Information and Privacy
Commissioner/Ontario

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

ORDER 167

Appeal 890044

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

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

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

1. On December 19, 1988, the requester wrote to the Ministry of Labour (the "institution") seeking access to the following information:

> ...all documents, if any, prepared by the Office of the Worker Advisor of the Ministry of Labour, which contain a critique or analysis of, or opinion or comment on Bill 162, The Workers' Compensation Amendment Act, 1988.

2. The institution responded on January 27, 1989, granting full access to one of the requested records, granting partial access to one record, and denying access to two records in their entirety. The institution claimed exemptions under subsections 12(1)(e) and 13(1) of the Act for all of the severed and withheld material.

3. On February 28, 1989, the requester appealed the institution's decision. Notice of the appeal was given to the appellant and the institution on March 8, 1989.

4. The records which are at issue in this appeal were obtained and reviewed by the Appeals Officer. The records can be described as follows:

Record 1. Memorandum to the Minister of Labour from Odario Di Santo, Director, Office of the Worker Advisor dated November 2, 1988. This 6 page memorandum entitled "Response of the Office of the Worker Advisor to Bill 162" was withheld in its entirety.

Record 2. Response of the Office of the Worker Advisor to the Proposed Amendments to the Workers' Compensation Act. Alec Farquhar, Manager, Special Services created the record in October 1988. This 21 page record was withheld in its entirety.

Record 3. Background _ Bill 162. This 81 page background report, which reviews the issues of reinstatement rights as well as economic and noneconomic loss, was disclosed with severances. Employees of the Office of the Worker Advisor prepared this report in June 1988.

5. The Appeals Officer contacted both the appellant and the institution in an attempt to mediate a settlement. However, settlement was not effected and the parties indicated that they were content to proceed to an inquiry.

6. Notice that an inquiry was being conducted was given to the institution and the appellant by letter dated July 24, 1989. Enclosed with the Notice of Inquiry 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 representations, need not limit themselves to the questions set out in the Report.

7. On September 20, 1989, our office received a copy of additional information contained in Record 3 which the institution had decided to disclose to the appellant.

8. On February 7, 1990, a letter was sent by our office to a person who had made a request to the institution for records which appeared to include the records which are the subject of this appeal. The institution had not identified these records as being responsive to that person's request, and accordingly, had not included them in the list of records which it identified for the purposes of its response to that person's request.

9. On February 7, 1990, the institution acknowledged that the records which are the subject of this appeal also respond to that person's request. Accordingly, notice of this appeal was given to the person ("the affected person"), inviting representations with respect to the issues arising in this appeal.

10. Representations have been received from the appellant, the affected person and the institution. I have considered all representations in making my Order.

In considering the specific issues arising in this appeal, I have been mindful that one of the purposes of the Act, as set out in subsection 1(a), is to provide a right of access to information under the control of institutions. The provision of this right is 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.

It should also be noted that section 53 of the Act provides that the burden of proof that the 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 head properly applied the mandatory exemption provided by section 12 of the Act to the requested records.

B. Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act to the requested records.

C. Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without disclosing the information that falls under an exemption.

ISSUE A: Whether the head properly applied the mandatory exemption provided by section 12 of the Act to the requested records.

The head has claimed that all three records are subject to exemption pursuant to subsection 12(1)(e) of the Act.

Subsection 12(1)(e) provides as follows:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of the deliberations of an Executive Council or its committees, including,
>
> ...
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy;
>
> ...

It is the institution's position that all three records which are the subject of this appeal "were prepared to brief the Minister in his task of taking amendments to the Workers' Compensation Act through the legislative assembly (sic), which in the normal course (and in this case) included discussions and deliberations of the Executive Council and the Cabinet Committee on Resources Development."

In Order 131 (Appeal Numbers 890159 and 890160), dated December 19, 1989, at page 4, the Commissioner commented on the type of record which would qualify for exemption under subsection 12(1)(e) of the Act:

> ...in order to qualify for exemption under this subsection, the record itself must have been prepared

> to brief a Minister in relation to matters that are either:
>
> (a) before or proposed to be brought before the Executive Council or its committees; or
>
> (b) the subject of consultations among ministers

After reviewing the records at issue in this appeal, I accept that Records 1 and 2 were prepared to brief the Minister of Labour. However, the subsection requires more. The records in question relate to a Bill 162, The Workers' Compensation Act, 1988 which came into force in January, 1990. The institution has not provided any information which would suggest that the subject matter of the Bill is before or proposed to be brought before Cabinet or its committees, or is the subject of current consultation among ministers relating to government decisions or the formulation of government policy.

Order 22 (Appeal Number 880008), dated October 21, 1988, also involved records for which a claim for exemption under subsection 12(1)(e) of the Act was made by the institution.

At page 4 of that Order the Commissioner stated:

> The appellant submits that the exemption provided by subsection 12(1)(e) is temporary in nature and expires after the record has been presented and dealt with by Cabinet. In the opinion of the appellant, the use of the present tense in subsection 12(1)(e) precludes its application to a record which has already been presented to Cabinet. In his view, had the Legislature intended the exemption to continue after consideration by Cabinet, the proper tense would have been used. I accept the appellant's argument, and find that the

> record at issue does not fall within the exemption provided by subsection 12(1)(e). The use of the present tense precludes its application to a record that has already been presented to and dealt with by the Executive Council or its committees.

I agree with the Commissioner that subsection 12(1)(e) is not available in circumstances where the matters referred to in the records have already been dealt with by the Executive Council or its committees. I find that the records at issue in this appeal do not fall within the subsection 12(1)(e) exemption. However, even though I have found that the records do not qualify for exemption under subsection 12(1)(e), this finding is not determinative of the issue of disclosure of these records; consideration must be given to the proper interpretation of the introductory wording of subsection 12(1).

In considering the applicability of subsection 12(1), I must determine whether the release of the records at issue in this appeal "...would reveal the substance of deliberations of the Executive Council or its committees."

The records at issue are not typed on Cabinet letterhead, nor are they addressed to Cabinet, nor to a Cabinet committee. Further information was requested from the institution as to whether the records had been prepared for submission to Cabinet or one of its committees and whether they had actually been submitted to and considered by Cabinet, or one of its committees, and if so, how and when. The institution was also asked whether any of the information contained in the records had been discussed by Cabinet or its committees, and if so, on what date. In response, Mr. Farquhar stated in his affidavit that:

> While I have no specific knowledge of which committees, the times and dates, I am aware that a number of the amendments to Bill 162 proposed in Documents 2 (created from Document 3) and 1 were acted upon. This is reflected in the final form of Bill 162.

The institution intimates that the fact that the final form of Bill 162 incorporates some of the recommendations contained in the records at issue would lend weight to its position that the actual records or their contents were considered by the Executive Council:

> Clearly, the fact that Bill 162 was amended to reflect a number of the suggestions contained in Documents 1, 2 and 3 prove [sic] that they were relied upon by the Minister and as such should be afforded the protection of section 12(1).

As previously mentioned, Bill 162, The Workers' Compensation Act, 1988 was proclaimed into force on January 1, 1990. However, I am aware that the passage of the Bill through the House was not without considerable public discussion among various individuals and groups representing the interests of injured workers as well as employers. Many of these individuals and groups provided their recommendations as to amendments to the Bill.

In Order 131 supra, the Commissioner considered the meaning of the words "substance" and "deliberation":

> "Substance" is variously defined as "essence; the material or essential part of a thing, as distinguished from form" (Black's Law Dictionary, 5th ed.), or "essential nature; essence or most important

> part of anything" (Oxford Dictionary). Black's Law Dictionary also defines "deliberation" as "the act or process of deliberating, the act of weighing and examining the reasons for and against a contemplated act or course of conduct or a choice of acts or means."

In Order 72 (Appeal Number 880159), dated July 11, 1989, the Commissioner considered the question of whether a record which had never been submitted to the Executive Council (the "Cabinet") would, if disclosed, reveal the "substance of deliberations" of Cabinet, as required by the wording of subsection 12(1). At page 8 of that Order, he stated:

> In my view, 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... documents, such as draft reports or briefing materials not intended to be placed before Cabinet, would normally fall within the scope of the discretionary exemption provided by subsection 13(1) of the Act.

The Commissioner also stated at page 7 of Order 131 supra, that in deciding whether disclosure of a record would reveal the "substance of deliberations" of Cabinet or its committees, all relevant factors including the record's form and content should be considered.

The institution has not provided any objective evidence that supports the conclusion that the records went before Cabinet or its committees or even that they were 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 records

would reveal the "substance of deliberations" of the Cabinet or its committees. Further, nothing in the records leads me to conclude that they were prepared for submission to Cabinet or its committees. Although the institution states in its representations that some of the suggestions contained in the records appear in the amended Bill, I find that this is not sufficient to bring the records within the scope of the section 12 exemption.

There is one final issue with respect to the section 12 exemption which I must address. The institution submitted that:

> The position of the Ministry is that the Information and Privacy Commissioner's jurisdiction extends only to the decision made by the head. It is submitted that the Commissioner must determine whether, given the facts in existence at the time the head's decision was made, the decision was correct.

It is my view that such a restrictive view of the authority to review the head's decision is at variance with the purposes of the Act as set out in subsection 1(a):

> 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;

It is my view that it would be unreasonable to adopt a position whereby the Commissioner or his delegate would be prohibited from taking into consideration facts and developments which have arisen subsequent to the head's decision. In order to give effect to the purposes of the Act, it is essential that all relevant facts and developments that arise prior to the date of an Order be considered. I note parenthetically that the head is also free, during the course of an appeal, to take notice of a change of circumstances which might affect the application of the Act, and to change his/her decision in respect of the appeal accordingly. For example, when certain events which have prompted an exercise of discretion in favour of not disclosing a record have passed, a head might alter the original decision and the appeal could be settled.

Accordingly, it is my view that I may consider all relevant facts and developments in reviewing the head's decision, and in deciding whether or not a particular record falls within a specified exemption.

In summary, having reviewed the records and considered the representations of the institution, I find that the institution has not satisfied the burden of proof that the records fall within the exemptions provided by subsections 12(1)(e) or 12(1).

ISSUE B: Whether the head properly applied the discretionary exemption provided by subsection 13(1) of the Act to the requested records.

The institution also relied on the discretionary exemption provided by subsection 13(1) of the Act. Subsection 13(1) provides that:

> 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 Commissioner has taken a purposive approach towards the interpretation of the subsection 13(1) exemption. In Order 94 (Appeal Number 890137) dated September 22, 1989, he stated:

> ...in my view, section 13 was not intended to exempt all communications between public servants despite the fact many can be viewed, broadly speaking, as advice or recommendations.
>
> ...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 Order 118 (Appeal Number 890172) dated November 15, 1989 the Commissioner considered what kind of information would qualify as "advice" for the purposes of subsection 13(1):

> 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 suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

The Office of the Worker Advisor (the "OWA") was created in 1985 to assist workers with workers' compensation problems. The OWA is a branch of the Ministry of Labour and as such, the employees

of the OWA are civil servants. According to an affidavit provided to this office by Alec Farquhar, Manager, Special Services at the OWA, its general mandate includes providing advice to the Minister on legislation which has been proposed by the Ministry of Labour.

I have examined each of the records in question and I am of the opinion that only parts thereof qualify for exemption under subsection 13(1). 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.

Subsection 13(2) provides exceptions to the exemption from disclosure under subsection 13(1). The only exception provided by subsection 13(2) which I find to have any relevance to this appeal is contained in subsection 13(2)(a) which states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> ...

The Commissioner considered the question of what constitutes "factual material" in Order 24 (Appeal Number 880006) dated October 21, 1988. At page 7 of that Order he stated:

> In my view the overwhelming majority of records providing advice or 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.

The institution submits that:

> In making his determination [in response to the appellant's request], the head took into account all the exemptions [sic] listed in subsection 13(2) of the Act for all three documents. In the two withheld documents, any factual material was so interwoven with advice and recommendations as to be inseparable.

I do not agree with the institution's submission. Examination of the records at issue reveals paragraphs containing facts, disclosure of which, in my view, would not reveal the course of action which is suggested in those recommendations which do qualify for exemption. I find that this factual material is not covered by the exemption, and I order its disclosure.

I append to this Order a highlighted copy of each of the three records at issue, to enable the head to determine which severances I have found to be "advice", and therefore subject to exemption, and which material must be disclosed to the appellant and to the affected person.

Subsection 13(1) also provides the head with the discretion to release a record even if it meets the test of an exemption. I find nothing improper in the way in which the head has exercised his discretion and would not alter it on appeal.

ISSUE C: Whether the requested records could reasonably be severed, under subsection 10(2) of the Act, without

disclosing the information that falls under an exemption.

In my discussion of Issue B, I found that part of each record qualifies for exemption under subsection 13(1) of the Act. I must now determine whether the severability requirements of subsection 10(2) apply to these records.

Subsection 10(2) 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.

I have reviewed the records, and find that no parts of the record which I have found to be subject to exemption under subsection 13(1) could reasonably be severed without disclosing the exempt information.

In summary, I order the head to sever the requested records as indicated in the copy of the records I have provided to the head, and to disclose the remaining parts of the records to the appellant and to the affected person within 20 days of the date of this Order. I further order the head to advise me in writing, within five (5) days of the date of disclosure of the records, of the date on which disclosure was made.

Original signed by: May 15, 1990
Tom Wright Date
Assistant Commissioner