



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER 42**

**Appeal 880052**

**Ontario Labour Relations Board**



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**O R D E R**

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 is given notice of a request, under subsection 28(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. On March 1, 1988, the Ontario Labour Relations Board (the "institution") notified a third party (the "appellant" in this appeal) that it was going to release certain severed portions of a number of records pursuant to an access request received by the institution. The records consisted of the contents of a union certification application made by the appellant to the institution.
2. By letter dated March 23, 1988, the third party appealed the institution's decision to release the records and I gave notice of the appeal to the institution and the two original requesters.
3. A copy of the records was reviewed by an Appeals Officer from my staff, and efforts were made to settle the appeal. A settlement was not effected as the parties maintained their respective positions.
4. On July 27, 1988, I advised the appellant, the institution, and the original requesters by letter that I was conducting

an inquiry to review the decision of the head. Enclosed with this letter was a copy of an Appeals Officer's Report, 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, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report. The Report is sent to all persons affected by the subject matter of the appeal.

5. By letter dated August 11, 1988, I invited the parties to provide written representations to me. I received representations from the appellant, the institution and one of the original requesters. On August 17, 1988, the other original requester advised me that his access request was being withdrawn.
6. I have reviewed all representations and considered them in making my Order.

It should be noted at the outset that the purposes of the Act as defined in subsections 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.

Section 53 of the Act stipulates that the burden of proof that a record or part of a record falls within one of the specified exemptions in the Act lies upon the head. However, where a third party appeals the head's decision to release a record, the burden of proving that the record should be withheld from disclosure falls on the third party.

I considered the question of this shift in the burden of proof in my Order in Appeal Number 880031, dated June 21, 1988. At page 4 of that Order I stated:

I have considered the Federal Court decision in Maislin Industries Limited v. Minister for Industry, Trade and Commerce, et al [1984] 1 F.C. 939 (T.D.) which addresses the issue of burden of proof. At page 943, Mr. Justice Jerome states that 'the burden of persuasion must rest upon the party resisting disclosure'.

The issues arising in this appeal are as follows:

A. Whether sections 109 and 111 of the Labour Relations Act R.S.O. 1980 c.228, as amended, are "confidentiality provisions" for purposes of section 67 of the Act, and if

so, whether the information in question falls within the scope of the "confidentiality provisions".

- B. If the answer to Issue A is in the negative, whether any parts of the records are exempt from release pursuant to subsections 17(1) (a) (b) and (c) of the Act.
- C. If the answer to Issue B is in the negative, whether any of the records contain "personal information", as defined in subsection 2(1) of the Act, and if so, whether disclosure of the information would constitute an unjustified invasion of the personal privacy of any individual.
- D. If the answer to Issue C is in the negative, whether any of the records are exempt from disclosure pursuant to section 22(a) of the Act.

**ISSUE A: Whether sections 109 and 111 of the Labour Relations Act R.S.O. 1980 c.228, as amended, are "confidentiality provisions" for purposes of section 67 of the Act, and if so, whether the information in question falls within the scope of the "confidentiality provisions".**

The relevant sections of the Labour Relations Act reads as follows:

s.109 Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil suit or in any proceeding before the Board or in any proceeding before any other tribunal respecting information obtained in the

discharge of their duties or while acting within the scope of their employment under this Act.

s.111(1) The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

(6) No information or material furnished to or received by a labor relations officer under this Act and no report of a labour relations officer shall be disclosed except to the Board or as authorized by the Board, and no member of the Board and no labour relations officer is a competent or compellable witness in proceedings before a court, the Board or other tribunal respecting any such information, material or report.

It is important to note at the outset that, even though sections 109 and 111 of the Labour Relations Act deal with restrictions on the dissemination of certain information by the institution, the head's position is that the records at issue in this appeal, once severed, should be disclosed. The appellant, who represents persons affected by the release of the records, argues that these sections of the Labour Relations Act prevent the head from releasing the records.

Section 109 of the Labour Relations Act acts as a shield to protect Board members and Board staff from being compelled to give testimony, in any proceeding, with respect to information

they obtained in the course of their employment with the Board. In my view, this section has no application to the records at issue in this appeal.

Subsections 111(1) and (6) of the Labour Relations Act are designed to protect information about union membership. The subsections give the Board discretion to refuse to release records which would provide information about whether or not a particular individual is or is not a member of a trade union, or does or does not want to be represented by a trade union (subsection 111(1)); and information given to a labour relations officer, or any report prepared by that officer (subsection 111(6)).

In my Order in Appeal Number 880028, released on October 13, 1988, I considered the proper interpretation of subsection 111(6), and decided that a head could properly rely on the subsection as a "confidentiality provision" barring the application of the Freedom of Information and Protection of Privacy Act, 1987. I must now consider whether or not the records in question fall within the scope of this "confidentiality provision".

I have reviewed the records and, in my view, none properly fall under the terms of subsections 111(1) or 111(6) of the Labour Relations Act. The records are of a different nature than those considered in Appeal Number 880028, and the head has severed all information which would fall under the scope of subsections 111(1) and (6). Also, I find it significant that the head in this case has not invoked the application of any confidentiality provision contained in the Labour Relations Act; on the

contrary, she feels that the records at issue in this appeal should be released.

**ISSUE B: If the answer to Issue A is in the negative, whether any parts of the records are exempt from release pursuant to subsections 17(1)(a) (b) and (c) of the Act.**

Subsection 17(1) of the Act reads as follows:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

In order to fall within the section 17 exemption, a record must meet all requirements of the following three\_part test outlined in my Order in Appeal Number 880031, released on June 21, 1988:

1. the records must contain information which falls within one of the specified categories of third party information; and



2. the information must have been supplied by the third party to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the records must give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of subsection 17(1) will occur.

Applying this test to the records at issue in this appeal, there can be little doubt that the records qualify as labour relations information, and as such the first part of the test is satisfied.

As far as the issue of confidentiality is concerned, the institution does not address it in its representations. The original requester, in his submissions to me states that

...most \_ if not all \_ of the documents, the board proposes to release have been sent as a matter of course to both parties involved in the file. Thus, they can hardly be said to be confidential or to reveal competitive secrets, or to result in refusal to provide the information in the future or to result in financial losses.

The appellant in his representations states that:

The Record is a certification file. Because the granting of a certificate under the Labour Relations Act ("the Act") is predicated on a trade union's demonstration of the requisite level of membership support, the focus of a certification proceeding is directed towards ascertaining the Union's level of membership support. All the documents in the Record are aimed at furthering that very inquiry and are explicitly made confidential pursuant to section 111 of

the Act, which provision prevails over the Privacy Act pursuant to Section 67 of the Privacy Act... Accordingly, it [is] the Union's position that pursuant to the sections of the Act all labour relations information in the custody or control of the Board is confidential.

As I determined in Issue A, above, sections 109 and 111 of the Labour Relations Act do not operate to explicitly make confidential all of the information in these records. Section 109 has no application to these records, and the severences made by the head have taken the records outside the scope of the confidentiality provisions of section 111. As a result, I do not accept the appellant's contention that these sections of the Labour Relations Act protect the balance of the records from disclosure by providing "explicit statutory assurances of confidentiality".

In my view, the appellant has failed to establish that the records were supplied to the Board in confidence, either implicitly or explicitly. Nor is there any statutory assurance of confidentiality afforded to the information contained in a certification file by virtue of sections 109 and 111 of the Labour Relations Act.

Accordingly, the appellant has not satisfied the second part of the section 17 test and the exemption does not apply to the records at issue in this appeal.

**ISSUE C: If the answer to Issue B is in the negative, whether any of the records contain "personal information", as defined in subsection 2(1) of the Act, and if so, whether disclosure of the information would constitute an unjustified invasion of the personal privacy of any individual.**

"Personal information" is defined in subsection 2(1) of the Act as "recorded information about an identifiable individual". Before considering whether any of the statutory protections afforded by the Act to personal information apply to the records at issue in this appeal, the information must first meet the definition of "personal information".

The head submits that none of the records contain information that falls within the subsection 2(1) definition. She states:

None of the documents the Board intends to release reveal the names of any of the employees involved. Thus, all the documents in the file including Board forms and correspondence, reveal only the name of a trade union, a corporation and the law firms representing each. None of the documents being released reveal any information relating to individuals.

I have reviewed the records and, in my view, the head's interpretation is correct. The names of a trade union, corporation or law firm taken individually or in combination with each other or with the rest of the information contained in the records do not constitute "recorded information about an identifiable individual". As a result, none of the statutory provisions in the Act which relate to personal information apply in this case.

**ISSUE D: If the answer to Issue C is in the negative, whether any of the records are exempt from disclosure pursuant to section 22(a) of the Act.**

Section 22(a) of the Act reads as follows:

22. A head may refuse to disclose a record where,
- (a) the record ... has been published or is currently available to the public; or...

The appellant submits that all information contained in the records at issue in this appeal is otherwise available to the public as part of the decision of the Labour Relations Board certifying the union. In his view, because this information is readily available to the original requester upon examination of the Board's decision or the summary of the decision in the Board's monthly reports, it qualifies for exemption under section 22(a).

I do not accept the appellant's interpretation of the section 22(a) exemption. This section provides a head with discretion not to release information that has been published or is currently available to the public in another form. It does not impose a requirement on the head to refuse disclosure; it gives the head an opportunity to refuse to disclose the requested information if it is otherwise available.

The head has discretion under section 22(a) to decide to release the record, whether or not it has been published. That is what the head has done in this case, and I find nothing improper in the exercise of her discretion.

In summary, I uphold the head's decision to release the record to the original requester.

Original signed by:  
Sidney B. Linden  
Commissioner

March 2, 1989  
Date