



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

# **ORDER 15**

**Appeal 880010**

**Ministry of Consumer and Commercial Relations**



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Appeal Number 880010

**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 has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Commissioner.

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

1. On November 20, 1987, the appellant made a request to the Ministry of Consumer and Commercial Relations (the "institution") for access to any 1986-87 investigation reports related to funeral firms.
2. On February 4, 1988, the institution responded that such reports would be records as described in subsection 14(2) (a) of the Freedom of Information and Protection of Privacy Act, 1987, and under subsection 14(3) of the Act the existence of such records would neither be confirmed nor denied.
3. On February 14, 1988, the requester appealed the institution's decision and I gave notice of the appeal to the institution.

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4. An attempt was made by an Appeals Officer to settle this appeal, however, settlement was not effected.
5. By letter dated May 11, 1988, I sent notice to the institution and the appellant that I was conducting an inquiry to review the decision of the head.
6. Written representations were received from both parties.
7. At my request, the institution notified the appellant that in its written representation it had raised the application of section 14(1) of the Business Practices Act, R.S.O. 1980, c.55 as a "confidentiality provision", which it maintained prevailed over the Freedom of Information and Protection of Privacy Act, 1987 pursuant to section 67 of that Act. The appellant made representations to me on this additional issue.
8. Although the institution initially relied on subsection 14(3) of the Act and refused to confirm or deny the existence of the records requested, as the appeal progressed, the question of the "confidentiality provision" became a preliminary issue and its resolution was sufficient to dispose of the appeal.

The relevant issues for consideration in this appeal are as follows:

- A. Whether it is permissible for the institution to raise subsection 14(1) of the Business Practices Act, R.S.O. 1980, c.55 for the first time, in its representations to the Commissioner at this stage of the appeal process.

- B. Whether the legislative provision relied on by the institution acts as a "confidentiality provision" thereby barring the application of the Freedom of Information and Protection of Privacy Act, 1987.
- C. If the answer to Issue B is in the affirmative, whether the records in question, if they exist, fall within the scope of the "confidentiality provision" relied on.

**ISSUE A: Whether it is permissible for the institution to raise subsection 14(1) of the Business Practices Act, for the first time, in its representations to the Commissioner at this stage of the appeal process.**

I expect that the introduction of new or different grounds for refusing access to records at the appeal stage will be the exception rather than the rule. Pursuant to subsection 29(1) of the Act the institution has a statutory obligation, when refusing to provide access, to identify the specific provision of the Act under which access is refused and the reasons the provision applies to the record in question. Clearly, it would be preferable if the parties to an appeal would raise all arguments they intend to rely upon at the first possible opportunity. When a new issue is introduced, at the appeal stage, it slows the process down. However, I understand and accept that the parties may not always be aware, at the first instance, of all arguments they will eventually want to make.

When a new issue, that is or may be relevant, is introduced by either party for the first time at the appeal stage, it is incumbent upon me as Commissioner to ensure that other interested parties are made aware of this new issue and are

given an opportunity to respond to it. In this case, the appellant was advised of the new issue raised by the institution, given an opportunity to respond, and did so.

Accordingly, it is my view that, in this case, it is permissible for the institution to raise this issue of the application of section 14(1) of the Business Practices Act, at the appeal stage, despite its untimeliness.

**ISSUE B: Whether the legislative provision relied on by the institution acts as a "confidentiality provision" thereby barring the application of the Freedom of Information and Protection of Privacy Act, 1987.**

Reliance on the "confidentiality provisions" of other statutes was an issue that I dealt with in my Order in Appeal No. 880016. I have applied the same reasoning in this appeal.

Before considering the specifics of this appeal, I think it is important for me to make some general comments regarding the status of "confidentiality provisions".

As Information and Privacy Commissioner, I am responsible for ensuring that the rights and obligations of the people of Ontario and government officials are respected and complied with, as they relate to this Act. In order to fulfill this obligation it is sometimes necessary for me to balance the two interests of access and privacy which, by their very nature, are sometimes in conflict. However, where, as in this case, an institution relies upon a valid "confidentiality provision" that is contained in another act, to remove itself from the ambit of the Freedom of Information and Protection of Privacy Act, 1987, I do not engage in such a balancing act. My responsibility in

these cases is still heavy, because as I stated in Order No. 880016, I do not intend to accept the institutions assertion that a clause is a "confidentiality provision" on the basis of the institution's claim alone. I intend to subject each such claim to my independent analysis and scrutiny. As I said in Order No. 880016:

"While the head of an institution must determine at first instance whether a particular statutory provision is a "confidentiality provision" precluding access to the requester, I, too, must be assured of the relevance and application of the provision upon receipt of an appeal. I regard this duty as fundamental to the effective operation of the Freedom of Information and Protection of Privacy Act, 1987 and the principles of providing a right of access to information and protecting the privacy of individuals."

However, once I have concluded that a clause is a valid "confidentiality provision", then the operation of the Freedom of Information and Protection of Privacy Act, 1987 is quite clear. What the Legislature has done, in effect, is to give institutions a two year period of grace in so far as "confidentiality provisions" are concerned.

Section 67 of the Freedom of Information and Protection of Privacy Act, 1987 reads as follows:

67.-(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 not to disclose information pursuant to a "confidentiality provision" contained in another piece of legislation until that date. After that date, and depending on whether or not the Legislature specifically provides otherwise, it may become necessary for me to engage in a balancing of interests, in which case the results achieved may or may not be different depending on the circumstances of each individual case.

In this appeal, the institution has relied on section 14 of the Business Practices Act as a "confidentiality provision" which forbids the disclosure of the information requested by the appellant. That provision reads as follows:

14.-(1) Every person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation under section 10 or 11 shall preserve secrecy in respect of all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person except,

- (a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations;
- (b) to his counsel or to the court in any proceeding under this Act or the regulations;
- (c) to inform the consumer involved of an unfair practice and of any information relevant to the consumer's rights under this Act; or
- (d) with the consent of the person to whom the information relates.

(2) No person to whom subsection (1) applies shall be required to give testimony in any civil suit or proceeding with regard to information obtained by him in the course of his duties, employment, inquiry, inspection or investigation except in a proceeding under this Act or the regulations.

In my view, this provision constitutes a "confidentiality provision" as that term is used in section 67 of the Act.

While I do not purport to offer a definitive outline of all types of provisions contemplated by section 67, it is clear in this case that section 14 of the Business Practices Act employs mandatory language to "preserve secrecy" with respect to certain matters. Accordingly, I am satisfied that this provision does operate to forbid any person employed in the administration of the Business Practices Act, including the investigator(s) who may have written such reports and the head, from disclosing "all matters that come to his knowledge in the course of his duties, employment, ...or investigation" with specified exceptions for certain circumstances and persons. Therefore my response to Issue B is in the affirmative.



**ISSUE C: If the answer to Issue B is in the affirmative, whether the records in question, if they exist, fall within the scope of the "confidentiality provision" relied on.**

Subsection 14(1) of the Business Practices Act provides certain exceptions to the mandatory prohibition against disclosure found therein. Because the appellant's request is not subsumed under subparagraph 14(1)(a) and the appellant himself is not a person mentioned in either of subparagraphs 14(b) or (c), the requested information must be considered information included in the phrase "all matters" and, therefore, it falls under the general prohibition of disclosure in section 14 of the Business Practices Act. My response to Issue C, therefore, is also in the affirmative.

In conclusion, I find in the circumstances of this appeal that subsection 14(1) of the Business Practices Act operates as a "confidentiality provision" barring the application of the Freedom of Information and Protection of Privacy Act, 1987 in respect to the information requested.

I find that the information requested, if it existed, would fall within the scope of this "confidentiality provision", and accordingly, I cannot interfere with the head's decision.

Original signed by: \_\_\_\_\_  
Sidney B. Linden  
Commissioner

September 8, 1988  
Date