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

ORDER PO-2430

Appeal PA-050040-1

Ontario Human Rights Commission

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NATURE OF THE APPEAL:

This appeal arises from a two-part request submitted to the Ontario Human Rights Commission (the OHRC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). One part of the request was for access to records containing the personal information of the requester relating to a specific case before the OHRC in which he was involved. The second part of the request sought the correction of two identified records. The OHRC responded to the two parts of the request by issuing a single decision to the requester.

Concerning the request for records, the OHRC identified the responsive records and granted access to many of them. The OHRC advised that access to some records was denied pursuant to the exemption found in section 49(a) (discretion to refuse requester's own information) in conjunction with sections 13(1) (advice or recommendations), 14(1)(a) and (b) (law enforcement) and 19 (solicitor-client privilege); and pursuant to sections 49(b) and 21(1) (invasion of privacy) with reference to the factors in sections 21(2)(f) and (h) and the presumption in section 21(3)(b) of the *Act*.

In addition, the OHRC also indicated that the fee for photocopying the records which were being disclosed to the requester was $711.00 (approximately 3,555 pages of records at $.20 per page).

With respect to the request for the correction of the two identified records, the OHRC advised the requester that it would not make the requested corrections.

The requester (now the appellant) appealed the OHRC's decision.

During the mediation stage of the appeal, the OHRC provided the appellant with a copy of an index of the records at issue to which access was denied in full.

Also during mediation, the appellant submitted a request for a fee waiver to the OHRC. In response, the OHRC agreed to reduce the fee by one-half, to $355.50. The appellant advised that he wished to continue his appeal of the fee and to appeal the decision of the OHRC not to fully waive the fee.

Following mediation, this appeal was transferred to the inquiry stage of the process. I sent a Notice of Inquiry to the OHRC, initially, and received representations in response. In its representations, the OHRC identified that it was no longer relying on the exemption in section 13(1) of the *Act*, and that section is accordingly no longer at issue in this appeal. I then sent the Notice of Inquiry, along with a copy of the OHRC's representations, to the appellant, who also provided representations to me.

RECORDS:

There are 24 records remaining at issue to which access was denied in full. They consist of witness statements, correspondence, a chart, records of contact, and an investigation plan.

With respect to the correction request, the records which the appellant requests be corrected are two Case Analysis reports.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the *Act*, personal information is defined as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The OHRC takes the position that the records at issue, except for Record 6, contain the personal information of the appellant. The OHRC states that Records 1-5 and 7-24 contain the appellant's name along with the name of his employer and details of the appellant's allegations against his employer. The OHRC also indicates that some of these records contain references to the appellant's age, ethnic origin and the file numbers assigned to the appellant's human rights complaints. I agree, and find that all of the records, except for Record 6, contain the personal information of the appellant.

The OHRC also takes the position that Records 1-6, 11, 14, 15-18 and 24 contain the personal information of individuals other than the appellant.

Records 1-4, 16 and 17 are witness statements made by individuals in the course of the investigation. The OHRC takes the position that these records contain the personal information of identifiable individuals such as their names, along with other personal information about them, including their involvement in the OHRC investigation. I agree, and find that these records contain the personal information of the identified individuals who made the statements.

Records 5, 11, 15, 18 and 24 are copies of correspondence between the OHRC and the representative for the respondents in the investigation. The OHRC also takes the position that these records similarly contain the names of identifiable individuals along with other personal information relating to them, including information about their involvement with the OHRC investigation. The OHRC posits that these records therefore contain the personal information of the named individuals. I agree, and find that these records contain the personal information of the identifiable individuals named in the correspondence.

Record 6 is a chart of the organizational structure of one of the companies that is a respondent in the OHRC investigation. The OHRC states that this record contains the personal information of identifiable individuals, as it contains their names, along with information about their employers and job titles. However, the OHRC does not indicate whether this record contains or reveals something of a personal nature about these individuals.

As set out above, to qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual unless it reveals something of a personal nature about the individual. Based on my review of Record 6, I am not satisfied that it contains any information that may be considered the "personal

information" of identifiable individuals. In my view, this record simply identifies the individuals in their professional capacity, and does not contain information that qualifies as their personal information.

Record 14 is described by the OHRC as an "investigation plan", and is clearly a draft document summarizing information relating to the OHRC investigation. It contains the names of numerous individuals, along with a summary of their involvement in the matter. I am satisfied that this document also contains the personal information of the individuals identified in it.

In summary, I have found that all of the records, except for Record 6, contain the personal information of the appellant, and that Records 1-5, 11, 14-18 and 24 contain the personal information of other identifiable individuals.

INVASION OF PRIVACY

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 exemptions from disclosure that limit this general right.

Under section 49(b) of the *Act*, where a record contains the personal information of both the requester and another individual, and disclosure of the information would constitute an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester. If the information falls within the scope of section 49(b), that does not end the matter as the institution may exercise its discretion to disclose the information to the requester.

Sections 21(1) through (4) of the *Act* provide guidance in determining whether disclosure would result in an unjustified invasion of an individual's personal privacy under section 49(b). Sections 21(1)(a) through (e) provide exceptions to the personal privacy exemption; if any of these exceptions apply, the information cannot be exempt from disclosure under section 49(b).

Section 21(2) provides some criteria for determining whether the personal privacy exemption applies. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy. Section 21(4) lists the types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2). A section 21(3) presumption can be overcome, however, if the personal information at issue is caught by section 21(4) or if the "compelling public interest" override at section 23 applies (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

If none of the presumptions in section 21(3) applies, the institution must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The OHRC relies on section 49(b) in conjunction with section 21 to support its denial of access to the records. More specifically, the OHRC relies on the "presumed unjustified invasion of personal privacy" at section 21(3)(b), 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;

The OHRC states that the presumption in section 21(3)(b) applies as the records were compiled and are identifiable as part of an investigation into a possible violation of law, a violation of the *Ontario Human Rights Code* (the *Code*).

The appellant does not directly address this issue, although he has provided evidence in support of his view that the OHRC's decision relating to the investigation is wrong, and that he should be entitled to access the information. He subsequently provided a significant amount of documentation relating to his OHRC complaint and his request for reconsideration of the OHRC investigation. Much of this information appears to relate to the factor favouring the disclosure of information found in section 21(2)(d) which reads:

> 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,
>
> > the personal information is relevant to a fair determination of rights affecting the person who made the request;

However, as identified above, the Divisional Court has ruled that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2).

Based on my review of the representations of the OHRC, I am satisfied that the information in the records was compiled as part of an investigation by the OHRC into a possible violation of the *Ontario Human Rights Code* (the *Code*). Previous orders have established that OHRC investigations undertaken pursuant to the *Code* are law enforcement matters that fall within section 21(3)(b) (Orders PO-1858, PO-2201 and PO-2359).

Furthermore, on my review of the records and the representations in this appeal, I find that the personal information in the records was compiled and is identifiable as part of an investigation into a possible violation of law for the purpose of the presumption in section 21(3)(b), and that its disclosure is presumed to be an unjustified invasion of the personal privacy of the identified individuals. Accordingly, I am satisfied that the disclosure of Records 1-5, 11, 14-18 and 24 would constitute an unjustified invasion of the personal privacy of individuals other than the appellant, and that these records qualify for exemption under section 49(b).

DISCRETION TO REFUSE REQUESTER'S OWN 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.

Section 49(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

The OHRC is relying on section 49(a) to exempt the information in the records from disclosure on the basis of the exemptions contained in section 14(1)(a) and (b) and section 19.

I will consider whether the records qualify for exemption under sections 14 and 19 as preliminary steps in determining if section 49(a) applies.

SOLICITOR-CLIENT PRIVILEGE

The OHRC has claimed the application of the section 19 exemption to Record 19, a memorandum from the OHRC's investigator to its legal counsel.

General principles

Section 19 of the *Act* reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. The OHRC must establish that one or the other (or both) branches apply.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two types of privilege:

- solicitor-client communication privilege
- litigation privilege

The OHRC takes the position that record 19 is subject to common law solicitor-client communication privilege.

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Representations

The OHRC states:

> … the information in the record consists of a memo that was written by the investigator, assigned to the appellant's human rights complaints, in which she asks counsel with the OHRC's Legal Services Branch to advise her on a specific issue with respect to the appellant's complaints.

> … the information in this record can be defined as a direct communication of a confidential nature between a solicitor and a client, made for the purpose of obtaining legal advice relating to the appellant's complaints.

The appellant does not directly address this issue, although he confirms that the record was not provided to him.

Findings

Record 19 is a memo written by the investigator assigned to the appellant's human rights complaints, to counsel for the OHRC, requesting advice on a particular issue in the appellant's complaints. Based on the record itself and the representations of the OHRC, I am satisfied that Record 19 is a direct communication of a confidential nature between a client and solicitor, made for the purpose of obtaining professional legal advice. Furthermore, I have not been provided with any evidence that the privilege was waived or that the privilege was lost. Accordingly, I find that this record is subject to solicitor-client communication privilege under Branch 1 of section 19 of the *Act*. It is also, therefore, exempt from disclosure under section 49(a) of the *Act*, subject to any finding I may make below on the exercise of discretion.

LAW ENFORCEMENT

I have found that Records 1-5, 11, 14-19 and 24 qualify for exemption under the *Act*. I will now review whether the exemption in section 14(a) and/or (b) applies to the remaining records (Records 6-10, 12, 13, and 20-23).

General principles

Sections 14(1)(a) and (b) state:

> (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter;
>
> (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The term "law enforcement" is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,

> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

For section 14(1)(a) to apply the law enforcement matter in question must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with "potential" law enforcement matters [Orders PO-2085, MO-1578].

For section 14(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations [Order PO-2085].

Representations

The OHRC submits the following in support of its position that the matter in question is a law enforcement matter for the purpose of section 14(1)(a):

> It is the institution's position that the matter in question which is an investigation of the appellant's human rights complaint against his employers constitutes a law enforcement matter. The institution refers … to Order 89, in which Commissioner Linden found that an investigation into a human rights complaint, conducted by the [OHRC] qualifies as a "law enforcement matter" within the meaning of subsection 14(1)(a) of the *Act*.

With respect to whether there exists a specific, ongoing law enforcement matter, the OHRC submits:

> It is the institution's position that the interference is with a specific, ongoing law enforcement matter because the appellant's complaint is at the Reconsideration stage of the OHRC's process. As a result, the initial investigation of the appellant's complaint has been completed; the findings of the investigation have been shared with the parties; the Commissioners of the OHRC have issued a decision not to refer the subject-matters of the appellant's complaints to the Human Rights Tribunal; the appellant has appealed the OHRC's "No – Tribunal" decision and has filed a reconsideration application with the OHRC asking it to reverse its original decisions.
>
> The OHRC's Reconsideration process involves its Reconsideration staff reviewing the complaint, conducting further investigations if required, and making a recommendation to the Commissioners with respect to whether or not they should uphold or reverse their original decisions.
>
> The [ORHC] refers … to Order 178, in which former Assistant Commissioner Tom Wright found that:
>
> > "until either a board of inquiry (now a human rights tribunal) has been appointed or the reconsideration process has been completed, it is not possible to categorically state that the institution's investigation has been completed".

The OHRC states that disclosure of the records could reasonably be expected to interfere with its investigation of the appellant's complaints because "… all of the records contain specific information relating to the investigation or the appellant's human rights complaints." The OHRC then refers to Order PO-2331 in which Adjudicator Stephanie Haly found that certain OHRC records which contained information of an administrative nature only did not qualify for exemption under this section, but that other records which contained specific information relating to the investigation of the appellant's human rights complaint in that case were "sufficiently linked to the actual investigation of the appellant's complaint" and qualified for exemption. The OHRC states that any records of an administrative nature have been disclosed in this appeal.

The OHRC submits similar arguments in support of its position that section 14(1)(b) applies to the records. The OHRC also refers to previous orders which found that ongoing proceedings before the Human Rights Tribunal are considered law enforcement proceedings within section 14(1)(b) and that, until the OHRC has rendered a decision or until the reconsideration process has been exhausted, the investigation is considered ongoing (Orders P- 178 and P-2331).

Findings

It has been previously established that OHRC investigations meet the definition of a "law enforcement matter" (Order 89 and many subsequent orders) and I adopt this finding for the purposes of this order.

Furthermore, I find that proceedings before the OHRC are considered law enforcement proceedings within section 14(1)(b) and that until the Tribunal has rendered a decision or until the reconsideration process has been exhausted, the investigation is considered ongoing (Orders P- 178 and P-507).

I have carefully reviewed the records remaining at issue in this appeal.

Records 7-10, 12, 13 and 20-23 contain information relating to the contact the OHRC investigator had with the representative for the corporate respondents in the course of conducting the OHRC investigation, and relate to matters raised in the investigation. These records include an identification of the positions taken by the respondents in the course of the investigation, and some of these records are identified as "strictly privileged and confidential". On my review of these records, I am satisfied that they all contain specific information relating to the investigation of the appellant's human rights complaint. I agree with the OHRC that this information is "sufficiently linked to the actual investigation of the appellant's complaint" and qualifies for exemption under section 49(a) and 14(1)(b) of the *Act*. I make this finding based on the representations of the OHRC and on the nature of the information contained in these records.

However, as identified above, Record 6 is a chart of the organizational structure of one of the companies that is a respondent in the OHRC investigation. On my review of this record and the representations of the OHRC, I have not been provided with sufficient evidence to persuade me that the disclosure of this information would interfere with the ongoing law enforcement matter or investigation. The record appears to contain factual information about the organizational structure of one of the respondents and, in my view, it does not qualify for exemption under sections 14(1)(a) or (b) of the *Act*.

EXERCISE OF DISCRETION

The section 49, 14 and 19 exemptions are discretionary and permit the OHRC to disclose information, despite the fact that it could be withheld. On appeal, this office may review the OHRC's decision in order to determine whether it exercised its discretion and, if so, to determine whether it erred in doing so (Orders PO-2129-F and MO-1629).

In support of its position that it exercised its discretion in a proper manner, the OHRC identifies that it exercised its discretion to release many records to the appellant, including records that are "of a more administrative nature", and that it only chose to deny records under section 14 and 49(a) which deal directly with the investigation, and those under section 49(b) where the privacy of other individuals needs to be protected.

I am satisfied, based on the OHRC's representations and the circumstances of this appeal, that the OHRC properly exercised its discretion in refusing to disclose the remaining records under sections 49(a) and (b).

FEE AND FEE WAIVER

Was the fee calculated in accordance with the Act?

When providing a requester with a fee, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460. Section 57(1) of the *Act* requires an institution to charge fees for requests under the *Act*. That section reads:

> 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,
>
> (a) the costs of every hour of manual search required to locate a record;
> (b) the costs of preparing the record for disclosure;
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
> (d) shipping costs; and
> (e) any other costs incurred in responding to a request for access to a record.

Section 6.1 of Regulation 460 states:

> 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.
> 2. For floppy disks, $10 for each disk.
> 3. For developing a computer program or other method of producing the personal information requested from machine readable record, $15 for each 15 minutes spent by any person.
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the personal information requested if those costs are specified in an invoice that the institution has received.

The OHRC states that its initial fee of $711.00 (which was subsequently reduced to $355.50) was calculated on the basis of the photocopying costs alone, and that this fee reflects the costs of photocopying 3,555 pages of records at $.20 per page. It identifies that no other costs factored into the calculation of the fee.

The appellant's representations do not address the issue of whether the fees are calculated in accordance with the *Act*. Based on the material provided by the OHRC and in the absence of representations from the appellant on this issue, I am satisfied that the fees were calculated in accordance with the provisions of the *Act*, and I uphold the OHRC's decision.

Whether it would be fair and equitable to waive the fee

For a fee waiver to be granted under section 57(4), it must be "fair and equitable" in the circumstances. Relevant factors in deciding whether or not a fee waiver is "fair and equitable" may include:

- the manner in which the institution responded to the request;
- whether the institution worked constructively with the requester to narrow and/or clarify the request;
- whether the institution provided any records to the requester free of charge;
- whether the requester worked constructively with the institution to narrow the scope of the request;
- whether the request involves a large number of records;
- whether the requester has advanced a compromise solution which would reduce costs; and
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution.

[Orders M-166, M-408, PO-1953-F]

As set out above, in the course of mediation the appellant submitted a request for a fee waiver to the OHRC. In response, the OHRC agreed to reduce the fee by one-half, and identified that the fee for the requested records was now $355.50. The appellant advised that he wished to appeal the decision of the OHRC not to fully waive the fee.

In its representations the OHRC identifies the factors it considered in waiving a portion of the fee. It states:

> The [OHRC] has no knowledge of whether the fee will cause financial hardship to the appellant. This is for the reason that the appellant has not provided any information to the [OHRC] to that effect.

> It is also the [OHRC's] position that dissemination of the records will not benefit public health and safety because the subject matter of the records is a matter of private rather than public interest ….

With respect to whether the waiver of half of the fee is fair and equitable in the circumstances, the OHRC identifies a number of reasons why it is fair and equitable. These include the fact that the appellant has filed a number of access requests to the OHRC, all of which were responded to properly; that the OHRC has worked with the appellant to suggest several options as to how to narrow or clarify the scope of the requests; that the OHRC has waived the fees in other requests involving the appellant; and that the request in this appeal was not narrowed.

The appellant does not provide representations on this issue.

Based on the material provided by the OHRC and on my review of the factors above, in particular the OHRC's decision to waive half of the photocopying fees in this appeal, I am satisfied that the OHRC properly considered the factors for and against fully waiving the fees in this appeal. Consequently, I uphold the OHRC's decision to waive half, but not all, of the fee.

CORRECTION

As identified above, the appellant also requested that the OHRC correct certain records pursuant to section 47(2). The records which the appellant requests be corrected are two Case Analysis reports, and the appellant's request stated:

> The [two Case Analysis documents] prepared by the department of investigation dated [an identified date] which was in front of the Commissioners contained the following untrue claim:
>
> > Conciliation was attempted but was unsuccessful
>
> The following is a material fact: No conciliation was ever proposed to us by anyone.
>
> We are asking the Commission to recognize the seriousness of such an untrue claim in its legal documents and to remove it from the Case Analysis and inform the Commissioners about this request and corrections.

The OHRC's response to the request read as follows:

> You asked for a correction of two records in the [OHRC's] possession. You wrote that the Case Analysis reports for your … human rights complaints state that "conciliation was attempted but was unsuccessful" and that you want this information to be corrected in the Case Analysis reports as you assert that "no conciliation was ever proposed to us by anyone."

> A review of the records in the file indicates that the investigator reviewed the findings of the investigation with both the complainant and the respondents and that the respondents' counsel, upon completion of the review of the findings, advised the investigator that his clients were not interested in entertaining the complainant's settlement position.
>
> Please be advised that we cannot make the correction to the Case Analysis reports that you are requesting. This is for the reason that the Conciliation sections of the Case Analysis reports refer to the process followed by [OHRC] staff during the course of case processing and as such, these sections of the reports do not contain your … personal information for the purposes of the *Act*. Moreover, it is the [OHRC's] position that the Conciliation sections in the Case Analysis reports are not inaccurate because the records in the file show that the investigator did make a conciliation attempt for both of the complaints but that the respondent's counsel advised that his clients were not interested in entertaining the complainant's settlement position.

The appellant appealed the OHRC's decision not to make the requested correction, and the issue of the correction of the identified records remains an issue in this appeal. The parties both provided representations on this issue.

Records:

The records which the appellant requests be corrected are two Case Analysis reports.

Do the records contain the personal information of the appellant?

Sections 47(2)(a) and (b) of the *Act* provide for correction requests and statements of disagreement relating to one's own *personal information*. These sections state:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> (a) request correction of the personal information where the individual believes there is an error or omission therein;
>
> (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made; and

The definition of "personal information" is set out above.

The records at issue which the appellant requests be corrected are two Case Analysis reports involving the appellant and two respondent companies. These Case Analysis reports identify the complainant by name and review the complaints in detail, including setting out the positions of the parties, identifying the background circumstances, summarizing the evidence, and providing analysis and recommendations.

The OHRC takes the position in its representations that the information the appellant wants corrected is not his personal information; rather, it refers to the procedure followed by the investigator in processing the appellant's human rights complaint.

I do not accept the OHRC's position, and I find that these records relate to the appellant and contain his personal information, as they contain information relating to his national or ethnic origin and age (paragraph (a)), employment history (paragraph (b)), his personal opinions or views (paragraph (c)), the views or opinions of another individual about the individual (paragraph (g)), and his 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 (paragraph (h)). Furthermore, the records summarize the actions taken by the investigator and the positions of the parties in the appellant's complaints. I find that the records contain the personal information of the appellant.

Should the personal information be corrected?

In Order 186, former Commissioner Tom Wright set out the requirements necessary for granting a request for correction, as follows:

1. the information at issue must be personal and private information; and

2. the information must be inexact, incomplete or ambiguous; and

3. the correction cannot be a substitution of opinion.

I adopt this test for the purposes of the present appeal.

Representations

The OHRC submits that:

> . . . the information is not "inexact, incomplete or ambiguous", nor does the information consist of an opinion. Rather, the [OHRC] states that the phrase "conciliation was attempted but was unsuccessful" accurately describes the process followed by the OHRC staff, namely that an attempt was made to settle the complaint but it was not successful.

The appellant's representations on this issue focus on his view that the OHRC inaccurately characterized his correction request, and that the appellant is really interested in correcting the inaccurate information rather than having the identified statement (that is, the statement "no conciliation was ever proposed to us by anyone") replace the inaccurate statement. In documentation provided earlier, the appellant provided a number of attachments which include portions of the OHRC's processes and explanations about the conciliation process. The appellant appears to rely on this information in support of his position that there was no conciliation, and that the statements are therefore untrue.

Findings

I have found that the two records described above which the appellant is seeking to have corrected contain his personal information, thereby satisfying the first part of the test described in Order 186.

However, in my view, the correction sought by the appellant is not warranted. The portion of the records which the appellant maintains is incorrect reads: "Conciliation was attempted but was unsuccessful". This statement is clear and unambiguous, and although it does not specifically identify which party the conciliation was attempted with, and why it was not successful, I am not satisfied that a correction is justified. In my view, the statement is an accurate statement based on the information provided by the OHRC that the investigator did make a conciliation attempt for both of the complaints, but that the respondent's counsel advised that his clients were not interested in entertaining the complainant's settlement position. Although the statement does not describe in detail the specifics of the conciliation attempt, it was not intended to serve as a detailed statement of the conciliation process; rather, it simply identifies the outcome of the conciliation. In my view, the statement is not "inexact, incomplete or ambiguous".

Accordingly, I uphold the OHRC's decision to deny the appellant's correction request.

ORDER:

1. I order the OHRC to disclose Record 6 to the appellant by providing a copy to him by **December 20, 2005**.

2. I uphold the decision of the OHRC to deny access to the other remaining records at issue in this appeal.

3. I uphold the OHRC's fee and the fee waiver decisions.

4. I uphold the OHRC's decision to deny the appellant's correction requests.

5. In order to verify compliance with provision 1 of this Order, I reserve the right to require the OHRC to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: November 29, 2005
Frank DeVries
Adjudicator