



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER 94**

Appeal 890137

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) the right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

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

1. On February 14, 1989, the requester wrote to the Ministry of Labour (the "institution") and requested access to "All Personal Information from the Employment Standards Branch."
2. The institution responded on April 20, 1989 and provided partial access to the requested records. Three records were disclosed subject to severances pursuant to subsections 13(1) and 49(b) of the Act. A fourth record was withheld from disclosure in its entirety pursuant to subsection 14(2) (a) of the Act.
3. On April 25, 1989, the requester wrote to me appealing the institution's decision and I gave notice of the appeal to the institution on May 12, 1989.
4. The Appeals Officer assigned to this case obtained and reviewed the four records which had been withheld from disclosure. During the course of the Appeals Officer's investigation, the appellant advised that he was not appealing the institution's decision under subsection 49(b) to sever another individual's personal information from the records in question. As the institution maintained its position respecting the other exemptions cited by it to deny access, a mediated settlement could not be achieved.

5. By letters dated July 28, 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 paraphrase those sections of the Act which appeared to the Appeals Officer, or any other parties, to be relevant to the appeal. Those sections of the Act paraphrased in the report include the exemption sections cited by the head in refusing access to a record or a part thereof. The report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.
6. Representations were received from the institution and I have considered them in making my Order.
7. In its representations, the institution indicated that two of the records in question could be disclosed in their entirety to the appellant. These two records were provided to the appellant on August 25, 1989 and, accordingly, this Order concerns only the two remaining records at issue which are:
  - Memo from J. Bell to K. Armstrong, dated December 10, 1986. The second page of the two-page memo was severed pursuant to subsection 13(1) of the Act;
  - Officer's Narrative Report, undated, exempted in its entirety pursuant to subsection 14(2) (a) of the Act.

The issues arising in this appeal are as follows:

- A. Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act in severing information from a requested record.
- B. Whether the head properly applied the discretionary exemption provided by subsection 14(2) (a) of the Act in withholding from disclosure a requested record.

It is important to note at the outset that the purposes of the Act as outlined in subsection 1(a) and (b) are as follows:

1. The purposes of this Act are,
  - (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
    - (i) information should be available to the public,
    - (ii) necessary exemptions from the right of access should be limited and specific, and
    - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
  - (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

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

**ISSUE A: Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act in severing information from a requested record.**

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.

As noted above, the record which has been severed pursuant to subsection 13(1) of the Act is a two-page memo from J. Bell to K. Armstrong, dated December 10, 1986. Both J. Bell and K. Armstrong are employees of the institution. The first page of the memo was disclosed to the appellant with the exception of a paragraph which contained another individual's personal information; as noted above, this severed information is not in dispute. The second page of the memo was severed in its entirety and withheld from disclosure. From the information disclosed on the first page of the memo it is apparent that the author of this memo is

requesting that an investigation be conducted into complaints received by the institution's Employment Standards Branch from the appellant and another individual.

These complaints concern the amount of wages paid to patients performing workshop or service functions at institutions such as the Penetanguishene Mental Health Centre, Oak Ridge Division. The investigation which ensued from these complaints considered whether the Employment Standards Act, R.S.O. 1980 c.137 applies to individuals in such circumstances.

The last line on the first page of the December 10, 1986 memo reads - "Some of the questions Health did not provide answers to are as follows:". It is not surprising, therefore, that the information severed from page two of the memo lists questions which the author of the memo suggests should be addressed in the investigation. In addition to the questions noted by the memo's author, page two also contains the handwritten notes of an unknown individual listing additional questions to be addressed in the investigation.

As stated in Order 58, dated May 16, 1989, there must be evidence of some type of communication of information from one person to another in order for that information to qualify as "advice or recommendations". Even if I were to conclude that the handwritten notes were communicated to another individual, 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.

In this case, it can be inferred that the author of the memo is "recommending" that the noted questions be considered in the course of the investigation but in my view this is not the kind of recommendation

to be exempted pursuant to subsection 13(1) of the Act. The disclosure of this type of information could not reasonably be expected to inhibit the free flow of information to policy-makers and decision-makers within the government. At best, disclosure of the information severed from page two of the record would reveal something about the preliminary step of collecting facts and information on which decisions are made but clearly would not reveal the substance of the actual deliberations themselves.

Although it is difficult to define conclusively the type or nature of the "advice or recommendations" which may be considered to fall within the scope of the exemption provided by subsection 13(1) of the Act, I find that the information severed from page two of the record at issue does not qualify for exemption. Accordingly, I order the institution to disclose page two of the memo to the appellant.

**ISSUE B: Whether the head properly applied the discretionary exemption provided by subsection 14(2)(a) of the Act in withholding from disclosure a requested record.**

Subsection 14(2)(a) reads as follows:

A head may refuse to disclose a record,

- (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law.

As stated in Order 38, dated February 9, 1989,

subsection 14(2)(a) is unusual in the context of the Freedom of Information and Protection of Privacy Act, 1987, in that it exempts a type of document, a report. The exemption does not require that the report meet additional criteria such as a reasonable expectation of some harm resulting from the disclosure of the report, or specifications about the contents thereof.

Under subsection 14(2)(a) the head may exercise his or her discretion to deny access to an entire report.

The record which was exempted by the institution pursuant to this provision is a "Narrative Report" which followed from complaints received from the appellant and another individual. As noted above,

this report considers the application of the Employment Standards Act to patients performing workshop or service functions at institutions such as the Penetanguishene Mental Health Centre.

Having reviewed the report in question, it is clear that it was prepared in the course of an investigation by an officer of the Employment Standards Branch of the institution. The Employment Standards Branch is mandated to enforce and regulate the Employment Standards Act.

Accordingly, I have concluded that this report qualifies for exemption from disclosure pursuant to subsection 14(2) (a) of the Act. As there is no apparent basis for interfering with the head's exercise of discretion as it relates to the report in question, I uphold the head's decision to exempt this record from disclosure.

In summary, I order the institution to disclose to the appellant page two of the memo dated December 10, 1986 within 20 days of the date of this Order. The institution is further ordered 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. The head's decision regarding disclosure of the Officer's "Narrative Report" is upheld.

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

\_\_\_\_\_ September 22, 1989  
Date