that the materials related to the complaint and reconsideration file were placed twice before the OHRC Commissioners and that in his request, the appellant asked for all the materials that were placed before the OHRC Commissioners. The

appellant took issue with the OHRC's response concerning the fee. Accordingly, the amount of the fee of $27.80 is also an issue in these appeals.

Further mediation was not possible and the appeals were moved to the adjudication stage of the process. I decided to seek the representations of the OHRC initially and received its submissions, which were shared in their entirety with the appellant, along with a Notice of Inquiry. The appellant also provided representations.

RECORDS

The records at issue consist of the undisclosed portions of two Case Disposition and Chronology forms and one record entitled Proposed Decision.

DISCUSSION:

PERSONAL INFORMATION

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

Under section 49(a) of the *Act*, the institution has the discretion to deny an individual access to their own personal information in instances where the exemptions in sections 12, **13**, 14, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that information.

As the section 49 personal privacy exemption applies only to information that qualifies as "personal information", I must first determine whether the records contain personal information and if so, to whom that information relates. Personal information is defined, in part, in section 2(1)(h) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> > 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 at issue and find that they contain the personal information of the appellant. Each of the records refers to the appellant by name and describes the recommended disposition of each of the two complaints and a reconsideration brought to the OHRC by him. I find that this information in the records qualifies as the personal information of the appellant as it includes his name and other information relating to him, specifically the recommended

disposition of each of his complaints and reconsideration within the meaning of that term in section 2(1)(h).

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/ADVICE OR RECOMMENDATIONS

The OHRC has claimed the application of the discretionary exemption in section 49(a) in conjunction with section 13(1) to the undisclosed portions of the records.

General principles

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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.)]

Representations of the parties

The OHRC relies on the decision of Senior Adjudicator David Goodis in Order PO-2201. That decision addressed the application of section 13(1) to Case Disposition and Chronology forms, which are identical to the records at issue in the present appeals. The Senior Adjudicator stated:

> I agree with the OHRC that in Order P-363, this office found that a record indicating OHRC staff advice to Commissioners as to how a specific case should be disposed of (in that case, whether or not it should refer a complaint to a Board of Inquiry (now the Human Rights Tribunal of Ontario)), was exempt, to the extent that it revealed the suggested course of action. I agree with the approach taken in Order P-363 (which was upheld in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.)). Accordingly, I find that any information in the records that reveals how the OHRC Commissioners should dispose of the appellant's case is exempt under section 49(a)/13.

The OHRC submits that the undisclosed information in the present appeals consists of exactly the same information as that referred to in Order PO-2201. Only information that indicates staff advice as to the disposition of a specific case has been withheld under section 13(1). As a result, the OHRC urges me to make a similar finding in the present appeals.

The appellant's submissions do not directly address the application of the exemptions claimed to the undisclosed portions of the records.

Findings

I agree with the approach taken by Senior Adjudicator Goodis in Order PO-2201 which followed the reasoning in Order P-363 and has received judicial approval in the *Ontario (Human Rights Commission)* decision cited above. I adopt the rationale behind these decisions for the purposes of the present appeals. In these cases, the OHRC has disclosed all of the information contained in the records with the exception of the recommended disposition made by OHRC staff. In the present appeals, the only undisclosed information remaining is the recommended course of action to be taken by OHRC Commissioners in disposing of the appellant's complaints and reconsideration request. I find that this information qualifies as advice or recommendations for the purposes of section 13(1). The undisclosed portions of the records are, accordingly, exempt from disclosure under the discretionary exemption in section 49(a).

FEES

The OHRC charged the appellant a fee of $27.80 for the cost of reproducing 139 pages of records disclosed to him in response to the first part of his request. The appellant was charged a further $10.60 in photocopying charges for the 53 pages disclosed to him in response to the

second part of his request. The appellant objects to the amount of the fee, claiming that he was charged twice for access to the same records.

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads, in part:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding the charging of fees for photocopying are found in section 6.1 of Regulation 460. This section reads:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.

The OHRC acknowledges that the appellant was charged for photocopying of portions of the records twice but that it did so in order to fully comply with the appellant's request, as he had requested copies of "the materials related to my complaints that were place before the OHRC Commissioners". The OHRC states that it:

> . . . understood this request to mean that the appellant wanted to confirm exactly which records were placed before the Commissioners when they made their decisions with respect to his complaints on each of the dates listed above.

However, the OHRC goes on to add that:

> . . . the appellant would have been aware that he was requesting duplicate copies of records since he had been advised by the Commission that his submissions in response to the Commission's Case Analysis Reports for both of his complaints and his submissions in response to the Reconsideration Report for [one of the complaints] would be placed before the Commissioners when they made their decisions with respect to his complaints and the appellant attached copies of many of the same documents to his three sets of submissions.

The appellant objects to being charged twice for the photocopying of 68 pages that appeared in one of the complaint files as well as the reconsideration file.

Findings

The appellant's request clearly indicated that he was seeking access to all of the documentation put before the Commissioners in relation to the two complaints and the reconsideration which he initiated. In my view, the OHRC adopted a reasonable approach in providing access to **all** of the material contained in the files provided to the Commissioners in each of these proceedings. The records provided to the appellant responded directly to the appellant's request for all of the material. I find that the OHRC was justified in charging a fee for the photocopying of the entire contents of the files as this is precisely what the appellant was seeking.

As a result, I find that the photocopying charges levied by the OHRC were in accordance with the requirements of section 57(1) and section 6.1 of Regulation 460 and I dismiss this part of the appeal.

IS THE OHRC OBLIGED UNDER THE *ACT* TO CREATE A RECORD?

During the mediation stage of the appeal, the appellant requested that the OHRC create a list of all of the documents presented to the Commissioners who heard the appellant's complaints and reconsideration in order that he might apply to the courts for a review of their decisions. The appellant relies on the decision of Madame Justice McFarland of the Superior Court of Justice (Divisional Court) in *Pritchard v. OHRC and Sears Canada* (June 27, 2001) where the OHRC was ordered to "disclose all information placed before the Commissioners when they issued their section 34 decision."

The appellant argues that in order for him to bring all of the necessary documentation to the court, he requires a list of all the material before the Commissioners which was relied upon in reaching their decisions.

The OHRC points out that it is not required to create a record in response to a request. It relies on the decision of former Commissioner Sidney B. Linden in Order 50 where he found that:

> . . . the *Act* gives requesters a right (subject to the exemptions contained in the *Act*) to the 'raw material' which would answer all or part of a request, but, subject to special provisions which apply only to information stored on computer, the institution is not required to organize the information into a particular format before disclosing it to the requester.

The OHRC submits that:

> . . . the requester is requesting the Commission to create a record for him which he then intends to use in some form of unspecified litigation. Moreover, it is the

> institution's position that should the requester want to indicate to an unspecified 'Court' that he is not withholding any of the records that he has received from the Commission, he can swear an affidavit to that effect.

Findings

In Order PO-2237, Adjudicator Frank DeVries addressed a similar situation in which a requester asked that an institution create a record from existing information. He found that:

> It has been established and recognized in a number of previous orders that section 24 of the *Act* does not, as a rule, oblige an institution to create a record where one does not currently exist. However, in Order 99, former Commissioner Sidney Linden made the following observation with respect to the obligations of an institution to create a record from existing information which exists in some other form:
>
> > While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the *Act* is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the *Act*, it also enhances one of the major purposes of the *Act* i.e., to provide a right of access to information under the control of institutions.
>
> Although I accept the appellant's position that the Ministry could calculate the specific amounts requested, I find that the Ministry is not required to do so in the circumstances, and that it has met its obligations under the *Act*. As identified above, an institution is not, as a rule, obliged to create a record where one does not currently exist, and I find that the circumstances present in this appeal are not such as to warrant the creation of a record. In my view this is not the type of situation described by former Commissioner Linden in Order 99. The creation of a record as suggested by the appellant would, in this case, simply be creating a record containing information already contained in a record in the possession of the Ministry, but which the parties have agreed that MAG has a greater interest in. Furthermore, any calculation as proposed by the appellant would also be based on the information contained in those records for which the request was transferred. Accordingly, I find that the present circumstances are not such as to oblige the Ministry to create a record containing the requested information.

I adopt the reasoning of Adjudicator DeVries for the purposes of the present appeals. In my view, this is not a situation where the creation of a record by the institution would be "consistent with the spirit of the *Act*", as described by former Commissioner Linden in Order 99. In this case, the appellant was granted access to all of the requested records, subject to several severances described above. In my view, the appellant can compile the list that he requires from

the records provided to him in the same fashion and with the same degree of accuracy as the OHRC. The list he is seeking can be easily compiled from the information disclosed to him in response to his requests.

It is often useful to have an Index of Records prepared by an institution for the purposes of conducting the mediation of an appeal and to assist a requester in determining what records remain outstanding, particularly in cases involving large numbers of records. This is not the case in the present appeal as all of the records have been disclosed to the appellant and they are not voluminous. I find that, in the present circumstances the OHRC is not obliged to create a list of documents as requested by the appellant and I dismiss this part of his appeal.

ORDER:

1. I uphold the OHRC's decision to deny access to the undisclosed portions of the records.

2. I dismiss the appeals with respect to the amount of the fees payable and the obligation of the OHRC to create a record.

Original Signed by: March 18, 2004
Donald Hale
Adjudicator