



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

ORDER P-411

Appeal P-9200439

Ministry of Consumer and Commercial Relations



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ORDER

BACKGROUND:

The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for information relating to the Ministry's investigation into possible violations of the Discriminatory Business Practices Act by the Ontario Science Centre. The Ministry denied access to the records pursuant to section 14(2)(a) of the Act. The requester appealed the Ministry's decision.

During mediation, the scope of the appeal was narrowed to the following three records:

1. Memo dated February 6, 1991, from two investigators of the Ministry to the Director of the Business Regulation Branch.
2. Memo dated February 27, 1991, from two investigators of the Ministry to the Assistant Deputy Minister, Business Practices Division.
3. Memo dated April 15, 1991, from two investigators of the Ministry to the Assistant Deputy Minister, Business Practices Division.

Further mediation was not possible and notice that an inquiry was being conducted to review the Ministry's decision was sent to the appellant and the Ministry. Written representations were received from both parties. In its representations, the Ministry advised that in addition to section 14(2)(a), it was also relying on section 13(1) to deny access to the three records.

The appellant indicates that he is not seeking access to the identities of witnesses interviewed during the investigation.

ISSUES:

The issues arising in this appeal are:

- A. Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.
- B. Whether the discretionary exemption provided by section 13(1) of the Act applies.
- C. Whether section 23 of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 14(2)(a) of the Act applies.

Section 14(2)(a) of the Act states:

A head may refuse to disclose a record,

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;

In order to properly exempt a record under section 14(2)(a), the Ministry must demonstrate that the record satisfies each part of the following three-part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with the law.

[Order 200]

In order to satisfy the first part of the test, a record must consist of a formal statement or account of the results of the collation and consideration of information (Order 200). Having reviewed the records, I am satisfied that all three records are reports and, therefore, the first part of the test has been met.

In order to satisfy the second part of the test, the report must have been prepared as part of the actual investigation, inspection or law enforcement activity (Order 188). In other words, the author of the document must be, at the time of preparing the document, engaged in the conduct of an investigation (Order 170). In my view, the requirements of the second part of the test have been established for Records 1 and 2.

Record 3 is dated four days after the Minister of Consumer and Commercial Relations tabled in the Legislature the Ministry's binding order resulting from the Ministry's investigation. In my view, Record 3 was not prepared as part of the actual investigation, and the requirements of the second part of the test have not been satisfied for Record 3 and, therefore, it does not qualify for exemption under section 14(2)(a).

In order to satisfy the third part of the test, the reports must have been prepared by an agency which has the function of enforcing and regulating compliance with the law. Records 1 and 2 were prepared by Ministry investigators, and the Ministry is entrusted with the responsibility of

enforcing compliance with the Discriminatory Business Practices Act. In my opinion, the requirements of the third part of the test have been satisfied in respect of Records 1 and 2 and, therefore, Records 1 and 2 qualify for exemption under section 14(2)(a).

In reviewing the Ministry's exercise of discretion in favour of refusing to disclose Records 1 and 2 under section 14(2)(a), I have found nothing to indicate that the exercise of discretion was improper, and will not alter it on appeal.

ISSUE B: Whether the discretionary exemption provided by section 13(1) of the Act applies.

The Ministry submits that section 13(1) of the Act applies to all three records. Because I have found that Records 1 and 2 qualify for exemption under section 14(2)(a), it is not necessary for me to consider the application of the section 13(1) exemption to these records. Section 13(1) reads:

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.

For the purposes of section 13(1), 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 (Order 161). Recommendations must be viewed in the same vein. I have reviewed Record 3 and, in my view, it does not contain advice or recommendations. Accordingly, I find that section 13(1) of the Act does not apply.

ISSUE C: Whether section 23 of the Act applies.

In his representations, the appellant argues that it is in the public interest that the records be disclosed; in that way, the public can have access to all the facts surrounding the investigation into this matter.

In Issue A, I found that Records 1 and 2 qualify for exemption under section 14(2)(a). Section 23 of the Act contains a "public interest override" and reads as follows:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

While section 23 applies to many of the exemptions contained in the Act, it does not apply to the law enforcement exemption contained in section 14. Accordingly, I am unable to consider the appellant's public interest argument.

ORDER:

1. I uphold the Ministry's decision to not release Records 1 and 2 to the appellant.
2. I order the Ministry to disclose Record 3, with the name of each of the witnesses severed, to the appellant within 15 days of the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Ministry to provide me with a copy of the record disclosed to the appellant pursuant to Provision 2 of this order, **only** upon my request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

_____ February 15, 1993