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

ORDER 160

Appeal 890179

Ministry of Labour

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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 has made a request for access to a record under subsection 24(1) a right to appeal any decision under the Act to the Information and Privacy Commissioner.

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

1. On February 1, 1989, a request was made to the Ministry of Labour (the "institution") for the following information:

> ...any and all information relating to the amendment to section 12(1) of the Employment Standards Act, R.S.O. 1980, c. 137 contained in Bill 85, which was introduced on or about June 15, 1987... specifically ... any memoranda, legal and otherwise, opinions, policy papers and any other background information prepared by or for the Ministry of Labour in preparation for the amendment of section 12(1).

2. On May 23, 1989, the institution responded granting access to some records, and denying access to others pursuant to sections 12, 13, and 19 of the Act.

3. On June 7, 1989, the requester wrote to me appealing the head's decision, and I gave notice of the appeal to the institution.

4. The records were obtained and examined by the Appeals Officer assigned to the case, and efforts were made by the Appeals Officer to mediate a settlement.

5. During the course of mediation, the Appeals Officer asked the institution to clarify its letter regarding access, which stated that there were "twelve documents which fall within the scope" of the appellant's request and that access was denied to six of the records but granted to seven records. The Appeals Officer confirmed that one record that had been released by the institution was not, in fact, related to the appellant's request and it constituted the thirteenth record referred to in the institution's letter.

6. Also during mediation, the Appeals Officer confirmed with the appellant that the severance of a record to which access had been granted was not at issue in this appeal. After receiving a copy of the portion of the record which had been severed, the Appeals Officer was able to confirm that the material severed was not related to the appellant's request.

7. At the Appeals Officer's request, the institution again reviewed the records at issue, and released one further record to the appellant.

8. Mediation efforts with respect to the remaining five records were unsuccessful, and by letter dated September 12, 1989, I notified the institution and the appellant that I was conducting an inquiry to review the decision of the head. In accordance with my usual practice, the Notice of

Inquiry was accompanied by a report prepared by the Appeals Officer. This Report is 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 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.

9. I received representations from the institution and the appellant, and have considered the representations of both parties in reaching my decision.

The following is a list of the records at issue in this appeal, which I have numbered for convenience in identifying individual records:

#1. Cabinet submission dated May 29, 1987 (only pages two and three are relevant);

#2. Memorandum dated June 19, 1987 from the Directors of the Employment Standards and the Industrial Adjustment Branches to the Assistant Deputy Minister, the Director, Legal Services Branch and the Director, Policy Branch;

#3. Paper dated December 10, 1986, from an individual in the Minister's office, responding to a policy branch document.

The paper relates to record #4, and only item 2 on page three is relevant;

#4. A Policy Branch discussion paper dated December 23, 1986, titled "Reform of Termination of Employment Legislation and Establishment of a Commission of Employment_threatened Companies" which deals with a range of issues. Only part of this record is relevant to the appellant's request.

#5. Correspondence dated June 4, 1987 from a law firm to the Legal Branch of the institution.

The issues arising in this appeal are as follows:

A. Whether any of the records are properly exempt from disclosure pursuant to subsection 12(1)(b) of the Act.

B. Whether any of the records are properly exempt from disclosure pursuant to subsection 13(1) of the Act.

C. Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.

D. If the answer to issues A, B or C is answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

E. Whether there is a compelling public interest in disclosure of the records exempted under section 13 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions should be limited and specific. Subsection 1(b) sets out the counter_balancing

privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to information about themselves held by institutions, and should provide individuals with a right of access to their own information.

Further, section 53 of the Act provides that the burden of proof that a record or part of a record falls within one of the specified exemptions lies upon the head.

ISSUE A: Whether any of the records are properly exempt from disclosure pursuant to subsection 12(1)(b) of the Act.

Subsection 12(1)(b) of the Act reads as follows:

> 12.__(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its committees, including,
>
> ...
>
> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
>
> ...

The institution claimed subsection 12(1)(b) as a mandatory exemption for Record #1, of which only pages two and three are relevant to the request. The record is titled "Amendments to the Employment Standards Act", is dated May 29/87, and is printed on paper which is titled "Cabinet Submission". The relevant pages contain recommendations regarding the amendment of the Employment Standards Act.

I have reviewed Record #1 and, in my view, the record contains options and recommendations prepared for submission to the Executive Council or its committees, and, therefore, falls squarely within the exemption under subsection 12(1)(b) of the Act.

On the question of whether the institution should seek to obtain the consent of the Executive Council (the Cabinet) for which, or in respect of which, the record has been prepared, in accordance with subsection 12(2)(b) of the Act, the institution, in its representations, advised that the head had considered but rejected the idea of seeking Cabinet consent to the disclosure of this record under subsection 12(2)(b).

In a previous Order _ Order 24 (Appeal Number 880006), dated October 21, 1988, I stated at page 11, that, in my view, subsection 12(2)(b) does not impose a mandatory requirement on the head of an institution to seek the consent of Cabinet in all instances where the exemption under subsection 12(1) of the Act has been claimed. However, in that Order, I also stated that it was my view that in all instances where the exemption has been claimed, the head must direct his or her mind to the question of whether or not the consent of the Cabinet should be sought.

In this appeal, I find that the head has properly exercised his discretion in deciding not to seek the consent of Cabinet, with respect to the disclosure of the record. Accordingly, I uphold the head's decision not to disclose record #1.

ISSUE B: Whether any of the records are properly exempt from disclosure pursuant to subsection 13(1) of the Act.

The institution cited subsection 13(1) as the basis for refusing to disclose the relevant portions of records #2, #3, and #4. Subsection 13(1) of the Act reads as follows:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

I had the opportunity to consider the application of section 13 in my Order 94 (Appeal Number 890137), dated September 22, 1989. At page five of that Order, I outlined the proper interpretation of the scope of the subsection 13(1) exemption as follows:

> In my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making.

I further considered the application of section 13 in Order 118 (Appeal Number 890172) dated November 15, 1989. At page four of that Order, I stated:

> In my view, "advice" pursuant to subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a future course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

I will discuss the application of the section 13 exemption to each of the three records at issue.

Record #2: Memorandum dated June 19, 1987

As previously stated, the memorandum is from the Employment Standards Branch and the Industrial Adjustment Branch, to the Assistant Deputy Minister, the Legal Services Branch and the Policy Branch. The authors of the memorandum are in the process of developing the institution's response to what they perceive to be potential transitional problems of legislative interpretation. As such, I find this memorandum was prepared as part of the governmental policy_making process and, therefore, the relevant portions fall within the purview of subsection 13(1) of the Act.

Record #3: Paper dated December 10, 1986

Only item 2 on page three of this paper is relevant to the request. The paper deals with a response from an individual in the Minister's office regarding a policy branch document. The relevant section of the paper not only contains advice but also makes a recommendation. For these reasons, I find that the relevant portion of record #3 falls within the subsection 13(1) exemption.

Record #4: A Policy Branch discussion paper

The paper is titled "Reform of Termination of Employment Legislation and Establishment of a Commission of Employment_threatened Companies", and contains a series of recommendations and policy options prepared by the institution

which formed the basis of a subsequent Cabinet submission (Record #1). Only pages nine and 11 of Record #4 are relevant to the appellant's request and, in my view, they qualify for exemption under subsection 13(1) of the Act.

Having decided that the relevant portions of records #2, #3 and #4 meet the requirements for exemption under subsection 13(1), I must now determine whether any of the exceptions outlined in subsection 13(2) apply.

In my view, the only exception which might apply to these records is subsection 13(2)(a), which reads as follows:

> Despite subsection (1) a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> ...

I considered the question of what constitutes "factual material" in Order 24 (supra). At page 7 of that Order I stated:

> In my view, the overwhelming majority of records providing advice and recommendations to government would inevitably contain some factual information. However, I feel that this is not sufficient to meet the requirements of subsection 13(2)(a). ...'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record.

Having reviewed records #2, #3 and #4, in my view, no reasonable distinction can be drawn between information considered to be "factual material" and that qualifying as "advice or recommendations".

I find, therefore, that the exception provided by subsection 13(2)(a) is not available with respect to the relevant portion of these records.

Finally, I have reviewed the institution's representations with respect to the head's exercise of discretion under subsection 13(1) and I find that the exercise of discretion in favour of non_disclosure of the relevant portion of the records should not be interfered with on appeal.

ISSUE C: Whether any of the records are properly exempt from disclosure pursuant to section 19 of the Act.

The institution has claimed section 19 as the ground for refusing to release record #5, which is correspondence from a law firm to the institution's Legal Branch, dated June 4, 1987.

Section 19 of the Act provides as follows:

> A head may refuse to disclose a record that is subject to solicitor_client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

I considered the proper interpretation of section 19 of the Act in Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989. At page 12 of that Order I stated:

> This section provides an institution with a discretionary exemption covering two possible situations:

(1) a head may refuse to disclose a record that is subject to the common law solicitor_client privilege; or

(2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. A record can be exempt under the second part of section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

As far as the common law solicitor_client privilege is concerned, the case of Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex. C.R. 27, identifies what appear to be two branches of this privilege. They are:

1. all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and

2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege")

The first branch of the common law solicitor_client privilege applies to confidential communications between the client and his/her solicitor, and exists any time a client seeks advice from the solicitor, whether or not litigation is involved. The rationale for this first branch is to protect communications between client and solicitor from disclosure in the interest of providing all citizens with full and ready access to legal advice.

In order for a record to be covered by the first branch of common law solicitor_client privilege, the four criteria outlined at page 14 of Order 49 must be satisfied. They are:

1. there must be written or oral communication;

2. the communication must be of a confidential nature;

3. the communication must be between a client (or his agent) and a legal adviser;

4. the communication must be directly related to seeking, formulating or giving legal advice.

Failure to meet any one of these criteria means that a record will not qualify for the common law solicitor_client privilege.

I have examined the contents of Record #5, and, in my view, the criteria for the first branch of solicitor_client privilege has been met. Further, I find that the head's decision to exercise his discretion in favour of non_disclosure of the records should not be interfered with on appeal.

ISSUE D: If the answer to issues A, B or C is answered in the affirmative, whether any exempt records can reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

In my discussion of the issues, I found that the relevant portions of records #1, #2, #3, #4 and record #5 qualify for exemption. I must now determine whether the severability requirements of subsection 10(2) apply to these records.

Subsection 10(2) reads as follows:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I addressed the issue of severance in Order 24 (supra). At page 13 of that Order I stated:

> The inclusion of subsection 10(2) reinforces one of the fundamental principles of the Act, that "necessary exemptions from the right of access should be limited and specific." (subsection 1(a)(ii)). An institution cannot rely on an exemption covered by sections 12 to 22 of the Act without first considering whether or not
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> parts of the record, when considered on their own, could be disclosed without revealing the nature of the information legitimately withheld from release.

The key question raised by subsection 10(2) is one of reasonableness. As I found in Order 24:

> ...it is not reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value. A valid subsection 10(2) severance must provide the requester with information that is in any way responsive to the request, while at the same time protecting the confidentiality of the portions of the record covered by the exemption.

I have reviewed the records and, in my view, no information that is in any way responsive to the request could be severed from these records and provided to the appellant without disclosing information that legitimately falls within the section 12, 13 and 19 exemptions.

ISSUE E: Whether there is a compelling public interest in disclosure of the records exempted under section 13 that clearly outweighs the purpose of the exemptions, as provided by section 23 of the Act.

The relevant portions of records #2, #3 and #4 are the only records subject to consideration under section 23 of the Act.

Section 23 of the Act reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

I considered the proper interpretation of section 23 in Order 61 (Appeal Number 880166), dated May 26, 1989, and found that two requirements must be satisfied in order to invoke the application of the so_called "public interest override". As stated at page 11 of that Order:

> ...there must be a compelling public interest in disclosure and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question. (emphasis added)

Although the Act is silent as to who bears the burden of proof in respect of section 23, as I have stated in a number of orders, in my view, it is a general principle that a party that is asserting a right or a duty has the onus of proving its case, and therefore the burden of establishing that section 23 applies is on the appellant.

As far as the relevant portion of the records at issue in this appeal are concerned, the institution submitted that no compelling public interest has been demonstrated and that section 23 should not apply.

The appellant submitted that section 23 should be invoked as "the public has a clear and compelling interest in having available any and all documentation which will enhance the referee's ability to interpret" the amended subsection 12(1) of the Employment Standards Act.

Having reviewed the contents of the records, and considered the representations of the appellant, I have reached the conclusion that the circumstances of this case are not sufficient to invoke the application of section 23. Most of the records dealing with the appellant's request have been released to the appellant and, in my view, the public's interest has been adequately and properly served by the degree of disclosure that has taken place.

In summary, I uphold the decision of the head to exempt the relevant portions of Records #1, #2, #3, #4 and Record #5 from disclosure.

Original signed by: April 18, 1990
Sidney B. Linden Date
Commissioner