

Section 33 – Information from a Workplace Investigation

Section 33 states as follows:

33. (1) *For the purpose of this section*

(a) *"harassment" means comments or conduct which are abusive, offensive, demeaning or vexatious that are known, or ought reasonably to be known, to be unwelcome and which may be intended or unintended;*

(b) *"party" means a complainant, respondent or a witness who provided a statement to an investigator conducting a workplace investigation; and*

(c) *"workplace investigation" means an investigation related to*

(i) *the conduct of an employee in the workplace,*

(ii) *harassment, or*

(iii) *events related to the interaction of an employee in the public body's workplace with another employee or a member of the public*

which may give rise to progressive discipline or corrective action by the public body employer.

(2) *The head of a public body shall refuse to disclose to an applicant all relevant information created or gathered for the purpose of a workplace investigation.*

(3) *The head of a public body shall disclose to an applicant who is a party to a workplace investigation the information referred to in subsection (2).*

(4) *Notwithstanding subsection (3), where a party referred to in that subsection is a witness in a workplace investigation, the head of a public body shall disclose only the information referred to in subsection (2) which relates to the witness' statements provided in the course of the investigation.*

This section serves two purposes. In some cases it is a mandatory exception that requires that relevant information from a workplace investigation be withheld (i.e. where the applicant is a complete "outsider" to the investigation). However, it also provides for a mandatory right of access to all relevant information created or gathered for the purpose of a workplace investigation **if the applicant is a party to an investigation**. Witnesses in a workplace investigation are only entitled to relevant information related to their own witness statement.



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It is essential to determine the status of the applicant with respect to the investigation, as section 33(2) provides for a mandatory disclosure of relevant information to complainants and respondents, and **other exceptions (including section 40 – disclosure harmful to personal privacy) should not be applied when releasing information to parties under this section.**

Much of the information collected in a workplace investigation is personal information. If a situation does not fit within section 33, decisions with respect to the disclosure of personal information would be made in accordance with section 40, as are all other decisions respecting the disclosure of personal information. Section 33 was included in the legislation to give complainants and respondents to a workplace investigation a greater right of access to personal information (in the narrow context of a workplace investigation) than what might otherwise be available under section 40 to a non-party applicant. It also clarifies that witnesses are only entitled to information that relates to their own statements.

When releasing information under this section, it is imperative that careful consideration be given to the word “relevant”. In the course of workplace investigations, a lot of information may be created or gathered that is ultimately not relevant to the investigation. Examples of such information might include medical diagnoses unrelated to the issue or specifics of medical treatment. While a general diagnosis or description of a medical condition may be relevant in some situations, sometimes detailed treatment notes or plans are not relevant.

Similarly, detailed personal histories may be collected as part of a workplace investigation. Significant portions of the personal history may not be relevant to the investigation. **Information that is not relevant to the investigation which is also an unreasonable invasion of personal privacy is still protected and should not be disclosed.**

Decisions with respect to relevance are case specific, and as a result certain types of information may be disclosed in one case but not another. The relevance of the information is a decision that must be made by the public body given the specific circumstances of each file, and release of information in one instance should not be seen as a “precedent setting.”