



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER 128**

**Appeal 890194**

**Ministry of Labour**



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December 5, 1989

VIA PRIORITY POST

Appellant

Dear Appellant:

Re: Order 128  
Appeal Number 890194  
Ministry of Labour

This letter constitutes my Order in your appeal of the decision by the Ministry of Labour (the "institution"), to refuse access to records requested under the Freedom of Information and Protection of Privacy Act, 1987 (the "Act").

The appeal file indicates that on February 3, 1989, you wrote to the institution asking for access to the following records:

Copies of all background papers, draft statutory language, draft language for regulations, Workers' Compensation Board procedures and policies, exchanged between the Ministry of Labour and the Workers' Compensation Board on the subject of Bill 162, or generated for internal use by either the Ministry of Labour or by the Workers' Compensation Board.

On May 29, 1989, the institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") wrote to you pointing out that you had submitted requests for similar types of records to two other institutions, the Ministry of the Attorney General and the Workers' Compensation Board. To avoid confusion, the Co-ordinator informed you that each institution would restrict its response to records which originated in that institution. Accordingly, the Ministry of Labour's response related to all background papers on Bill 162 which did not originate with the

Workers' Compensation Board, and the Ministry of the Attorney General responded to the portion of your request which involved draft language of Bill 162.

The institution identified a total of 17 records which appeared to fall within the scope of your request. Nine of these records were identified by their titles and approximate length, and you were advised that they would be released in their entirety, subject to payment of photocopying charges. The remaining eight records were all exempted by the institution pursuant to subsection 13(1) of the Act. One record was also found by the institution to be exempt under subsection 17(1)(b) of the Act.

On June 22, 1989, you sent me a letter appealing the head's decision to deny access to the eight records, and I gave notice of the appeal to the institution on July 4, 1989. You did not appeal the head's decision to charge a fee for the remaining nine records.

As you are aware, as soon as your appeal was received by my office, an Appeals Officer was assigned to investigate the circumstances of the appeal and attempt to mediate a settlement. The Appeals Officer obtained and reviewed the eight exempted records, and spoke with the Co-ordinator regarding possible settlement. Following their discussions, the Co-ordinator and the Appeals Officer both concluded that settlement was not possible, and the Co-ordinator requested that the matter proceed to the inquiry stage of the appeals process.

Accordingly, on October 3, 1989, I sent notice to you and the institution that I was conducting an inquiry to review the decision of the head, and invited representations from you and the institution. Enclosed with this letter was a copy of a report prepared by the Appeals Officer, intended to assist you and the institution in making 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 their representations to the Commissioner, need not limit themselves to the questions set out in the Report.

I have received and considered representations from you and the institution in making my decision in this appeal.

The following records are at issue in this appeal:

1. Discussion paper entitled "Compensating Permanent Partial Disability" by C. Muir, December 9, 1987.
2. Memo from C. Muir to B. Rea re: Permanent Partial Disability Benefit Reform, February 6, 1988.
3. Options paper on Non-Economic Loss by B. Rea, February 22, 1988.
4. Summary of Ministry of Labour consultations - Rights to Reinstatement by B. Rea, undated.
5. Discussion paper entitled "Injured Workers' Rights of Reinstatement" by B. Rea, undated.
6. Excerpt of draft discussion paper entitled "Compensating Economic Loss", author and date unknown.
7. Excerpt of draft discussion paper entitled "Appendix II - Model B", author and date unknown.
8. Excerpt of draft discussion paper entitled "Injured Workers' Reinstatement Rights - Recommendations", author and date unknown.

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides the right of access to information under the custody or 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 counterbalancing privacy protection purpose of the Act. The subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that where a head refuses access to a record, the burden of proof that the record falls within one of the specified exemptions in the Act lies upon the head.

The issue in this appeal is whether the requested records qualify for exemption under subsection 13(1) of the Act. (It should be noted that the institution's claim for exemption under subsection 17(1) was dropped during the course of the appeal.)

Subsection 13(1) 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.

Recently I had the opportunity to consider the application of section 13 in my Order 94 (Appeal Number 890137), dated September 22, 1989. At page 5 of that Order, I outlined the proper interpretation of the scope of the subsection 13(1) exemption as follows:

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.

Although three of the records at issue in this appeal have no identified author, it is evident that each was prepared by employees of the "Policy Branch" of the institution. All eight records identify policy options or models, and most of them include a discussion of the "pros" and "cons" of a particular option or model and the recommendations of the author regarding a preferred course of action to be followed by the institution.

In its representations, the institution submitted the following:

While certain of the documents are not addressed to a particular person, the advice contained within originated at an upper level within the Ministry: the Policy Branch had the responsibility of formulating the legislation. It is clear that the advice was directed at the Minister of Labour, who ultimately introduced Bill 162 in the House.

Bill 162 was created after such advice as these documents reveal, was given to the Minister and discussed. It is essential that an atmosphere of freedom must be fostered at the Policy Branch if all options, popular and unpopular, are going to be raised and frankly opined on. To publicize the advice of the Policy Branch would be to exhibit the candor which is necessary to ultimately make informed decisions.

In your letter of appeal, you state that, in your view, section 13:

...is intended to protect a particular individual in the public service from being identified as the source of particular advice to the government. It is not intended to protect committees or anonymous groups of public servants...

I do not agree with your interpretation. I considered a comparable situation in my Order 68 (Appeal Number 880007), dated June 28, 1989. In that case, I found that an advisory body to a minister fell squarely within the scope of entities intended to be covered by subsection 13(1). In my view, the fact that a particular record cannot be attributed to a named public official does not, for that reason alone, remove the record from the scope of subsection 13(1).

In previous Orders I have indicated that records falling within the scope of subsection 13(1) must reflect a communication between public servants (Order 58, dated May 16, 1989; and Order 94, dated September 22, 1989). In my view, advice or recommendations must flow from one individual to another. I have reviewed the records at issue in this appeal, and, although some of them are not addressed to a particular individual, it is evident that they were prepared by public servants to provide advice to senior-level decision-makers and policy-makers within the institution. Accordingly, I find that all eight records withheld by the institution meet the requirements for exemption under subsection 13(1) of the Act.

In your letter of appeal, you raise the possible application of subsection 13(2) of the Act, which provides an exception to the subsection 13(1) exemption for records containing factual material. Having reviewed the records, in my view, this exception does not apply in the circumstances of this case. As I stated at page 7 of my Order 24 (Appeal Number 880006), released on October 21, 1988:

...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 clearest example would be an appendix or schedule of factual information supporting a policy document.

In my view, none of the records at issue in this appeal contain "factual material" as the words are used in subsection 13(2).

Having concluded that the eight records meet the requirements for exemption under subsection 13(1), I must now consider the possible application of section 23 of the Act, raised in your representations.

Section 23 of the Act 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.

In my Order 68, referred to above, I outlined the proper approach to be followed in interpreting section 23. As stated in that Order, in order for the so-called public interest override to apply:

there must be a compelling public interest in disclosure and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question.

In your representations, you submitted two arguments in support of the application of section 23 in this case. You state that:

...the Ministry of Labour had, since the introduction of the draft legislation and the position papers upon which it is based, sought public input... It is difficult in the extreme to enter into an intelligent discourse with respect to matters that are the subject of public debate when the position of one of the main parties, in this case the sponsoring Ministry, is not revealed except in terms of the draft of the legislation itself.

...[T]he reason for requesting access to information is to find what policy considerations and supporting materials have been utilized in the drafting of the legislation... In the absence of the release of this material, it would be difficult to effectively challenge the broad rule making powers and legal powers of the Board. It is submitted that there is a compelling public interest in making accessible that documentation which would assist in ascertaining the statutory interpretation of the legislature and the sponsoring Ministry of this legislation. Not to release the information frustrates any statutory interpretation at odds with the Board's.

Clearly, one of the consequences, if not the purposes, of the Freedom of Information and Protection of Privacy Act, 1987 is to foster public awareness and discussion of issues by providing access to government-held records. It is also true that the existence of exemptions in the Act serve to deny the public some of the tools available to participate in these discussions, and it is for this reason that the Act contains the provision that "necessary exemptions from the right of access should be limited and specific". However, in passing this Act, the Legislature acknowledged that certain types of records could or should be withheld from disclosure in order to protect legitimate interests of government, and certain exemptions were formulated and included in the Act. Having found that the records in this case do fall within the scope of one of these exemptions, subsection 13(1), I am not persuaded that the need for public debate, in and of itself, is sufficient to outweigh the purpose of this exemption. In my view, public debate may be restricted when access to government records is denied, but as long as the reasons for denying access fall within the scope of one of the Act's exemptions, such restrictions are not inconsistent with the principles of the legislation.

I am also not persuaded that your second argument in favour of the application of section 23 is sufficient to trigger the public interest override. As stated earlier, to satisfy the requirements of section 23, the compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of a particular record in question (emphasis added). Your submission is record-specific, and even if it were not, I am not convinced that possible difficulties in effectively challenging the "broad rule making powers and legal powers of the Board" is sufficiently compelling so as to



outweigh the need for the government to receive full and frank advice and recommendations from its employees.

Accordingly, in my view, section 23 of the Act does not apply in the circumstances of this appeal.

Before concluding my Order, I want to comment briefly on the section of your representations wherein you question the appropriateness of the institution's decision to transfer part of your request to the Workers' Compensation Board, pursuant to subsection 25(2) of the Act.

The decision to transfer portions of the request would appear to be in accordance with subsections 25(2) and (3) of the Act, which read as follows:

25.--(2) Where an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.

(3) For the purpose of subsection (2), another institution has a greater interest in a record than the institution that receives the request for access if,

- (a) the record was originally produced in or for the other institution; or
- (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy thereof.

In your representations you suggest that the Ministry of Labour was aware of the existence of a confidentiality provision in the Workers' Compensation Act, which would permit the Workers' Compensation Board to deny access to certain records, but would not be available to the Ministry of Labour as a grounds for exemption. The confidentiality provision you refer to is a discretionary provision, and the head of the Workers' Compensation Board has the authority to release records which fall within the scope of the provision. Whether or not the head of the Workers' Compensation Board exercised his discretion in

favour of denying release to certain records identified in response to your request does not, in my view, suggest that the Ministry of Labour acted inappropriately in transferring parts of your request. The three institutions involved with your request restricted their responses to documents which originated in their particular institution. This, in my view, was a reasonable approach to take in attempting to respond effectively without creating confusion or requiring unnecessary effort.

In summary, I find that the eight records at issue in this appeal fall within the scope of the exemption provided by subsection 13(1) of the Act. However, it is important to note that the subsection 13(1) exemption is discretionary, and the head has the authority to release records, regardless of whether they meet the requirements for exemption. In the institution's representations, the head did not respond to the Appeals Officer's request that he outline the factors that were considered when deciding to exempt the records from disclosure. However, the institution did indicate that two of the eight exempt records would be reconsidered by the head due to the fact that Bill 162 has now been passed by the Legislature.

In the absence of representations on the question of discretion, I order the head to reconsider the appellant's request within 20 days of the date of this Order, and to exercise the discretion required by subsection 13(1) of the Act. I further order that I be notified in writing of the decision regarding the exercise of discretion within five (5) days of the date of that decision.

Subject to my receipt of representations regarding the exercise of discretion under section 13(1) of the Act, I uphold the decision of the head.

Yours truly,

Sidney B. Linden  
Commissioner

cc: The Honourable Gerry Phillips, Minister of Labour  
Mr. Christopher Berzins, FOI Co-ordinator