



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

ORDER P-1054

Appeal P-9500358

Workers' Compensation Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

BACKGROUND:

The Workers' Compensation Board (the Board) is financed by assessments levied on the payrolls of employers covered by the Workers' Compensation Act. For the most part, payments to the Board by employers are made based on their estimated payroll at the beginning of the year. At year end, this estimate may be found to have been too low or too high.

In 1987, the Board introduced the debit/credit interest program. This program recognizes the value of the money that should have been in the hands of the Board during the year in the case of assessments based on underestimated payrolls and, conversely, in the employers' hands when assessments were based on overestimated payrolls. The purpose of this program is to encourage employers to accurately estimate their annual payrolls at the beginning of each year and then revise them if necessary throughout the course of the year. In this way, the Board's assessments are accurate and employers pay their proper share during the year.

NATURE OF THE APPEAL:

The Board received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to information related to the payment of interest by the Board to employers.

The Board identified a draft policy paper dated July 27, 1994 issued by its Revenue Policy Branch as being responsive to the request. The Board denied access to this document in its entirety, relying on the following exemption in the Act:

- advice and recommendations - section 13(1)

The requester appealed this decision.

During mediation the Board released the factual portions of the draft policy paper to the appellant. In addition, the appellant advised this office that, as he previously received a copy of page 2 of the record during the course of another proceeding, he was not seeking access to this information. Therefore, it is only those portions of the record which have not been disclosed to the appellant, with the exception noted, that remain at issue in this appeal.

A Notice of Inquiry was sent to the Board and the appellant. Representations were received from both parties.

DISCUSSION:

ADVICE AND RECOMMENDATIONS

Section 13(1) of the Act states 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.

It has been established in a number of previous orders that advice and recommendations for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it "... purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making."

The Board has explained that it is the function of the Revenue Policy Branch, through its policy analysts, to develop policy proposals in the form of draft policy papers. These papers, such as the record at issue, are used for discussion, consultation and consideration by either senior management or the Board of Directors. The papers explore an issue and make proposals or recommendations regarding the initiation of a new policy or the rescission or revision of an existing one.

The Board further indicates that the Revenue Policy Branch is not the decision-maker in policy matters. Rather, the Board states that the sole role of the Revenue Policy Branch in the policy development process is that of advisor to the decision-makers, the senior management or Board of Directors of the Board.

I have carefully reviewed those portions of the record which the Board has declined to disclose, taking into consideration the role of the Revenue Policy Branch and the scope of the exemption in section 13(1) of the Act. The portions at issue consist of the title of the record, the second paragraph of the "Issue" section, sections on "Advantages" and "Risks", two paragraphs of the "Conclusions" section and the "Recommendations" section in its entirety. In my view, disclosure of these portions of the record would reveal the advice or recommendations advanced by the policy analyst who wrote the draft policy paper.

Some of the information, such as the title of the paper, as well as the "Conclusions" and "Recommendations" sections, actually consists of the advice and recommendations themselves. Disclosure of the "Advantages" and "Risks" sections, which provide a rationale for the recommendations, would permit the drawing of accurate inferences as to the nature of the advice and recommendations and thus reveal the advice and recommendations put forth.

Accordingly, I find that the portions of the record at issue consist of advice or recommendations provided during the deliberative process of policy-making within the Board.

I must now consider whether any of the mandatory exceptions contained in section 13(2) of the Act apply to the parts of the record which I have previously characterized as advice or recommendations.

The appellant submits that the record constitutes a report dealing with the performance and efficiency of a Board program, the employer assessment scheme, and, as such, the exception in section 13(2)(f) applies.

Section 13(2)(f) prescribes that an institution **shall not** refuse to disclose a record which contains "a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy."

Section 13(2)(f) is unusual in the context of the Act in that it constitutes a mandatory exception to the application of an exemption for discrete types of documents, namely reports on the performance or efficiency of an institution, program or policy. Even if the report contains advice or recommendations for the purposes of section 13(1), the Board must still disclose the **entire** document if the record falls within a section 13(2) exemption (Order P-726).

It is the position of the Board that the record does not qualify as a "report" for the purposes of section 13(2)(f). The Board refers to the definition of the word "report" adopted in past orders of the Commissioner's office, that is:

... a formal statement or account of the results of the collation and consideration of information. Generally speaking, a report would not include mere observations or recordings of fact.

[Order 200]

The Board states that draft policy papers do not have the degree of formality, professionalism and expertise which, in its view, is required in order to characterize a document as a "report" according to the above definition. The Board supports this assertion by providing the following information:

- (1) Documents such as the record at issue are described as "policy discussion papers" throughout the consultation process until they are approved and minuted by the Board of Directors, at which time they become a "Minuted Policy" document. The record did not proceed to this stage of the consultation process.
- (2) Prior to receiving Board approval, policy discussion papers generally require cost/benefit or efficiency impact analyses. Such an analysis was not performed for this paper.
- (3) The record is only a draft document which was never formally presented to the first level of senior management with the mandate to consider and decide policy proposals.

The Board summarizes its position on this issue as follows:

It is submitted that to equate a draft policy paper reflecting one Policy Analyst's suggestion or subjective advice and preliminary policy discussion on the advantages of a policy option to a "formal statement of account" or efficiency report would render the subsection 13(1) advice exemption meaningless, an absurd result which could not have been intended by the legislature.

I agree with the Board that, in order for the exception in section 13(2)(f) to apply, the record must consist of a formal statement or account of the results of the collation and consideration of information. I also accept the submissions of the Board, as outlined above, that the draft policy paper cannot be so characterized. In my opinion, a preliminary draft document which has not been completed for presentation to the decision-making body does not have the requisite degree of formality to be considered to be a "report" for the purposes of section 13(2)(f).

Accordingly, I find that the exception in section 13(2)(f) does not apply to the portions of the record at issue, which are exempt pursuant to section 13(1) of the Act.

ORDER:

I uphold the decision of the Board.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ November 21, 1995