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

ORDER 92

Appeal 880193 and 880194

Ministry of Labour

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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 personal information under subsection 48(1) or 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 appeals and the procedures employed in making this Order are as follows:

1. On April 4, 1988, the requester wrote to the Ministry of Labour (the "institution") seeking access to records containing the following information:

> A copy of the investigation and all correspondence with the Ministry of Labour between May 1986 and the present time, when my employer York Condinum (sic) 241 and Andrejs Management and a company called Pac Productions.
>
> To see the authority that one Patrick O'Reilly, R. Frith and R. Ryan from the Industrial Health and Safety Branch of your Ministry claim to have
>
> - to amend legislation
> - to decide by force who can and who cannot live in the Province of Ontario
> - to supercede Federal law (Canadian Bill of Rights, section 1B) (sic)
>
> (Constitution Act s.62(b) (sic))
>
> - to place their personal friends above law, Patrick O'Reilly's friend [named individual]
>
> I have a letter dated 19/03/87 from W. Wrye, Minister of Labour, pertaining knowledge of above events.

2. The institution treated this letter as two separate requests; one

for personal information about the requester contained in the investigation file (Appeal Number 880194), and the second for all other general records in the file (Appeal Number 880193). On June 16, 1988, the institution wrote to the requester granting partial access to the requested records. Some of the 37 records were disclosed in their entirety, some were disclosed with severances, and others were withheld.

3. In separate letters responding to the request, the head gave reasons for denying access to the requester's personal information, and to certain general records in the investigation file.

Records containing personal information were withheld pursuant to sections 67 and 13 of the Act. The head stated that:

> [T]he record to which access is denied contains material or information acquired under investigation pursuant to [section 34 of] the Occupational Health and Safety Act. This provision currently prevails pursuant to section 67 of the Freedom of Information and Protection of Privacy Act , 1987. In addition, access is also denied pursuant to section 13 of the Freedom of Information and Protection of Privacy Act, 1987. This provision applies since the records contain advice and recommendations of staff members of the Occupational Health and Safety Division.

Section 67 of the Act was cited by the head as the basis for denying access to the general records.

4. On June 23, 1988, the requester wrote to me appealing the head's decisions, and I gave notice of the appeals to the institution. In his letter the appellant raised the following concerns:

Two phone calls not documented (July + Aug. '86).

> The analyst's report of what the chemicals were from the samples you took (containers were already open and mislabelled).
>
> The authority of your employees to place their own personal friends above law and amend legislation.

> The authority of your Ministry to supercede Federal legislation (Constitution Act #6 - 2B - #7 - #11B) (Canadian Bill of Rights - #1A - #2 - #2B).

5. The records at issue were received and reviewed by an Appeals Officer from my staff. Efforts were made by the Appeals Officer to settle the issues through mediation. As a result of these efforts the institution agreed to release two additional letters addressed to the appellant, and one letter from a third party to the institution which contained information about the appellant.

6. No records provided by the institution responded to the portion of the appellant's request dealing with the authority of the named institution officials. In response to the Appeals Officer's request for comments on this issue, the institution provided the following statement in a letter dated January 27, 1989:

> The Ministry's position is that it is preposterous to suggest that these gentlemen claim any such authority and in our view, these allegations do not merit a response

A copy of the institution's letter was sent to the appellant. The institution's statement did not satisfy the appellant, and he informed the Appeals Officer that he wished this and the other unresolved issues in the two appeals to be decided by the Commissioner.

7. On May 11, 1989, I sent notice to the appellant and the institution that I was conducting an inquiry to review the decisions 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 the 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 their representations

to the Commissioner, need not limit themselves to the questions set out in the Report.

8. By letters dated May 24, 1989, I invited both parties to submit written representations to me on the issues arising in the appeals.

9. On July 10, 1989, the appellant informed the Appeals Officer that he had not received the Appeals Officer's Report, or the letter inviting representations. Accordingly, he was sent a second copy of the Report and was granted a time extension for making representations.

10. Submissions were received from the institution. I have taken these representations and the concerns raised by the appellant in his June 23, 1988 appeal letter into account in reaching my decision.

11. On June 16, 1989, following the submission of representations, the institution decided to release nine additional records to the appellant, leaving a total of 12 records to be disposed of by my Order.

The issues arising in these appeals are as follows:

A. Whether any of the requested records fall within the discretionary exemption provided by section 13(1) of the Act, and, if so, whether any of the exceptions listed in subsection 13(2) apply to require the head to disclose any of the records or parts thereof.

B. If the answer to Issue A is in the affirmative, whether the severability requirements of subsection 10(2) of the Act apply to any of the records at issue in these appeals.

C. Whether subsection 34(1)(a) of the Occupational Health and Safety Act, R.S.O. 1980, c. 321, as amended, is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987, and, if so, whether any of the records at issue in these appeals fall within the scope of this "confidentiality provision".

D. Whether certain requested records exist and, if so, whether they

are in the custody or control of the institution.

E. Whether certain records identified by the institution respond to the request and properly fall within the scope of these appeals.

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 counterbalancing privacy protection purpose of the Act. This 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.

It should also be noted that 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.

The following records are the subject of these appeals:

1. six draft letters to the appellant from the Minister of Labour and the Director of the Industrial Health and Safety Branch;
2. the "response" sections of two Minister's Issue Notes;
3. three pages of handwritten notes;
4. one Ministry inspection report;
5. two internal memos from Ministry officials.

ISSUE A: Whether any of the requested records fall within the discretionary exemption provided by section 13(1) of the Act, and, if so, whether any of the exceptions listed in subsection 13(2) apply to require the head to disclose any of the records or parts thereof.

Subsection 13(1) of the Act provides:

> 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 head has claimed exemption under subsection 13(1) with respect to the six draft letters to the appellant, the "response" sections of two Minister's Issue Notes, and the three pages of handwritten notes.

Looking first at the draft letters, the institution argues that they should be exempt in their entirety. In its representations the institution submits that:

> all of the... documents are drafts of correspondence that were prepared for a Ministry official or for the Minister, by a Ministry employee. The draft constitutes the employee's advice as to the appropriate response. Thus the official accepts the advice by accepting the draft and rejects the advice by changing the letter. Based on the foregoing, it is submitted that these drafts constitute the advice of a public servant.

I have reviewed the contents of the draft letters and, in my view, they qualify as "advice" under subsection 13(1) of the Act, and properly fall within the scope of the discretionary exemption provided by that subsection.

As far as the "response" sections of the two Minister's Issue Notes are concerned, the institution submits:

> The Minister is not claiming an exemption for the entire issue notes, but only for the portion of the Notes that advise the Minister on how to respond. An Issue Note is a memorandum prepared by Ministry employees to brief the Minister on various issues. An Issue Note has three components: "Issue" setting out the the subject of the Note; "response" which is the response recommended by the author of the Note and "Background" which sets out the factual genesis of the issue and the basis for the proposed response. The Ministry is prepared to disclose the "issue" and "background" portions of the Notes. However, the "response" portion suggests a response and as such constitutes the recommendation of a public servant.

I have reviewed the contents of these two records, and am in agreement with the argument presented by the institution. I find that the "response" sections contain "advice of a public servant" and clearly fall within the scope of subsection 13(1).

Finally, turning to the handwritten notes, they consist of three pages of material headed "draft letter". On examination of the contents of these notes, it is clear that although the writer may have intended to draft a letter, and indeed began to do so on page one, the balance of the notes on pages two and three are not, in fact, a draft letter. They are more accurately described as a "workplan" for possible continuation of the letter that was begun on page one. In my view, to qualify as "advice" or "recommendation" under subsection 13(1), the contents of a record must have been communicated from one person to another. The Oxford English Dictionary defines "advice" as "opinion given or offered as to future action" (emphasis added). There is no evidence to suggest that these handwritten notes were communicated to any other person and, in my view,
they do not qualify for exemption under subsection 13(1) of the Act, and should be released to the appellant without severances. Therefore, I Order the head to release the three pages of handwritten notes to the appellant in their entirety within twenty (20) days of the date of the Order.

Having decided that the draft letters and the "response" portion of the Minister's Issue Note meet the requirements for exemption under subsection 13(1), I must now determine whether any of the exceptions outlined in subsection 13(2) apply. If they do, then all or part of these records must be disclosed.
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 my Order 24 (Appeal Number 880006), released on October 21, 1988. At page 7 of that Order I state:

> 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 the contents of the records in these appeals, in my view, no reasonable distinction can be drawn between information considered to be "factual material" and that qualifying as "advice". I find, therefore, that the exception provided by subsection 13(2)(a) is not available in the circumstances of these appeals.

Section 13 is one of several discretionary exemptions contained in the Act. After deciding that certain records fall within the scope of this exemption, the head is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they qualify for exemption. During the course of these appeals I have received no indication as to whether the head considered the option of release prior to deciding to deny the appellant access to the six draft letters and the "response" sections of the two Minister's Issue Notes. It is my responsibility as Commissioner to ensure that the head has properly exercised his discretion under the Act and, accordingly, I have decided to defer my final determination of Issue A until I have received submissions from the head regarding the exercise of his discretion. Therefore, I Order the head to exercise his discretion under subsection 13(1) of the Act within twenty (20) days of the date of this Order, and to provide me with written notification of his decision regarding the exercise of discretion and accompanying reasons within five (5) days of the date of the decision.

ISSUE B: If the answer to issue A is in the affirmative, whether the severability requirements of subsection 10(2) of the Act apply to any of the records at issue in these appeals.

Subsection 10(2) states:

> 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 discussed the proper application of subsection 10(2) in my Order 24, supra. At page 13, I stated:

> 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 six draft letters and the "response" portions of the two Minister's Issue Notes and have concluded that no information can be severed from these records without disclosing information that legitimately falls within the subsection 13(1) exemption. It should be noted that the "response" portions of the two Minister's Issue Notes are actually severed portions of the complete Issue Notes, the rest of which have been provided to the appellant by the institution.

ISSUE C: Whether subsection 34(1)(a) of the Occupational Health and Safety Act, R.S.O. 1980, c. 321, as amended, is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987, and, if so, whether any of the records at issue in these appeals fall within the scope of this "confidentiality provision".

Section 67 of the Act 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 other legislation until that date.

Where an institution purports to remove itself from the ambit of the Act through the use of a "confidentiality provision" in another Act, it is my responsibility to scrutinize the provision of that other Act to ensure that it qualifies as a "confidentiality provision", and, if it does, to then decide whether the record which is the subject of the exemption claim falls within the scope of that provision.

The institution argues that subsection 34(1)(a) of the Occupational Health and Safety Act, R.S.O. 1980, c.231, qualifies as a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987, and that one Ministry investigation report falls within the scope of subsection 34(1)(a).

In my Order 32 (Appeal Number 880112), released on December 21, 1988, I

found that subsection 34(1)(a) did qualify as a "confidentiality provision" as that term is used in section 67 of the Freedom of Information and Protection of Privacy Act, 1987. Accordingly, the only issue before me in these appeals is whether the investigation report falls within the scope of subsection 34(1)(a).

Section 34 of the Occupational Health and Safety Act reads as follows:

> 34.--(1) Except for the purpose of this Act and the regulations or as required by law,
>
> (a) an inspector, a person accompanying an inspector or a person who, at the request of an inspector, makes an examination, test or inquiry, shall not publish, disclose or communicate to any person any information, material, statement, report or result of any examination, test or inquiry acquired, furnished, obtained, made or received under the powers conferred under this Act or the regulations;
>
> (aa) no inspector or other person who receives directly or indirectly from the claims board designated under subsection 22e(7) information provided to the claims board by an employer shall disclose it; (subsection proclaimed in force October 31, 1988)
>
> (b) no person shall publish, disclose or communicate to any person any secret manufacturing process or trade secret acquired, furnished, obtained, made or received under the provisions of this Act or the regulations;
>
> (c) no person to whom information is communicated under this Act and the regulations shall divulge the name of the informant to any person; and
>
> (d) no person shall disclose any information obtained in any medical examination, test or x-ray of a worker made or taken under this Act except in a form calculated to prevent the information being identified with a particular person or case.
>
> (2) An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector is not a compellable witness in a civil suit or any proceeding, except an inquest under the Coroners Act respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.

> (3) A Director may communicate or allow to be communicated or disclosed information, material, statements or the result of a test acquired, furnished, obtained, made or received under this Act or the regulations.
>
> (4) subsection (1) does not apply so as to prevent any person from providing any information in the possession of the person, including confidential business information, in a medical emergency for the purpose of diagnosis or treatment. (subsection proclaimed in force October 31, 1988.)

The record at issue is a report of an inspection conducted by a ministry official pursuant to the Occupational Health and Safety Act. I have reviewed this record and am satisfied that it falls within the scope of subsection 34(1)(a) of that Act. It is a "...report or result of [an] examination, test or inquiry... made... under the powers conferred under [the Occupational Health and Safety] Act.

I note that subsection 34(3) of the Occupational Health and Safety Act grants a discretionary power to a Director, authorizing him or her to disclose "information, material, statements or the result of a test acquired, furnished, obtained, made or received under this Act or the regulations". In the circumstances of these appeals, it is not clear whether a Director has in fact exercised the discretion provided under subsection 34(3) of the Occupational Health and Safety Act. Accordingly, my Order is that a Director appointed under the Occupational Health and Safety Act reconsider the request of the appellant in the context of subsection 34(3) of the Occupational Health and Safety Act, within twenty (20) days of the date of this Order, and exercise the discretion which that subsection provides. I further order that I be notified in writing of the Director's decision regarding the exercise of discretion within five (5) days of the date of the decision.

ISSUE D: Whether certain requested records exist and, if so, whether they are in the custody or control of the institution.

The appellant claims that the institution has custody or control of records containing the following information:

1. ...the authority that one Patrick O'Reilly, R. Frith and R. Ryan from the Industrial Health and Safety Branch of your Ministry claim to have

   - to amend legislation

   - to decide by force who can and cannot live in the Province of Ontario

   - to supercede Federal law (Canadian Bill of Rights, section 1B)
   - (Constitution Act s.62(b))

   - to place their personal friends above law, Patrick O'Reilly's friend [named individual].

2. an analyst's report, deriving from samples which the appellant claims were taken during an inspection by Ministry officials;

3. record of two telephone calls from the appellant to Patrick O'Reilly, a Ministry official, in July and August 1986;

4. "draft reply to (Appellant) - Nov.11/86".

With respect to the first item, the institution's representations state:

> The Requester has also requested the authority that Patrick O'Reilly, R. Frith and R. Ryan claim to have "to amend Legislation; decide by force who can and cannot live in the Province of Ontario; to supercede federal law (Canadian Bill of Rights Section 1B, Constitution Act section G2B) and to place their personal friends above law, Patrick O'Reilly's friend [named individual]." These individuals claim no such authority and thus no documents relating to such authority exist.

In the circumstances of these appeals, I accept the institution's position that the named employees do not have the authority claimed by the appellant. That being the case, it follows that no records relating to this alleged authority would exist, and, therefore, I accept the institution's position that there are no such records.

As far as items #2 and #3 are concerned, the institution was asked to address the existence of an analyst's report and any documented evidence of the two telephone calls in the Appeals Officer's Report. The

institution has failed to do so and, in the absence of representations, I am not prepared to make a final determination on these issues. Therefore, I order the institution to respond, by affidavit, to the following two questions within twenty (20) days of the date of this Order:

1. The institution is asked to indicate whether any analyst's report pertaining to the particular investigation exists.

   If the report does exist

   - is this report in the custody or control of the institution?

   - has this report been released to the appellant?

   - if the report has not been released to the appellant, is the institution claiming that it is exempt from disclosure and if so, under what provisions of the Act?

2. The appellant states in his appeal that two telephone calls to Patrick O'Reilly took place in July and August, 1986 and have not been documented.

   The institution is asked to indicate whether or not there are records which document these telephone calls.

   If these records exist

   - have they been released to the appellant?

   - if they have not been released, is the institution claiming that they are exempt from disclosure, and under what provision of the Act?

I remain seized of this matter pending submission of the institution's representations.

Item 4, the "draft reply to (Appellant) - Nov. 11/86", was listed in an index of documents responding to the appellant's request, provided to the Appeals Officer by the institution during the course of these appeals. However, the actual documents provided to the Appeals Officer did not include this record. The existence and whereabouts of this record was raised by the Appeals Officer, and the following response was provided by the institution in a letter dated January 23, 1989:

> ...please be advised that a draft reply from the Minister to (Appellant) dated November 11, 1986 does not exist. The person who prepared the index was thinking of a letter from (Appellant) to the Minister dated November 11, 1986. This letter was referred to in the Minister's response dated March 19, 1987.

Upon examination of the representations of the institution, I note that the institution included reference to a draft letter dated November 11, 1986 among the draft correspondence exempted by the institution under subsection 13(1) of the Act. In my view, this discrepancy between the institution's representations and the statement contained in the January 23, 1989 letter has not been adequately explained by the institution and, therefore, I order the institution to respond, by affidavit, to the following question within twenty (20) days of the date of this Order:

1. The institution is asked to indicate whether a draft letter to (Appellant) dated November 11, 1986 exists.

   If this draft letter does exist

   - is this draft letter in the custody or control of the institution?

   - has this draft letter been released to the appellant?

   - if the draft letter has not been released to the appellant, is the institution claiming that it is exempt from disclosure

and, if so, under what provisions of the Act?

If this draft letter does not exist

- why did the representations submitted by the institution in these appeals refer to the existence of this record?

I remain seized of this matter pending submission of the institution's representations.

ISSUE E: Whether certain records identified by the institution respond to the request and properly fall within the scope of these appeals.

The institution has included two internal memos among the documents sent to the Appeals Officer during the course of these appeals. The institution submits that these two memos relate to internal ministry procedures for writing letters, and fall outside the scope of the these appeals.

I have reviewed the contents of these two memos and am in agreement with the institution's position. Therefore, I find that the two internal memos do not respond to the appellant's request, and I uphold the head's decision not to release them.

In summary, my Order in these appeals is as follows:

1. I find that the six draft letters and the "response" portions of the two Minister's Issue Notes qualify for exemption under subsection 13(1) of the Act. I order the head to exercise his discretion pursuant to subsection 13(1) of the Act with respect to the disclosure of these records, within twenty (20) days of the date of this Order and to advise me of his decision and accompanying reasons within five (5) days of the date of the decision.

2. I find that the three pages of handwritten notes do not qualify

for exemption under subsection 13(1) of the Act, and I order the head to release them to the appellant in their entirety within twenty (20) days of the date of this Order and to advise me in writing, within five (5) days of the date of disclosure of the record, of the date on which disclosure was made.

3. I find that section 34(1)(a) of the Occupational Health and Safety Act is a "confidentiality provision" for the purposes of section 67 of the Freedom of Information and Protection of Privacy Act, 1987, and that the investigation report at issue in these appeals falls within the scope of subsection 34(1)(a) and is therefore exempt from disclosure. I order a Director appointed under the Occupational Health and Safety Act to review the appellant's request for the release of this record, in the context of subsection 34(3) of the Occupational Health and Safety Act, within twenty (20) days of the date of this Order, and exercise the discretion which that subsection provides. I further order that I be notified in writing of the Director's decision regarding the exercise of discretion within five (5) days of the date of the decision.

4. I order the institution to respond to my questions with respect to the existence of the analyst's report, the documentation of the telephone calls, and the "draft reply to (Appellant) of November 11, 1986, by affidavit, within twenty (20) days of the date of this Order.

5. I find that the two internal ministry memos fall outside the scope of the request in these appeals, and I uphold the head's decision not to release them.

6. With respect to all records which the institution has agreed to release to the appellant either before or during the course of

these appeals, I order the institution to release these records to the appellant within twenty (20) days of the date of this Order and to advise me in writing, within five (5) days of the date of disclosure of the record, of the date on which disclosure was made.

Original signed by:
Sidney B. Linden
Commissioner

September 21, 1989
Date