



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

ORDER 55

Appeals 880083 and 880084

Ontario Waste Management Corporation



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

O R D E R

These appeals were 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 Information and Privacy Commissioner.

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

1. On February 15, 1988, the Ontario Waste Management Corporation (the "institution") received a request for:
 - (a) "meeting minutes of board for 1986 and 1987 and 1988".
 - (b) "briefing, memos, reports on selection and reaction to the South Cayuga site and the type of emissions, controls for this plant site".

2. By letter dated February 18, 1988, the institution agreed to provide access to the following records relating to the request:
 - (a) a report entitled "Stage One Report Hydrogeological Study _ South Cayuga Hydrogeological Site".
 - (b) a copy of the Chairman's press conference statement of November 18, 1981 summarizing the reasons for rejecting the South Cayuga site.

No fees were charged to the appellant for these records, and they were subsequently forwarded to the requester on April 5, 1988.

3. In the same letter, the institution advised the requester that fees would be charged for the 1986, 1987 and 1988 minutes of the Board of Directors meetings, based on a rate of 20 cents for each page of photocopied material. A fee estimate was to be provided to the requester, and the institution indicated that it would forward the material to the requester upon receipt of the assessed fee.
4. By letter dated March 16, 1988, the institution provided the requester with a fee estimate of \$12.60 for photocopying charges, and on March 24, 1988 sent the requester an invoice in that amount.
5. On April 5, 1988, the institution informed the requester that his request for a fee waiver of the \$12.60 charge was denied.
6. On April 15, 1988, the requester sent me a letter appealing the decision of the institution to sever information from the minutes of the Board of Directors meetings, and the decision to charge the \$12.60 fee. I gave notice of the appeals to the institution.
7. The records at issue were reviewed by an Appeals Officer from my staff. As a result of mediation efforts by the

Appeals Officer and the parties, the institution reduced the number of severances to seven, four of which were disputed by the appellant. The institution retained its position regarding fees, and both parties sought resolution of the remaining issues in these appeals by way of an inquiry.

8. On August 10, 1988, I sent notice to the appellant and the institution that I was conducting an inquiry into the decision of the head. Enclosed with this letter was a copy of a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of these appeals. The Appeals Officer's Report outlines the facts of the appeals 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 appeals. 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 appeals.
9. By letters dated August 31, 1988, I invited the appellant and the institution to submit written representations to me on the issues arising from the appeals.
10. Written representations were received from the appellant and the institution and I have considered them in making my Order.

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 from the right of access should be limited and specific. Subsection 1(b) sets out the counter_balancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information. Further, section 53 of the Act provides that the burden of proof that a record falls within one of the specified exemptions in this Act lies upon the head.

The issues arising in this appeal are as follows:

- A. Whether the head properly applied the exemptions provided by subsections 13(1) and/or 18(1) of the Act to sever information from the records at issues in these appeals.
- B. If the answer to Issue A is in the affirmative, whether the public interest override provided by section 23 of the Act applies to any records found eligible for exemption.
- C. Whether the fees estimate provided by the head was calculated in accordance with the terms of the Act.
- D. Whether the head's decision not to waive fees under subsection 57(3) of the Act was in accordance with the terms of the Act.

ISSUE A: Whether the head properly applied the exemptions provided by subsection 13(1) and/or 18(1) of the Act to sever information from the records at issue in these appeals.

These appeals involve the severed minutes of four meetings of the Board of Directors of the institution, and for the purposes of clarity, I will deal with each meeting separately and in chronological order.

1. Minutes of September 23, 1986; Item 5.0

Taken together, the severed and unsevered parts of this record reveal that the institution reviewed a particular joint venture proposal submitted by an identified company on a specific date. The minutes also briefly state a decision by the institution to seek out opportunities to perform a named function in the area discussed.

The information severed by the head under subsections 18(1)(e) and (f) of the Act is the name of the company, the date of the proposal, a summary of the nature of the proposed joint venture, and the role the institution intends to perform during the project.

Subsections 18(1)(e) and (f) read as follows:

A head may refuse to disclose a record that contains,

...

- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

...

I have reviewed the record, and can find no severed information which would obviously trigger the application of either of these two subsections. In the absence of any arguments by the institution to support its position, in my view, no part of the record can reasonably be considered "positions, plans, procedures, criteria or instructions" or "plans relating to the management... of an institution...".

In its submissions, the head states that if the severed information were released it could result in "...a future prejudice to our (the institution's) competitive position." Although not specifically raised in its submissions, I presume

the use of the words "competitive position" were intended to invoke the exemption provided by subsection 18(1)(c), which reads as follows:

A head may refuse to disclose a record that contains:

...

- (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

...

In support of his position, the head states that: "(P)ivate sector partners generally demand complete confidence in their business dealings with crown agencies. To disclose this

information at this time may impair our ability to give that necessary assurance in the future."

After reviewing the submissions of the institution and the contents of this record, in my view, the head has failed to discharge the onus of establishing that the severed information falls within the scope of the exemption provided by any of the provisions of subsection 18(1).

I am aware that the information contained in this record includes the name of a particular company. In many cases this would give rise to an interest by this company that might require notification as a third party. However in the circumstances of this case, having determined that the company became bankrupt and its assets purchased by a competitor, prior to the commencement of this appeal, this Company has not been notified.

2. Minutes of November 14, 1986; Item 6.0

The information contained in this record indicates that the Board discussed the status of the joint venture proposal by the same named company, including the advantages and disadvantages of the proposal. The minutes indicate that the institution was in support of the proposal, and identify that the Chairman intended to request approval from the Ministry of the Environment on an urgent basis.

The head has claimed subsections 13(1) and 18(1)(e) and (f) of the Act in severing the name of the company involved in the joint venture and the date of the proposal.

Subsection 13(1) 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.

The institution's submissions do not indicate how or why the release of the severed information would reveal advice of the nature described in section 13; they merely raise the existence of the exemption. However, even if it could be successfully argued that the information qualifies under the terms of subsection 13(1), in my view, it would qualify as a "proposal... for the establishment of a new program...", as defined under subsection 13(2)(i) of the Act, and thus be subject to release under that exception to the subsection 13(1) exemption.

The institution's position regarding the application of the various provisions of subsection 18(1) is similar to that outlined with respect to record number 1, above, and I do not accept the institution's arguments for the same reasons.

3. Minutes of January 13, 1987; Item 6.0

This record outlines the ultimate result of the joint venture proposal discussed in record numbers 1 and 2, above. It indicates that the Ministry of the Environment turned down the proposal and that the Board noted its disappointment with this decision.

The information severed by the head under subsections 18(1)(c)(e) and (f) of the Act consists of the name of the company, the date of a memorandum and the recipient of this memorandum.

The institution's submissions with respect to this record are the same as for record numbers 1 and 2, and I do not accept them for the same reasons.

Therefore, I order the institution to release record numbers 1, 2 and 3 to the appellant in their entirety, subject to my decision regarding fees outlined under issues C and D, below.

4. Minutes of June 17, 1987; Item 6.0

This record consists of a summary of a presentation by the institution's Director of Marketing to the Board dealing with pricing policy proposals. The institution has relied on subsection 13(1) and 18(1)(c) and (f) to sever one section of this summary.

I have reviewed this record and agree that the severed information satisfies the requirements of subsection 13(1). I have also reviewed the exceptions to this exemption provided by subsection 13(2) and, in my view, none apply to this information.

I find, therefore, that the head has properly applied the provisions of subsection 13(1) to exempt record number 4. As a result, I need not consider the application of the subsection 18(1) exemption to this record.

ISSUE B: If the answer to Issue A is in the affirmative, whether the public interest override provided by section 23 of the Act applies to any records found eligible for exemption.

I have found under Issue A that only record number 4 is exempt from disclosure. Therefore, the discussion of Issue B is restricted to this record.

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.

Two requirements contained in section 23 must be satisfied in order to invoke the application of the so-called "public interest override": 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.

The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case and, therefore, the burden of establishing that section 23 applies falls on the appellant.

The appellant has provided no details in his submissions to support the position that section 23 should apply to record number 4, and as such has not discharged the required burden of proof. I am aware that the lack of detail in the appellant's

submission may be due, in part, to his not having seen the record. I should add, therefore, that, having reviewed the record, in my view, the severed information could not trigger the override provisions of section 23.

ISSUE C: Whether the fees estimate was calculated in accordance with the terms of the Act.

Subsection 57(1) of the Act reads as follows:

Where no provision is made for a charge or fee under any other Act, a head may require the person who makes a request for access to a record or for correction of a record to pay,

- (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record; and
- (d) shipping costs.

In its submissions, the institution notes that the records in question consist of 63 pages of material. The institution proposed to charge 20 cents per page, as set out in Ontario Regulation 532/87. (It should also be noted that the institution provided an additional 69 pages to the appellant in June 1988, free of charge.)

I find that the cost estimates are properly calculated in accordance with subsection 57(1) and the Ontario Regulation 532/87.

Subsection 57(1) provides the head with discretion as to whether or not a fee is charged in an individual case. I have reviewed

the head's submissions, and I find no error in the exercise of his discretion in favour of charging a fee in this case, subject to consideration of the issue of fee waiver, below.

ISSUE D: Whether the head's decision not to waive fees under subsection 57(3) of the Act was in accordance with the terms of the Act.

Subsection 57(3) provides that:

A head may waive the payment of all or any part of an amount required to be paid under this Act where, in the head's opinion, it is fair and equitable to do so after considering,

- (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
- (b) whether the payment will cause a financial hardship for the person requesting the record;
- (c) whether dissemination of the record will benefit public health or safety;
- (d) whether the record contains personal information related to the person who requested it; and
- (e) any other matter prescribed in the regulations.

I considered the proper application of the fee waiver provisions of subsection 57(3) in Order 4 (Appeal Number 880009), released on July 18, 1988. At page 9 of that Order I stated:

...the permissive wording of subsection 57(1) gives the head a general discretion to charge or not to charge a fee based on all the relevant factors in a given request. If this discretion is exercised in favour of charging a fee and a requester, in some manner, requests a waiver, the head must then consider whether or not any of the enumerated categories of

subsection 57(3) apply. The discretion under subsection 57(1) alerts the head that, while he may decide to do so, he is under no obligation to charge a fee in each case. The discretion under subsection 57(3), on the other hand, speaks to more specific categories where a fee may be waived when the head has otherwise determined that a fee should be charged.

The head, in his submissions, has indicated that he considered the application of the waiver provisions contained in subsection 57(3) and concluded that they do not apply in the circumstances of this appeal. I have reviewed the records and the submissions of both parties, and I am in agreement with the head's decision.

In summary, I order the institution to disclose the minutes for meetings of the Board of Directors for the institution held on September 23, 1986, November 14, 1986, and January 13, 1987, in their entirety to the appellant within (20) twenty days of the date of this Order. The institution is further ordered to advise me in writing, within (5) five days of the date of disclosure of the record, of the date on which disclosure was made. The head's decision regarding fees is upheld.

Original signed by:
Sidney B. Linden
Commissioner

April 28, 1989
Date