



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

# **ORDER 58**

**Appeal 880162**

**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 personal information under subsection 48(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

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

1. On March 28, 1988, the requester wrote to the Ministry of Labour (the "institution") seeking access to records respecting:

(...my complaint against the Ontario Human Rights Commission \_ first letter to the Minister of Labour sent December 1st, 1985).

- \_ Report submitted to the Minister of Labour by Commission staff regarding my complaint.
- \_ Correspondence, memorandum and any other documentary materiel (sic) pertaining to the matter preceding and after December 1st, 1985.

2. On April 6, 1988, the Freedom of Information and Privacy Co\_ordinator for the institution (the "Co\_ordinator") wrote to the requester advising him that the request had been forwarded to the Ontario Human Rights Commission.
3. By letter dated April 12, 1988, the requester clarified his request by advising the institution that the former

Minister of Labour wrote him a letter dated July 24, 1986 indicating that he had asked for and received a report on the requester's "allegations" respecting the Ontario Human Rights Commission. In his letter, the requester again

pointed out that he was seeking "...access to the record held by the Ministry of Labour on the matter, including the said report the Minister ordered and received and any prior and subsequent document material related to the matter."

4. On April 26, 1988, the institution granted partial access by providing:

...copies of the correspondence contained in the files of my predecessor, the Honourable William Wrye. Excluded from the file, pursuant to section 13 of the Act are records which would reveal advice and recommendations to the Minister. Material that is background to correspondence is not normally retained in the Minister's file, but is usually returned to the originating program. A report such as the one you are requesting and which is referred to in Mr. Wrye's letter to you dated July 24, 1986, in accordance with this normal practice is not contained in this Ministry's files.

5. On June 2, 1988, the requester wrote to me appealing the decision of the institution, and I gave notice of the appeal to the institution.
6. The records which had been withheld by the institution were obtained and reviewed by an Appeals Officer from my staff. The appellant provided my office with a copy of a letter which he had sent to the Minister of Labour, among others,

in December, 1985 and which was not included in the Minister's file.

7. Efforts were made by the Appeals Officer and the parties to settle the matter, however a settlement was not achieved as both parties retained their respective positions.
8. On January 13, 1989 and January 16, 1989 I sent notice to the appellant and the institution respectively that I was conducting an inquiry to review 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 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 their representations to the Commissioner, need not limit themselves to the questions set out in the report.

9. By letters dated January 24, 1989, I invited the parties to submit written representations to me on the issues arising in the appeal.
10. Representations were received from both parties and I have considered them in making my Order.

11. Following the submission of representations, the institution decided to release two of the records in dispute to the appellant on March 7, 1989.

The issues arising in this appeal are as follows:

- A. Whether any of the records in question fall within the discretionary exemption provided by subsection 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 this appeal.
- C. Whether the institution has taken reasonable steps to locate the records requested by the appellant.

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. 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.

It should also be noted that section 53 of the Act provides that the burden of proof that the record or part of the record falls within one of the specified exemptions of the Act lies upon the head.

Initially there was some confusion as to what records were at issue in the appeal.

In accordance with the usual procedure whenever an appeal is filed in my office, the Appeals Officer assigned to this case asked the Co\_ordinator to provide him with copies of all the relevant records. In response, the Co\_ordinator forwarded a package containing two groups of records: (1) a file folder marked "COPY OF MINISTER'S FILE" containing "...all records in the possession of the Ministry with respect to [the appellant's] ongoing correspondence with the former Minister of Labour"; and (2) a separate file of records containing "...all correspondence relating to [the appellant's] request under the Freedom of Information and Protection of Privacy Act, including [the appellant's] original request and the Ministry's response with all attachments."

In order to determine which records had been provided to the appellant and which had been exempted from disclosure, the Appeals Officer telephoned a representative of the institution and was advised that all of the second group of records had been disclosed to the appellant, and only the "Minister's File" had been withheld. However, there was considerable duplication in these two groups of records, so the Appeals Officer identified and numbered the seven records contained in the "Minister's File" which had not been previously disclosed to the appellant.

This numbering of records was outlined to the institution on January 16, 1989, together with the Appeals Officer's Report, and these records form the basis for this appeal.

As outlined earlier in this Order, two of these seven records were released by the institution to the appellant on March 7, 1989.

**ISSUE A: Whether any of the records in question fall within the discretionary exemption provided by subsection 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.**

The relevant parts of section 13 of the Act read as follows:

13.(1) 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.

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(a) factual material;

...

I will discuss the application of the subsection 13(1) exemption to each of the five records at issue in this appeal.

Record #1: Ministerial Correspondence Transmittal Slip

This slip originated in the Minister's office and is directed to a named person who is asked to prepare a reply for the Minister's signature in relation to correspondence received by

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the Minister. This record also identifies the name of the person who prepared the reply, the date of the reply, the initials of the branch head who approved the reply, and the date of this approval.

The institution submits that "...a record which reveals the fact that a letter was drafted by a particular public servant indicates that that public servant advised the Minister to respond to correspondence in a particular fashion".

Had this transmittal slip been attached to a prepared reply or had there been any evidence establishing a connection between the transmittal slip and a prepared reply, I may have agreed with the institution's submission. However, in this instance, the transmittal slip is neither attached to nor does it refer to a particular document. Accordingly, I find that the subsection 13(1) exemption does not apply to Record #1, and I order the institution to release this record to the appellant in its entirety.

Record #2: Action Memo

This record is directed to an individual who is identified only by initials, from someone identified by first name only. The memo notes the time and date (but not the month) on which a telephone call was returned. On the back of the record is a notation which, presumably, reveals the topic of this telephone conversation.

The institution submits that the individual's name and the notation on the back of the record "...clearly form the basis of some advice given or received by the individual whose name is on



the slip. It reveals in a crude way the nature of advice given or at least contemplated".

Having reviewed this record, I do not agree with the institution's position. At most, this record reveals the topic of a telephone conversation, but it does not reveal the views or opinions, much less the advice or recommendations of a public servant. Accordingly, I order the institution to release Record #2 to the appellant without severances.

Record #3: Single Sheet of Paper

This record consists of an undated single sheet of paper with the appellant's surname across the top. It contains brief notations of an unidentified individual as to why a particular decision was taken, although the decision itself is not identified.

The institution submits that this record "...indicates advice given or received in respect of some request made by the requester in this appeal".

In my view, in order to qualify as "advice", there must be evidence of some type of communication of information from one person to another. Record #3 is authored by an unknown individual and there is no indication that the information in the record is intended to be communicated to anyone else. In my view, the notations in this record simply reflect the musings of their unknown author, and, accordingly, do not meet the requirements for exemption under subsection 13(1). Therefore, I order the institution to release Record #3 to the appellant in its entirety.

Record #4: Message Slip and  
Record #5: Undated Memorandum

The institution claims that Records #4 and #5 fall outside the scope of the appellant's request because they do not pertain to the Minister's involvement in the appellant's human rights complaint. Record #4 is a dated message slip containing the first names of two public servants who have been involved in the administration of the Minister's File; and Record #5 consists of an undated memorandum containing nothing more than the names of two public servants.

The institution submits that "...even when faced with a broad request which arguably encompasses an entire file, material of this sort should not be considered part of the request unless it is specifically asked for. It has no bearing on anything other than the clerical functions within the Ministry".

In my view, the institution's submissions with respect to these two records point to a misunderstanding regarding the scope of responsibilities imposed on institutions when considering requests for information under the Act. It is apparent, in the circumstances of this case, that the institution did not review each of the records in the Minister's file before claiming exemption under subsection 13(1); the institution appears to have decided that the fact the records were in the Minister's file was sufficient to justify exemption, regardless of whether the requirements of subsection 13(1) applied to all records in the file. Moreover, the institution made no attempt to assist the appellant in clarifying his request, as required by subsection 48(2) and 24(2) of the Act. The appellant's request

was broadly worded to include "...correspondence, memorandum and any other documentary materiel (sic) pertaining to the matter preceding and after December 1st, 1985", and, in my view, Records #4 and #5 fall within the scope of this request.

Having reviewed both of these records, I find that they do not meet the requirements for exemption under subsection 13(1), and I order that the institution release Records #4 and #5 to the appellant without severances.

Because I have found that all five records at issue in this appeal fall outside the scope of the subsection 13(1) exemption, it is not necessary for me to consider the application of subsection 13(2).

Before moving on to a discussion of the remaining issues in this appeal, I wish to comment briefly on the portion of the institution's representations which address my authority to review the exercise of the head's discretion under the Act.

Section 13 is one of several discretionary exemptions contained in the Act. In its representations, the institution argued that, where a head determines that a record falls within the scope of one of these discretionary exemptions, the decision to release the record or not "...is entirely the Head's to make. It is submitted that there is no authority in the Commissioner's office to order release of [the record being exempted]."

I do not agree with the institution's position in this regard. In my view, I have not only the authority, but the duty under the Act to order the release of a record where I find that an exemption, be it discretionary or mandatory, does not apply to

the record in question. As I stated at page 10 in my Order 56 (Appeal Number 880157), released on May 3, 1989:

Section 53 of the Act places the burden of proving that a record falls within one of the exemptions of the Act upon the head, and, in my view, this burden cannot be discharged by a simple subjective exercise of discretion. The exemption . . . is only available to the head if he can first establish that the record in question falls within the parameters of the subsection.

Once an institution has demonstrated that a particular exemption applies to a specific record, the powers given to the head and to the Commissioner differ under the Act depending on whether or not the exemption is mandatory or discretionary. If it is a mandatory exemption, then neither the head nor the Commissioner may order the release of the record. On the other hand, if the exemption is discretionary, the head may choose to rely on the exemption and refuse disclosure, or he or she may release the record regardless of the fact that it qualifies for an exemption.

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision\_maker to ensure that the concepts of fairness and natural justice are followed.

**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 this appeal.**

Because I have found under Issue A that all of the records at issue in this appeal should be released to the appellant in their entirety, it is not necessary for me to consider the severability requirements of subsection 10(2).

**ISSUE C: Whether the institution has taken reasonable steps to locate the records requested by the appellant.**

In his original request, the appellant asked for access to a "...report submitted to the Minister of Labour by [Ontario Human Rights] Commission staff regarding my complaint". The institution responded by stating that "...material that is background to correspondence is not normally retained in the Minister's file, but is usually returned to the originating program. [The report] is not contained in the Ministry's files."

During the course of the Appeals Officer's investigation, the appellant provided a copy of a letter referred to in his request which he had sent to the Minister of Labour in December of 1985. This letter was not included in the Minister's file, prompting the appellant and the Appeals Officer to question whether all the relevant records had been identified.

The institution was asked to provide an affidavit outlining the steps it took to locate the requested records. A portion of the Co\_ordinator's affidavit relating to the Human Rights Commission report to the Minister reads as follows:

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In order to ascertain whether or not a copy of such a report exists, I have pursued a number of courses of action. First of all, I have carefully reviewed the file to satisfy myself that there is no written report which falls within the scope of [the appellant's] request. I am satisfied that our files contain no such report.

I have also reviewed this issue with my predecessor... She indicated that she reviewed the file with [an official] in the Minister's office and no such report could be found.

Finally, I discussed this issue at length with... the Freedom of Information Co\_ordinator for the Ontario Human Rights Commission. He told me that he has examined the Commission's files and has discussed the matter with Commission staff. He says that no such report can be found.

My Appeals Officer contacted a staff person at the Ontario Human Rights Commission who, at the time in question, was responsible for briefing the Minister of Labour on Commission matters. Although this person could not recall the specifics of the appellant's case, she was able to outline the following procedure as being normally followed in dealing with correspondence received by the Minister:

- \_ the Minister's office would forward the incoming correspondence to Commission staff who, in turn, would prepare a draft reply for the Minister's signature;
- \_ any relevant background material would be provided to the Minister together with the draft response;
- \_ if a Commission file was particularly complicated, a Commission staff member would brief a member of the Minister's staff, usually the Executive Assistant.

The Commission staff person also indicated that written reports were not created in drafting responses, if existing documents in the Commission's file provided sufficient information.

Having considered the evidence before me, I am drawn to the conclusion that the report referred to in Mr. Wrye's letter dated July 24, 1986, must have been an oral rather than a written report.

A great deal of confusion regarding this report could have been avoided if the institution had properly interpreted its responsibilities under subsection 25(1) of the Act. Subsection 25(1) stipulates that:

Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record...

In my view, this subsection imposes both mandatory and specific obligations on an institution that were not followed in this case. If the proper procedures had been followed, the fact that the report was an oral one could have been communicated to the appellant at the time of the institution's response to his original request.

Turning now to the appellant's December 1, 1985 letter to the former Minister of Labour which was not among the records contained in the "Minister's File", the institution offered the following explanation:

With respect to correspondence which the appellant claims was missing from the material provided, all the Ministry can say is that no such correspondence was in our file. A copy of the Minister's entire file on this matter was provided to the Appeals Officer.

The Co\_ordinator's affidavit makes no specific mention of this record.

To obtain a clearer understanding of the situation, I asked a Compliance Auditor on my staff to conduct a review of the correspondence tracking procedures followed in the Minister's office at the time this letter was sent.

The Compliance Auditor conducted a manual search of the daily incoming mail registers in the Minister's office for the period of November 1, 1985 to December 31, 1986. This review identified that the Minister's office had received a letter dated December 1, 1985 from the appellant on December 10, 1985. A notation indicated that the letter had been sent to the Minister's Executive Assistant for reply, however a manual search of the Minister's files by the Compliance Auditor did not produce the letter.

Because the appellant's December 1, 1985 letter was written in French, the French Language Services branch was contacted to see if they had a copy of the letter. Although translations were handled by someone on the Minister's staff in December of 1985, the French Language Services branch agreed to conduct a search of its records, but was unable to locate the letter or any reference to it having been received by the branch.

As a result of the investigation conducted by my Compliance Auditor, I am reluctantly drawn to the conclusion that the



institution is no longer in possession of the appellant's December 1, 1985 letter. This conclusion troubles me, since this letter should have been retrievable from the institution's files, and it raises the question whether other records may have been lost.

As I have indicated in previous Orders, I am hopeful that problems with the retrieval of records will diminish as we gain experience with the Act. Over the next several months, I will be working with various government institutions to determine ways of improving their records management systems. I am confident that improvements in this area will greatly enhance an institution's ability to fulfil its obligations under this Act.

To summarize my findings with respect to Issue C, based on the independent investigations conducted by my office, I am satisfied that any further action on the part of the institution in this case would not be productive. I am satisfied that as a result of this Order the appellant will receive all the records that are currently within the custody or control of the institution that pertain to him.

In conclusion, I order the head of the institution to release all five records which have been withheld from disclosure.

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

\_\_\_\_\_ May 16, 1989  
Date