



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

ORDER 62

Appeal 880138

Workers' Compensation Board



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ORDER

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act, a right to appeal any decision of a head to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. By letter dated March 12, 1988, the requester filed a written request to the Workers' Compensation Board (the "institution") for a copy of the Coopers and Lybrand Summary Report Concerning the Operational Review of the Corporate Services Division of the Workers' Compensation Board.
2. By letter dated April 27, 1989, the institution advised the requester that:

Access is denied to the Coopers and Lybrand Report under section 18(1)(f) of the Act because disclosure of the report 'contains plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public'.

Section (18) (1) (f) is being relied on to deny access because the Board's reorganization has not yet been completed. Upon completion, I will write to you again as to the release of this report.

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3. By letter dated May 18, 1988, the requester appealed the decision of the head. I gave notice of the appeal to the institution, by letter dated May 27, 1988.
4. The record at issue in this appeal was examined by the Appeals Officer.
5. By letter dated June 1, 1988, the institution advised the appellant that an additional ground was being relied on as a basis for refusing disclosure. The letter stated that the record was also being withheld: _

pursuant to section 102 of the Workers' Compensation Act. This provision states that:

No officer of the Board and no person authorized to make an inquiry under this Part shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the Board, any information obtained by him or that has come to his knowledge in making or in connection with an inspection or inquiry under this Part.

You should be aware that by virtue of section 67 of the FOIPPA, institutions are able to rely on statutory confidentiality provisions (such as section 102 of the Workers' Compensation Act) until January 1, 1990.

Since section 102 contains broad discretionary language, however, the Board may be willing to discuss with you certain aspects of the Coopers and Lybrand Report.

The institution then advised the appellant to contact a certain person at the institution and to "indicate

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precisely why you wish to review the report and the issues in which you have an interest."

6. The appellant agreed, during the course of the mediation efforts, to contact the person at the institution to see what portion of the record could be obtained. By letter dated September 6, 1988, the appellant wrote to the institution requesting a copy of the table of contents of the record so that he would be in a position to discuss the record with a representative from the institution pursuant to the institution's suggestion.
7. By letter dated October 18, 1988, the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") wrote to the appellant and advised that,

since the release of the index would generally reveal the subject matter of the report, this document cannot be released at this time. Notwithstanding this position, however, Board officials may still be willing to discuss certain aspects of the report with you on an informal basis.

The Co_ordinator then went on to reiterate that if the appellant still wished to consider this option, he should write directly to a certain person at the institution "indicating the reasons for your request and the specific issues in which you have an interest."

8. On November 2, 1988, the appellant verbally advised the Appeals Officer that he felt that it was "useless to continue mediating with the Workers' Compensation Board".

By letter dated November 10, 1988, the appellant confirmed that he wished to proceed with the appeal.

9. By letter dated December 22, 1988, I notified the appellant and the institution that I was conducting an inquiry to review the decision of the head. Enclosed with this letter was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. The Appeals Officer's Report indicates that the parties need not limit themselves to the questions set out in the Report.
10. Both parties were advised of their right to make representations on the issues arising in the appeal.
11. By February 3, 1989, written representations had been received from both the appellant and the institution. I have considered these representations in making my Order.

It should be noted, at the outset, that the purposes of the Act as set out in subsection 1(a) and (b) are:

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,

- (ii) necessary exemptions from the right of access should be limited and specific, and

...

- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head. Where, as here, an institution purports to withhold records or information from disclosure pursuant to a confidentiality provision, the onus is on the institution to prove that the confidentiality provision in question operates to bar the application of the Act.

The issues arising in this appeal are as follows:

- A. Whether section 102 of the Workers' Compensation Act is a confidentiality provision barring the application of the Freedom of Information and Protection of Privacy Act, 1987.
- B. If the answer to Issue A is in the affirmative, whether the record in question, falls within the scope of the "confidentiality provision" relied on.
- C. If the answer to Issue B is in the negative, whether disclosure of the record in question "would reveal advice or recommendations of ... a consultant retained by an institution" as defined by subsection 13(1) of the Freedom of Information and Protection of Privacy Act, 1987.

- D. If the answer to Issue C is in the affirmative, whether the record or any parts of it fall within any of the exceptions found in subsection 13(2) of the Act.
- E. If the answer to Issue D is in the negative, whether the severability requirements of subsection 10(2) of the Act apply to the record in question.

Before addressing these issues, it should be noted that, in its submissions, the institution has specifically abandoned its reliance on subsection 18(1)(f) of the Act as a basis for withholding the record. It states that, "As the Board's reorganization is essentially complete, subsection 18(1)(f) does not appear to be applicable at the present time".

ISSUE A: Whether section 102 of the Workers' Compensation Act is a confidentiality provision barring the application of the Freedom of Information and Protection of Privacy Act, 1987.

Section 67 of the Act reads as follows:

(1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,

- (a) the repeal of unnecessary or inconsistent provisions; and
- (b) the amendment of provisions that are inconsistent with this Act.

(2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.

(3) Subsection (2) shall not have effect until two years after this section comes into force.

Section 67 does not contain an exemption to the Act's disclosure obligations. Rather, subsection 67(2) provides that the Act overrides "confidentiality provisions" in other legislation, unless the other legislation specifically provides otherwise. However, because subsection 67(3) delays the application of subsection 67(2) until January 1, 1990, a head may be bound or entitled not to disclose information pursuant to a "confidentiality provision" contained in another piece of legislation until that date.

In this appeal, the institution has relied on section 102 of the Workers' Compensation Act, R.S.O. 1980, c.539 as a "confidentiality provision" which enables the head to resist disclosure of the records requested by the appellant. That provision reads as follows:

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102. (1) No officer of the Board and no person authorized to make an inquiry under this Part shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the Board, any information obtained by him or that has come to his knowledge in making or in connection with an inspection or inquiry under this Part.

(2) Every person who contravenes any of the provisions of subsection (1) is guilty of an offence and on conviction is liable to a fine of not more than \$50.

As I have stated in earlier Orders (see Order Nos. 9 and 15), I do not purport to offer a definitive outline of all types of provisions contemplated by section 67. However, it is clear to me that subsection 102(1) of the Workers' Compensation Act employs mandatory language by which the disclosure of certain information is prohibited. Accordingly, I find that subsection 102(1) of the Workers' Compensation Act is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987.

ISSUE B: If the answer to Issue A is in the affirmative, whether the record in question, falls within the scope of the "confidentiality provision" relied on.

Having found that subsection 102(1) operates to bar the application of the Freedom of Information and Protection of Privacy Act, 1987 until January 1, 1990, it is my responsibility to ensure that the information contained in the requested record falls within the scope of the confidentiality provision.

The record sought by the appellant in this case is the Coopers and Lybrand Summary Report Concerning the Operational Review of the Corporate Services Division of the Workers' Compensation Board.

The institution submits that the report in issue falls within the scope of the general prohibition contained in subsection 102(1) of the Workers' Compensation Act against disclosure of "any information". In support of that contention, the institution cites subsection 68(2) of the Workers' Compensation Act, which states as follows:

68._(2) Any inquiry that the Board considers necessary to make may be made by any director or officer of the Board or by some other person appointed by the Board to make the inquiry, and the Board may act upon his report as to the result of the inquiry.

The institution goes on to state that, as subsection 102(1) applies to an inquiry made under Part I of the Workers' Compensation Act, "the meaning of 'inquiry' as used in subsection 68(2) applies to a broad range of information and could include any matter under examination by the Board. Therefore, it may include the preparation of background materials and other reports for internal Board use." It should be noted that section 71 is included under Part I of the Workers' Compensation Act and gives the Board broad administrative powers including among others:

71._(3) The Board has power to,

...

(c) consider and approve annual operating and capital budgets;

...

(e) review and approve major changes in programs of the Board;

...

(j) undertake and carry on such investigations, research and training and make grants to individuals, institutions and organizations for investigations, research and training in such amounts and upon such terms and conditions as the Board considers acceptable.

The institution also submits that subsection 68(2) authorizes the Board to appoint "some other person appointed by the Board to make the inquiry", and that Coopers and Lybrand fall within the scope of persons "authorized to make an inquiry" as provided in section 102 of the Act.

The institution submits that the report at issue contains information regarding the internal operation of the Corporate Services Division of the Workers' Compensation Board and

constitutes "information obtained in the making of an inquiry under Part I" of the Workers' Compensation Act, concluding that, "...the subject_matter of the Report falls within section 102."

The appellant has argued, in part, that this confidentiality provision is not as "restrictive" as those contained in other statutes, and that the subject matter of the information protected is "administrative" and not a "core function operation" of the department. The appellant also states that there is no third party information involved and the confidentiality provision relied on was not intended to offer protection to the Workers' Compensation Board or to provide it with an opportunity to avoid disclosure of information that should be made public.

In my view, the appellant's arguments bring to bear much moral suasion to the issue of whether the Board should exercise its discretion to release the said record. Although subsection 102(1) of the Workers' Compensation Act prohibits disclosure, it also contains a discretionary power that has been accorded to officers of the Board and persons authorized to make inquiries

under Part I of that Act, to disclose certain information. In other words, it is not an absolute prohibition against disclosure of information and, in fact, provides a means whereby information that would otherwise be subject to the "confidentiality provision" can be disclosed by the institution. I encourage the institution to consider the release of information, such as the record in issue, to interested parties, such as the appellant.

However, I am convinced that, on a plain reading of subsection 102(1) of the Workers' Compensation Act, the record in question does fall within the scope of the confidentiality provision relied on by the institution, and I have no basis for interfering with the institution's decision to refuse disclosure.

Because Issues A and B have both been answered in the affirmative, it is not necessary for me to consider Issues C, D and E.

Original signed by:
Sidney B. Linden
Commissioner

May 26, 1989
Date