



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER 147**

**Appeal 890119**

**Workers' Compensation Board**



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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. By letter dated March 15, 1989, a request was made to the Workers' Compensation Board (the "institution") for the following information:

Recommendation on Freedom of Information and Protection of Privacy Act.

2. On April 18, 1989, the institution responded as follows:

Access is denied to the paper and recommendations relating to the Freedom of Information and Protection of Privacy Act (FIPPA) under section 12(1)(c) of the FIPPA. This provision is a mandatory exemption which prohibits the disclosure of a record prepared for submission to the Executive Council or its Committees for their consideration. Access is also denied under section 13(1) of the Act because disclosure "would reveal advice or recommendations of a public servant or any other person employed in the service of an institution".

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

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

The record consists of a one page memorandum dated October 19, 1988, which has attached to it, a two page memorandum dated October 4, 1988 with a four page appendix.

5. During the course of mediation, the institution amended its reasons for refusing access to the appellant. By letter dated July 19, 1989, the institution advised the Appeals Officer that it was now relying on subsection 13(1) and, in the alternative, subsection 12(1)(b) of the Act to deny access to the appellant. The institution withdrew its reliance on subsection 12(1)(c) of the Act.
6. Mediation efforts were not successful, and by letter dated August 9, 1989, my office 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 their representations to the Commissioner, need not limit themselves to the questions set out in the Report.

7. I received written representations from both parties and I have considered them in reaching my decision in this appeal.

It is important that the purposes of the Act, set out in section 1, be noted. Subsection 1(a) provides a 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. 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 information.

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 with the head of the institution (the "head").

The issues arising in this appeal are as follows:

- A. Whether the record is properly exempt from disclosure pursuant to subsection 12(1)(b) of the Act.
- B. Whether the record is properly exempt from disclosure pursuant of subsection 13(1) of the Act.

**ISSUE A: Whether the record is 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 memorandum dated October 19, 1988, is from Dr. Robert G. Elgie, Chairman, to the Members of the Board of Directors of the institution. This memorandum outlines information about the memorandum of October 4, 1988, described below, and contains Dr. Elgie's recommendation on certain matters set out in the memorandum of October 4, 1988.

The memorandum dated October 4, 1988, is from the Vice\_President of Corporate Services of the institution to the members of the institution's Executive Committee. This memorandum contains several paragraphs of background information and then sets out a number of specific recommendations. Attached to this memorandum is a four page appendix containing two columns. The left column sets out sections of the Workers' Compensation Act while the right column sets out proposals for these sections.

The institution submitted that:

The records formed the basis of discussions with representatives of the Freedom of Information Secretariat of Management Board of Cabinet and the Ministry of Labour. Although the staff representatives of Management Board of Cabinet may not constitute a committee of the Executive Council within

the meaning of subsection 12(1), nonetheless the records in question were prepared by the Board for submission to the Management Board of Cabinet with the intent that the substance of Board's recommendations would be presented for consideration or for use in its legislative exercise. It is submitted that this fact is sufficient to bring the documents within subsection 12(1)(b) of FIPPA.

In my Order 22 (Appeal Number 880008) dated October 21, 1988, I discussed the proper interpretation of subsection 12(1). At page 6 of the Order I stated:

...the use of the word 'including' in subsection 12(1) of the Act should be interpreted as providing an expanded definition of the types of records which are deemed to qualify as subject to the Cabinet records exemption, regardless of whether they meet the definition found in the introductory text of subsection 12(1). At the same time, the types of documents listed in subparagraphs (a) through (f) are not the only ones eligible for exemption; any record where disclosure would reveal the substance of deliberations of an Executive Council or its committees qualifies for exemption under subsection 12(1).

The representations submitted by the institution contain a claim for exemption under both the introductory text of subsection 12(1) and the expanded definition in subsection 12(1)(b).

Considering first the introductory text, I considered the circumstances which must exist in order for the disclosure of a record to reveal the "substance of deliberations" in my Order 72 (Appeal Number 880159), dated July 11, 1989. At page 8 of that Order, I stated that:

...it would only be in rare and exceptional circumstances that a record which had never been

placed before the Executive Council or its committees, if disclosed, would reveal the "substance of deliberations" of Cabinet, as required by the wording of subsection 12(1).

The expanded definition in subsection 12(1)(b), establishes two criteria which must be satisfied in order for a record to qualify for exemption: it must contain policy options or recommendations; and it must have been submitted or prepared for submission to the Executive Council (the "Cabinet") or its committees.

After viewing the contents of the record at issue in this appeal, in my view, they fail to meet the requirements for exemption under either the introductory wording of subsection 12(1) or the expanded definition provided by subsection 12(1)(b). I have no objective evidence before me that supports the conclusion that the record went before Cabinet or its committees or even that it was incorporated into a Cabinet submission or used as a basis for developing a Cabinet submission. Without knowing what actually went before Cabinet or one of its committees, I cannot conclude that the record would reveal the "substance of deliberations" of the Cabinet or its committees. Further, nothing in the record itself leads me to conclude that it was prepared for submission to Cabinet or its committees. In its representations, the institution acknowledges that the record was used as the basis for further discussions and I find that this is not sufficient to bring the record within the scope of the section 12 exemption.

**ISSUE B: Whether the record is properly exempt from disclosure pursuant to subsection 13(1) of the Act.**

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.

The general purpose of the section 13 exemption has been discussed in Order 94 (Appeal Number 890137) dated September 22, 1989. At page 5 of the Order, I stated that:

...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 addressed the section 13 exemption further in Order 118 (Appeal Number 890172) dated November 15, 1989. I stated at page 4 that:

In my view, 'advice' for the purposes of 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.

Having examined the record, I am of the opinion that only parts thereof satisfy the exemption provided by subsection 13(1) of



the Act. These parts contain advice or recommendations of a public servant or other person employed in the service of the institution and relate to a suggested course of action that was ultimately accepted or rejected during a decision\_making exercise.

I have also considered the exceptions enumerated under subsection 13(2) of the Act, with respect to those parts of the record that properly fall within the exemption provided by subsection 13(1) and I find that none of the exceptions are available in the circumstances of this appeal.

The appellant argued that:

The Compensation Board's internal memos and reports are more than just policy options which the Board of Directors of the Compensation Board is considering. These reports contain the Compensation Board's rules, guidelines and regulations for operation.

In my opinion, once a record or part of a record falls within the exemption provided for under subsection 13(1) of the Act, it does not lose the benefit of that exemption merely because the institution has completed a determination of the matter. Subsection 13(1) of the Act is a discretionary exemption and, in my view, the fact that a decision on the subject matter of the advice or recommendation has been made, is one of the factors that should be considered by the head in his exercise of discretion.

The Appeals Officer's Report asked the head to outline the factors that were considered in deciding not to release the record. In its representations, the institution stated that:

...the head had considered the fact that the records in issue contain recommendations of internal staff which have not yet been implemented and which may be the subject of ongoing review and discussion.

I find nothing wrong in the head's exercise of discretion with respect to those parts of the record that properly fall within the subsection 13(1) exemption.

Subsection 10(2) of the Act 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.

In my view, the record should have been severed pursuant to subsection 10(2) of the Act to disclose information that does not fall within the subsection 13(1) exemption. Specifically, the record contains significant amounts of information that is merely reportage and as such, does not qualify for exemption under subsection 13(1) of the Act.

Along with this Order, I have provided the head with a copy of the record that has been highlighted by me, to identify those parts of the record properly withheld from disclosure pursuant to subsection 13(1) of the Act.

I order the head to disclose the balance of the record to the appellant within twenty (20) days of the date of this Order. I further order the head to notify me as to the date of such disclosure within five (5) days of the date on which disclosure is made to the appellant.

Original signed by:  
Sidney B. Linden  
Commissioner

February 15, 1990  
Date