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

ORDER PO-2638

Appeal PA07-142

Ontario Human Rights Commission

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NATURE OF THE APPEAL:

The requester submitted a request to the Ontario Human Rights Commission (the OHRC) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of all information pertaining to a particular file in which he was the complainant, including all information concerning settlement by the Essex Region Conservation Authority (ERCA) and the OHRC's ruling against the ERCA.

The OHRC located responsive records and issued a decision advising that the responsive records had been divided into the following three categories:

- records submitted by the complainant;
- records submitted by the respondent; and
- records generated internally by Commission staff during the course of case processing.

The OHRC indicated that it would release all records pertaining to the first and third categories to the requester. With respect to the second category, the OHRC granted partial access to these records, with portions being withheld pursuant to sections 21(1) and 49(b) (personal privacy) of the *Act*. The OHRC advised that there are approximately 290 pages to be photocopied, and accordingly, the requester was required to pay a fee of $58.00 to obtain a copy of the records that the OHRC agreed to disclose, in whole or in part.

The requester (now the appellant) appealed the OHRC's decision to deny access to portions of the responsive records.

During the mediation stage of the process, the following three records were determined to be at issue in this appeal:

1. Correspondence dated June 1, 1998 (one page withheld in full);
2. Correspondence dated August 6, 2003 (six pages released with personal contact information severed); and
3. Correspondence dated May 6, 2005 (three pages released with three names severed).

In discussions with the mediator, the appellant confirmed that he does not wish to pursue access to the personal contact information (address, phone number and date of birth) that was severed in Record 2, nor does he wish to pursue access to the three names that were severed in Record 3. Accordingly, Records 2 and 3 are no longer at issue in this appeal.

The appellant confirmed that he wishes to pursue access to Record 1. The mediator contacted the author of the letter as an affected person in this appeal to obtain this person's views regarding disclosure of the letter. The affected person objected to the release of the letter to the appellant.

Also during mediation, the appellant indicated that he believes there should be additional records responsive to his request. In particular, he believes there should be terms of settlement regarding the agreement with the ERCA. Upon conducting a second search through the file, the OHRC analyst advised the mediator that there are no additional records relating to the terms of settlement. The analyst also agreed to speak with the investigator involved in this matter to see whether he retained any additional notes and/or terms of settlement. The investigator confirmed

to her that he has no further documentation regarding any terms of settlement for this case. The appellant advised the mediator that he still believes there should be terms of settlement regarding the agreement with ERCA, and accordingly, the existence of additional records remains at issue in this appeal.

I sought representations from the OHRC and affected person, initially, and sent them a Notice of Inquiry setting out the facts and issues on appeal. Both parties submitted representations. I then sought submissions from the appellant and attached a copy of the OHRC's submissions, in their entirety, to the Notice of Inquiry that I sent to the appellant. I briefly summarized the affected person's submissions in the background section of the Notice of Inquiry. In essence, the affected person objects to disclosure of the letter out of a concern that he/she will be contacted by the appellant.

Despite numerous telephone discussions with a staff member from this office and two extensions for the receipt of representations, the appellant did not submit representations by the final date provided to him. Accordingly, I am issuing this decision in the absence of his submissions.

RECORDS:

The record remaining at issue consists of a one page letter dated June 1, 1998.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624]. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (see Order M-909).

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. As I indicated above, the appellant believes there should be terms of settlement regarding an agreement with the ERCA.

The OHRC's representations on this issue are contained in an affidavit sworn by a Compliance Officer employed by the OHRC, whose duties include processing access requests made under the

Act. She indicates that in conducting the search for responsive records, she searched the file identified by the appellant and located a number of records, including signed Minutes of Settlement between the appellant and the ERCA. The Compliance Officer notes that this record was sent to the appellant in response to his access request.

She indicates further that during the mediation stage of this appeal, the mediator advised her that the appellant believed additional information regarding the terms of the settlement, including references to requirements that the ERCA revise its procedures, should exist. According to the Compliance Officer, the mediator told her that the basis for the appellant's belief was a conversation he said he had with the investigator at the OHRC who investigated his complaint. According to the appellant, the investigator told him about audits and the consequences of any additional complaints.

The Compliance Officer conducted two additional searches of the file and confirmed that the appellant had received everything in it with the exception of the records that had been withheld. She also contacted the OHRC investigator who investigated the complaint and negotiated the settlement between the appellant and the ERCA. He confirmed that he did not have any additional records relating to this complaint. He also confirmed that there were no additional terms of settlement, other than those outlined in the Minutes of Settlement that had been provided to the appellant.

The Compliance Officer also contacted the OHRC investigator about another complaint made against the ERCA by the appellant's mother to see if perhaps there was overlap or a connection between the two matters that would lead to the types of information the appellant was seeking. The investigator could not recall any differences between the two settlements reached in the two cases. He noted, however, that had either of the settlements contained the types of terms suggested by the appellant, they would have been processed as "jurisdictional settlements", where "the terms are futuristic and have not yet been met", rather than as "administrative settlements", meaning "all of the settlement terms have been met".

In explaining these two different approaches, the Compliance Officer indicates that administrative settlements are processed by OHRC staff and the complaint file can be closed once the parties all sign the settlement. In the case of jurisdictional settlements, approval must be given by the OHRC Commissioners and the Minutes of Settlement require signatures from all of the parties and from the OHRC Chief Commissioner before the file can be closed. The Compliance Officer provided a copy of the Minutes of Settlement with her affidavit. The settlement appears to follow the format of an administrative settlement.

On a further note, the investigator added during his conversation with the Compliance Officer, that he recalled having a conversation with the appellant about the OHRC investigation process, policies and orders issued by the Human Rights Tribunal in a general sense.

Based on the OHRC's submissions and my review of the Minutes of Settlement, I am satisfied that the OHRC has taken all reasonable steps to locate responsive records. I am further satisfied

that the information that the appellant is seeking in this case does not exist. Accordingly, this portion of the appeal is dismissed.

PERSONAL INFORMATION

General principles

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term as defined in section 2(1) means recorded information about an identifiable individual, including but not limited to 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 (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].

Moreover, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The OHRC submits that the record contains the personal information of the appellant and the author of the letter, as well as other identifiable individuals mentioned in the letter. I agree. The letter identifies the author by name, identifies several other individuals by name, including the appellant, and contains information about both the author and the appellant, primarily in the form of concerns expressed by the author. Accordingly, I find that the record contains the personal information of the appellant and other identifiable individuals.

I find further that the appellant's personal information is so intertwined with that of the other identifiable individuals that it is not severable.

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 exceptions to this general right of access. Section 49(b) of the *Act* provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,

> if the disclosure would constitute an unjustified invasion of another individual's personal privacy;

In this case, I have determined that the record at issue contains the personal information of the appellant and other identifiable individuals.

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. On appeal, I must be satisfied that disclosure would constitute an unjustified invasion of another individual's personal privacy (see Order M-1146).

In determining whether the exemption in section 49(b) applies, 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 the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making a determination as to whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(3) lists the types of information whose disclosure is *presumed* to constitute an unjustified invasion of personal privacy. Section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767], though it can be overcome if the personal information at issue falls under section 21(4) of the *Act* or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained, which clearly outweighs the purpose of the section 21 exemption. (See Order PO-1764)

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

In addition, if any of the exceptions to the section 21(1) exemption at paragraphs (a) through (e) applies, disclosure would not be an unjustified invasion of privacy under section 49(b).

If the information falls within the scope of section 49(b), that does not end the matter. Despite this finding, the institution may exercise its discretion to disclose the information to the requester. This involves a weighing of the requester's right of access to his or her own personal information against the other individual's right to protection of their privacy.

In this case, the OHRC has decided to deny access to the record at issue on the basis that it is exempt under section 49(b), in conjunction with the presumption at section 21(3)(b), which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if 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 record was compiled and is identifiable as part of an investigation into a possible violation of law, a violation of the *Ontario Human Rights Code* (the *Code*). The OHRC relies on the findings of previous orders of this office that have found that the presumption in section 21(3)(b) applies where a complaint was investigated by the OHRC in order to determine whether a violation of the *Code* had been committed (Orders PO-2419, PO-1858, P-1167, P-510, P-507 and P-449).

Based on my review of the OHRC's submissions, and the circumstances under which the record came into its custody, I am satisfied that the information in the record was compiled and is identifiable as part of an investigation by the OHRC into a possible violation of the *Code*. Previous orders have established that OHRC investigations undertaken pursuant to the *Code* are law enforcement matters that fall within the presumption in section 21(3)(b) (see also: Orders PO-2201, PO-2359 and PO-2572).

As noted 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). I find further that neither section 21(4) nor 23 are applicable in the circumstances. As a result, I find that disclosure of the personal information of individuals other than the appellant in the record would constitute an unjustified invasion of personal privacy under section 49(b) of the *Act*.

Exercise of Discretion

As noted above, the section 49(b) exemption is discretionary, and permits the Ministry to disclose information, despite the fact that it could withhold it. The Ministry must exercise its discretion. On appeal, I may determine whether the Ministry failed to do so.

In addition, I may find that the Ministry erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations

- it fails to take into account relevant considerations

In either case this office may send the matter back to the Ministry for an exercise of discretion based on proper considerations [Order MO-1573]. I may not, however, substitute my own discretion for that of the Ministry [section 54(2)].

I accept the OHRC's submissions with respect to the manner in which it exercised its discretion under section 49(b) in favour of the non-disclosure of the personal information of individuals other than the appellant. The OHRC indicates that it considered the purposes of the *Act* and factors unique to the circumstances of this case, including whether the appellant has a sympathetic or compelling need to receive the information, the relationship between the appellant and the affected person, the nature of the information and the extent to which it is significant and/or sensitive to the appellant and the affected person, and the historic practice of the OHRC with respect to similar information.

In exercising its discretion under section 49(b), I find that the OHRC has taken into account relevant factors and that it did not take into account irrelevant factors. Accordingly, I find that all of the personal information contained in the record is exempt from disclosure under section 49(b).

ORDER:

1. I uphold the OHRC's decision to deny access to the record at issue.

2. The OHRC's search for responsive records was reasonable and this portion of the appeal is dismissed.

Original signed by: January 28, 2008
Laurel Cropley
Adjudicator